FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission''), with the concurrence of the Assistant Attorney General, Antitrust Division, Department of Justice (''Assistant Attorney General'' or ''Antitrust Division'') (together the ''Agencies''), is issuing this final rule and Statement of Basis and Purpose (''SBP'') to amend the Premerger Notification Rules (the ''Rules'') that implement the Hart-Scott-Rodino Antitrust Improvement Act (''the HSR Act'' or ''HSR''), including the Premerger Notification and Report Form for Certain Mergers and Acquisitions (''Form'') and Instructions to the Notification and Report Form for Certain Mergers and Acquisitions (''Instructions''). The final rule requires parties to transactions that are reportable under the HSR Act to provide documentary material and information that are necessary and appropriate for the Agencies to efficiently and effectively conduct an initial assessment to determine whether the transaction may violate the antitrust laws and whether to issue a Request for Additional Information (''Second Request'') as provided by the HSR Act. In addition, the final rule implements certain requirements of the Merger Filing Fee Modernization Act of 2022 (''Merger Modernization Act'') and ministerial changes to the Rules as well as the necessary amendments to the Instructions to effect the final changes.

DATES: This rule is effective on February 10, 2025.

FOR FURTHER INFORMATION CONTACT: Robert Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024, or by telephone at (202) 326–3100.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is amending and reorganizing the documentary material and information requirements for premerger notification required by the HSR Act, 15 U.S.C. 18a, (''notification'' or ''HSR Filing'' or ''Filing'') to improve the efficiency and effectiveness of premerger review and to implement changes mandated by the Merger Modernization Act, 15 U.S.C. 18b. The Act and the Rules require parties to certain mergers and acquisitions to submit a notification to the Agencies and to wait a short period of time before consummating the reported transaction. The reporting and waiting period requirements of the HSR Act are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws, including section 7 of the Clayton Act, 15 U.S.C. 18, if consummated and, when appropriate, to take appropriate law enforcement action prior to consummation to prevent a violation of the antitrust laws.

To advance the Clayton Act's goal of preventing undue consolidation or stopping it in its incipiency,[1] Congress passed the HSR Act to require mandatory premerger notification of some acquisitions. In particular, it charged the Agencies with reviewing the details of those proposed transactions in advance of consummation. The Agencies rely on information submitted in an HSR Filing to conduct a premerger antitrust risk assessment and to identify those transactions that require additional investigation to determine if they may harm competition, and thus violate the antitrust laws if consummated. The HSR Act requires that the parties not consummate their planned transaction while the Agencies conduct this assessment until the expiration of the statutory waiting period, which for most transactions is 30 days (15 days in the case of a cash tender offer or certain bankruptcy sales). During that short period of time, referred to as the initial waiting period, the Agencies review the information submitted in the parties' HSR Filings to identify those transactions that require a closer look, including through the collection of additional information from the acquiring and acquired persons or from third parties. If either agency determines during the initial waiting period to conduct an in-depth investigation of the transaction, section 7A(e) of the Clayton Act, 15 U.S.C. 18a(e), authorizes the Agencies to request additional information or documents from each party, which is referred to as a Second Request.[2] Issuing Second Requests extends the waiting period under the HSR Act for another 30 days (ten days in the case of a cash tender offer or certain bankruptcy sales) after the parties have substantially complied with the Second Requests. During this second waiting period, if the reviewing agency believes that a proposed transaction may violate the antitrust laws, it may seek an injunction in Federal district court to prohibit consummation of the transaction.

The Commission has administered the HSR Act's premerger notification program for over forty-five years, issuing an initial set of HSR Rules that took effect on September 5, 1978.[3] Since then, it has regularly updated these rules, with the concurrence of the Assistant Attorney General, pursuant to its mandate under 15 U.S.C. 18a(d), to require a premerger notification for each reportable acquisition that contains documentary material and information necessary and appropriate to enable the Agencies to determine whether the transaction is one that may violate the antitrust laws and proceed to an in-depth investigation through the issuance of Second Requests. In this rulemaking, the Commission is responding to several factors that make today's economic reality more challenging for conducting a premerger assessment with the limited information required by the current rules. Simply put, the economy of 2024 is different than it was in 1978 or 2000 and, in the Agencies' experience, the HSR Form has not kept pace with the realities of how businesses compete today. There is a higher degree of interconnectivity of businesses along the supply chain as well as with other companies that provide ancillary services. The focus of competitive interaction is not as obvious when companies that supply goods or services also generate revenues from other sources, such as data sales, and when even businesses in traditional sectors such as manufacturing generate significant revenues from the sale of associated services. The changing nature of competition makes it more difficult for the Agencies to identify existing business relationships that might be affected by the acquisition, including through non-price effects such as innovation competition, and that are not

[1] *See, e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318 n.32 (1962).

[2] The FTC and DOJ share responsibility to enforce the antitrust laws and have established a protocol to clear the investigation of a transaction to one agency to avoid confusion and conserve public resources. The agency that receives clearance conducts the investigation and determines whether to issue Second Requests.

[3] The Commission commenced notice-and-comment rulemaking soon after the passage of the HSR Act and made extensive revisions to its proposed rules before issuing a final rule nearly two years later. *See* 41 FR 55488 (Dec. 20, 1976), 42 FR 39040 (Aug. 1, 1977), 43 FR 33450 (July 31, 1978), 43 FR 34443 (Aug. 4, 1978), 43 FR 36053 (Aug. 15, 1978). *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Second Hart-Scott-Rodino Annual Report (FY 1978).

apparent from simply focusing on sales in output markets. In addition, changes in mergers and acquisition (''M&A'') activity, corporate structures, and investment strategies have rendered the current Form's focus on traditional corporate structures outdated, and often the Agencies are unable to determine which entities or individuals will be making competitive decisions post-merger.

These profound changes that have occurred over time have created or exposed significant gaps in the information generated for premerger review under the current HSR Rules. These gaps curtail the Agencies' ability to efficiently and effectively detect transactions that may violate the antitrust laws. To fill in these gaps and to directly respond to the passage of the Merger Modernization Act, the Commission relied on its experience and expertise to identify specific information that is necessary and appropriate to conduct effective premerger screening.

To initiate this rulemaking, the Agencies conducted a comprehensive review of the premerger notification process, relied on their experience collecting and reviewing data and documents during antitrust investigations, and considered the cumulative effects of changes in deal structure, investment strategies, and the competitive dynamics of the modern economy explained in more detail below. From this review, the Commission identified several information deficiencies in the current HSR Filing that prevent the Agencies from efficiently and effectively conducting a premerger assessment of reportable transactions to identify which ones may violate the antitrust laws. The Agencies compared documentary material and information they have received over the years during in-depth merger investigations with the information collected in HSR Filings and assessed whether having certain types of documentary material and information at the beginning of an investigation would have changed the Agencies' decision whether and how to investigate reportable transactions. These specific categories of information and documents, which are readily available to the merging parties, are not required by the current Rules, but would be highly probative to the initial antitrust screening of a transaction during the initial waiting period and thus are necessary and appropriate for that review. The information identified and required by this final rule will enable the Agencies to detect transactions that may violate the law in light of modern commercial realities and in furtherance of the statutory mandate to arrest trends toward concentration in their incipiency. The final rule also will allow the Agencies to identify potentially unlawful transactions more quickly and with greater accuracy, narrowing the scope of their investigations in some cases, and in others, reducing the need to conduct a more burdensome in-depth investigation by issuing Second Requests.

In June 2023, the Commission proposed amendments to address the information deficiencies under the existing HSR Rules in a Notice of Proposed Rulemaking (''NPRM'').[4] The Commission received approximately 721 comments.[5] The majority of commenters were individuals who expressed general support for the rulemaking or for more vigorous antitrust enforcement more broadly. Others opposed certain aspects of the proposed rule and some questioned the Commission's authority to make any adjustments. After careful consideration of the comments and as discussed in more detail below, the Commission has substantially narrowed the information requirements proposed in the NPRM. In the final rule, the Commission is not adopting several proposed requirements outright, including those related to:

- a timeline of key dates for closing the proposed transaction;
- creating organization charts for the purpose of filing a notification;
- information about other interest holders;
- drafts of submitted documents;
- information about employees;
- information about board observers;
- geolocation information;
- prior acquisitions involving entities with less than $10 million in sales or revenues, or consummated more than 5 years prior to filing; and
- information about steps taken to preserve documents or use of messaging systems.

For other proposals, the Commission has substantially modified its proposals to minimize where possible the costs to filers and third parties, yet still provide the Agencies with information that is necessary and appropriate for effective and efficient premerger review. Overall, these modifications significantly reduce the effort required to comply with the final rule as compared to the proposed rule and include:

- Creating a new category of ''select 801.30 transactions'' for which the cost of complying with the information requirements has been limited because of the low risk that the transaction may violate the antitrust laws;
- Eliminating several document requirements to reduce costs;
- Limiting some requirements to materials that already exist;
- Excusing the seller[6] from certain information requests if it would be duplicative of information received from the buyer;
- Limiting some requirements to cover only recent information;
- Providing definitions or clarifications to reduce uncertainty and improve filer compliance;
- Creating *de minimis* exceptions to reduce the costs of generating information that has little economic impact; and
- Making the provision of certain information contingent on the identification of a significant business relationship between the filing persons that is critical to assessing whether the transaction may violate the antitrust laws.

As modified, the final rule introduces necessary and appropriate updates to HSR information requirements to allow the Agencies to understand the reported transaction and conduct an initial antitrust assessment within the statutory timeframe and does so in a manner that aligns the associated costs with the likelihood that the transaction is one that presents antitrust risk. With more complete information that is targeted to disclose existing business relationships between the parties, the Agencies can determine whether and how to deploy their resources to further investigate potentially anticompetitive acquisitions prior to consummation. The final rule will also provide transparency for those contemplating a reportable transaction by describing the information the

[4] On June 29, 2023, the Commission published a Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (hereinafter NPRM). On August 10, 2023, the Commission extended the comment period to receive public comments through September 27, 2023. 88 FR 54256. The comments on the NPRM (Doc. No. FTC–2023–0040) are available at *https://www.regulations.gov/docket/FTC-2023-0040/comments*.

[5] The Commission does not rely on any particular individual comment submission for its findings, but rather provides here (and throughout this final rule) examples of comments that were illustrative of themes that spanned many comments. The Commission's findings are based on consideration of the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise and experience in identifying mergers that violate the antitrust laws.

[6] References to ''seller'' throughout refer to the acquired person, as defined in 16 CFR 801.2, regardless of whether or not the acquired person is actually a party to the transaction.

Agencies rely on to conduct their initial assessment of whether a transaction may violate the antitrust laws. The amendments will also reduce the current burden on third parties (such as customers and competitors of the merging parties) on whom the Agencies often rely to fill in many of the information gaps during the initial review period because of inadequacies in the current Rules.

With this rulemaking the Commission has closely tailored the burden of complying with the HSR Act to align as much as practicable with the risks of a law violation presented by the particular transaction. This alignment is consistent with the statutory purpose of premerger review, which is for the Agencies to determine which reported transactions may violate the antitrust laws during the brief period provided by the Act for an initial antitrust assessment. As a result, the final rule achieves the benefits associated with mandatory premerger review with an overall burden that is reasonable and consistent with the legislative purpose of the HSR Act.

II. Background

A. Premerger Review and the Implications for Merger Enforcement

Section 7 of the Clayton Act is, by its terms, forward-looking and predictive, focused on acquisitions whose effect ''may be substantially to lessen competition, or to tend to create a monopoly.'' [7] To better effectuate the Clayton Act's goal of preventing undue consolidation or stopping it in its incipiency, Congress passed the HSR Act to require mandatory premerger notification of some acquisitions, and charged the Agencies with reviewing the details of those proposed transactions in advance of consummation to determine whether they may violate the antitrust laws. In doing so, Congress fundamentally changed the way the Agencies enforce the nation's antitrust laws to prevent harmful consolidation.[8]

Congress specifically charged that the Commission engage in rulemaking to require information in the HSR Filing that is necessary and appropriate to detect acquisitions that may violate the antitrust laws. Section 18a(d)(1) of the HSR Act states that the Commission, by rule and in accordance with the Administrative Procedures Act, shall require that the notification contain such documentary material and information to determine whether the acquisition may, if consummated, violate the antitrust laws.[9] Relying on this explicit rulemaking authority, the Commission has adjusted those requirements over time to carry out the purposes of the Act.

In passing the HSR Act, Congress imposed mandatory premerger review only for certain large transactions, in part to ''improve and modernize antitrust investigation and enforcement mechanisms,'' [10] ''ease burdens on the courts by forestalling interminable post-consummation divestiture trials . . . [, and] advance the legitimate interests of the business community in planning and predictability.'' [11] The robust legislative history of the HSR Act makes plain that premerger review should focus on the likelihood that a reported transaction may violate the antitrust laws and that the Commission shall collect information to make that determination prior to consummation.[12] Consistent with Congressional mandate, the Agencies rely on notifications under the HSR Act to target their enforcement efforts to their best use in preventing undue consolidation by seeking to prohibit the consummation of acquisitions that violate the antitrust laws.

To focus the Agencies' screening and potential enforcement efforts on the mergers that are most likely to harm competition and consumers, Congress required notice in advance for the largest mergers and tasked the Agencies with conducting an assessment of the risk that the proposed acquisition may violate the antitrust laws. To perform this task, the Agencies must review thousands of filings each year and identify which ones should be targeted for an intensive investigation of their potential to violate the antitrust laws. This is a fact-intensive endeavor that requires a deep understanding of precedent and economic analysis. The Agencies employ lawyers, economists, technologists, accountants, and support staff to conduct premerger analyses of reported transactions in order to perform this critical task on behalf of the American public.

Nonetheless, transactions reported under the HSR Act are a small fraction of the total number of mergers and acquisitions that occur each year in the United States. Relying on commercial data on M&A activity and data from the Agencies' annual HSR reports, Table 1 shows that during the five-year period of FY 2018 to 2022, HSR filings represented a small percentage of overall deal activity in the United States, on average 16.5 percent a year.[13]

[7] 15 U.S.C. 18. *See Brown Shoe* v. *United States,* 370 U.S. 294, 317–18 (1962) (Congress provided authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency and assure courts had the power to brake the process of concentration at its outset and before it gathered momentum).

[8] *See* Peter W. Rodino, Jr., Statement on the 25th Anniversary of Hart-Scott-Rodino (2001), *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-news-archive/statement-peter-w-rodino* (''Hart-Scott-Rodino was intended to give the anti-trust agencies two things: critical information about a proposed merger and time to analyze that information and prepare a case, if necessary. From what I hear, the legislation absolutely has transformed merger enforcement. Competition, as well as the consumer, has benefitted.'').

[9] 15 U.S.C. 18a(d)(1).

[10] S. Rep. No. 94–803, at 1 (1976).

[11] H.R. Rep. No. 94–1373, at 11 (1976). The HSR Act applies to acquisitions that met the statutory thresholds whether they are properly styled ''mergers'' and even if they do not result in a change of control. The terms ''mergers,'' ''acquisitions,'' and ''transactions'' are used interchangeably to refer to transactions for which an HSR filing is required.

[12] 15 U.S.C. 18a(d)(1).

[13] Using different commercially available data, the U.S. Government Accountability Office recently estimated that HSR filings during this same time frame averaged 15 percent of overall M&A activity. *See* U.S. Gov't Accountability Office, Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions 8 Fig. 1 (Oct. 2023) (GAO–24–106129), *https://www.gao.gov/assets/d24106129.pdf* (using Bloomberg data).

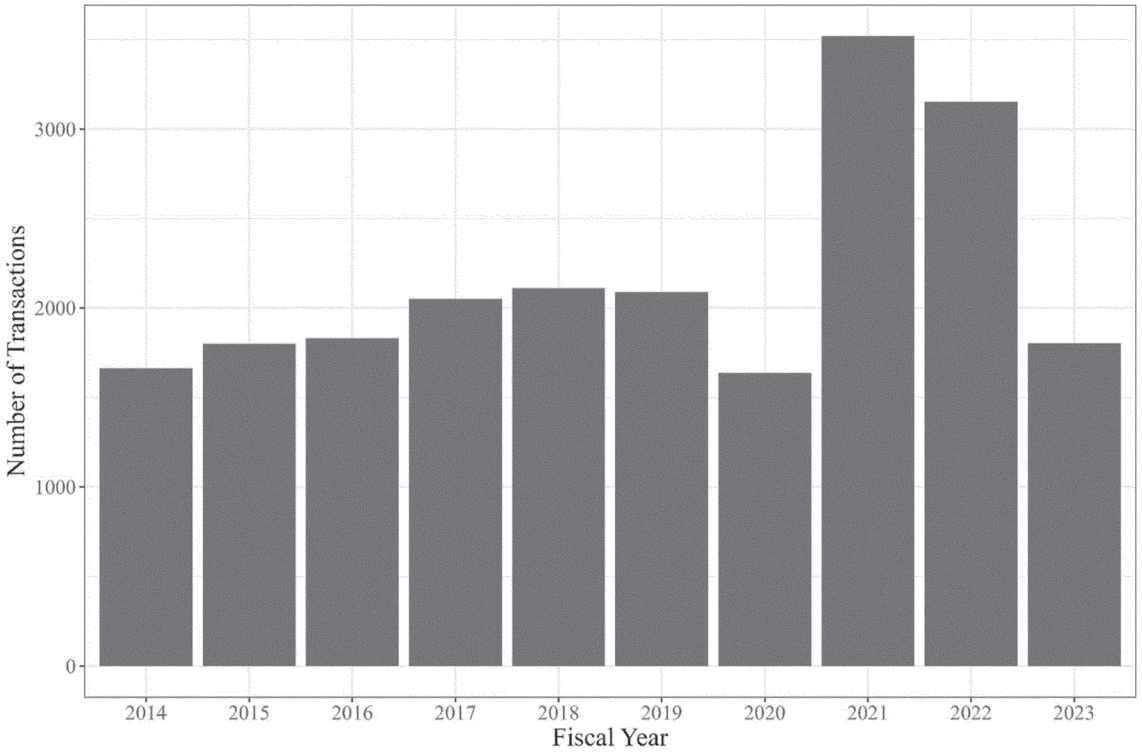
Table 1: M&A Transactions 2018 - 2022

	2018	2019	2020	2021	2022	Average
Total Number of Transactions[a]	13,366	13,696	12,828	19,099	15,734	**14,945**
Number of Reported Transactions[b]	2,111	2,089	1,637	3,520	3,152	**2,502**
Percentage	15.8%	15.3%	12.8%	18.4%	20.0%	**16.5%**

[a] Source: MergerStat Fact Set Review, M&A Announcements.
[b] Source: HSR Annual Reports for Fiscal Years 2018 - 2022, Figure 1.

While the Agencies investigate and ultimately seek to block only a small subset of reportable mergers each year, the challenges of administering mandatory premerger review have expanded and accelerated over time due to the changes in the nature of M&A activity discussed in detail below.

Figure 1: HSR Merger Transactions Reported Fiscal Years 2014 - 2023



As depicted in Figure 1, there was a recent spike in HSR-reportable transactions: in FY 2021, the Agencies reviewed HSR Filings for 3,520 transactions, over twice the number of the prior year's filings. In FY 2022, the Agencies reviewed 3,152 transactions. Although the pace of HSR Filings has recently moderated somewhat, the recent period of intense merger activity highlighted significant inefficiencies and deficiencies in current notification requirements that must be addressed so that the Agencies can direct their scarce resources to prevent those acquisitions most likely to cause widespread harm.[14]

The Commission is mindful of recent economic research that underscores the importance of adequate detection for effective merger enforcement. For instance, researchers posit that some firms appear to be employing strategies to avoid antitrust scrutiny of their anticompetitive deals, deliberately negotiating and structuring their deals to avoid premerger review (so-called

[14] Contrary to suggestions from some commenters, it is not practical for the Agencies to identify specific illegal transactions that they ''missed'' during their premerger review, nor is the Commission required to establish that as a predicate for invoking its statutory rulemaking authority under the HSR Act. *See Pharm. Rsch. & Mfrs. Am.* v. *FTC,* 790 F.3d 198, 199, 206 (D.C. Cir. 2015) (hereinafter *PhRMA*). Doing so would require a redirection of resources to investigate consummated mergers and away from resources devoted to premerger review. Instead, it is imperative that the Agencies ensure that they have the right information to address deficiencies that have emerged to undermine premerger review as an effective tool for detecting which transactions may violate the nation's antitrust laws.

stealth acquisitions),[15] or identifying acquisition targets at a nascent stage to buy them before they are valuable enough to require premerger review, sometimes solely for the purpose of preempting future competition (so-called ''killer acquisitions'').[16] One researcher concludes that merger enforcement falls by about 90 percent when transactions are not subject to premerger review.[17] Because most mergers are not subjected to premerger review, these strategies have contributed to a rise in aggregate concentration by stimulating mergers between competitors, with attendant negative effects on markups, private investment, and the share of output going toward profits.[18]

These studies support Congress' determination that premerger review is essential to effective enforcement of the antitrust laws and that without effective premerger review, there is inadequate detection of mergers that violate the law and cause harm.[19] While the Agencies can and do challenge acquisitions that are not reported under the HSR Act as well as consummated reported mergers that have caused harm, unwinding an illegal merger post-consummation still requires a significant investment of time and resources, and results in significant harm to market participants until unwound.[20] Even after the Agency succeeds in establishing a law violation, it may be difficult or impossible to restore the premerger state of competition, especially if the parties have commingled, sold, or closed assets, shared confidential information, or terminated key employees.[21] Moreover, the decision to pursue these time-consuming investigations involves opportunity costs, pitting the costs and benefits of challenging a consummated merger against devoting those enforcement resources to investigations into other potential antitrust violations, including investigations that may arise from HSR Filings.

To fulfill the Agencies' mandate to conduct quick yet effective premerger review of reported transactions, the Commission must make the best use of the tools Congress gave the Agencies to detect and prevent harmful acquisitions, including by requiring that the notification contain the documents and information that are necessary and appropriate for screening reportable mergers prior to consummation. Because premerger review is critically important to effective merger enforcement, the information contained in an HSR Filing must be fit for the purpose of determining whether a reported transaction may violate the antitrust laws in light of current market realities. Having the information necessary to make that assessment allows the Agencies to decide when and how to expend public resources to investigate and potentially challenge mergers. The final rule will enable the Agencies to engage in efficient and effective detection of illegal mergers that are subject to the HSR Act and thus is a reasonable exercise of the Commission's rulemaking authority under the HSR Act.

B. The Need for the Final Rule

The purpose of this rulemaking is to modernize the premerger review process in light of changing market dynamics, making adjustments that are necessary and appropriate to allow the Agencies to detect and prevent illegal mergers prior to consummation. The final rule also makes the process more efficient for filers, third parties, and the Agencies, shifting some of the burden of information collection and reporting to the merging parties (and away from third parties) and requiring the information needed for a preliminary antitrust assessment to be contained in the HSR Filing so that the Agencies have the full statutory review period to assess and confirm the information. Overall, the final rule addresses significant information gaps and asymmetries that have grown over time and undermined the Agencies' ability to conduct premerger review. In addition, this rulemaking implements requirements Congress imposed by passing the Merger Modernization Act, which broadened the scope of information the Agencies must collect as part of premerger review, including by requiring the collection of information about subsidies from foreign entities and governments of concern.

Due to changing commercial realities referenced above, the existing requirements for an HSR Filing leave significant gaps in the information available to the Agencies for conducting this assessment. Many of these gaps can be filled by information that the filing parties already have and often use in their own assessment of the transaction. Certain deficiencies in the existing reporting requirements prevent the Agencies from spotting problem areas that would justify a more in-depth investigation or, alternatively, from readily obtaining the facts needed to conclude that the transaction does not merit in-depth review prior to consummation. The rulemaking addresses these problems as well.

Based on the Agencies' extensive experience reviewing HSR Filings, transactions that present certain attributes are more likely to violate the antitrust laws and deserve further investigation. For instance, a merger of two firms that compete (or will soon compete) to provide goods or services to

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[15] John Kepler et al., ''Stealth Acquisitions and Product Market Competition,'' 78 J. Fin. 2837 (2023); John M. Barrios & Thomas G. Wollmann, ''A New Era of Midnight Mergers: Antitrust Risk and Investor Disclosures'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 29655, Jan. 2022), *https://www.nber.org/papers/w29655*; *see also* Colleen Cunningham et al., ''Killer acquisitions,'' 129 J. Political Econ. 649, 653 (2021) (killer acquisitions of overlapping targets bunch just below HSR threshold while there is no such pattern for non-overlapping acquisitions).

[16] Cunningham et al., *supra* note 15, at 653.

[17] *See* Comment of Thomas Wollmann, Doc. No. FTC–2023–0040–0680 at 1 n.2 (citing to Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–94 (2019) and Thomas G. Wollman, ''How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, 2021)).

[18] Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–78 (2019) (hereinafter ''Stealth Consolidation'').

[19] *See id.* at 77 (post-2000, enforcement against newly exempt transactions dropped to nearly zero while mergers between competitors rose sharply, reflecting an endogenous response to reduced premerger scrutiny).

[20] In a recent example, the Commission ordered the unwinding of an illegal merger three years and two months after consummation. In December 2020, the Commission approved Otto Bock's divestiture of the assets of Freedom Innovations to another company to resurrect competition in the market for microprocessor prosthetic knees. *In re Otto Bock HealthCare N. Am., Inc.,* No. 9378 (F.T.C. Dec. 1, 2020). The Commission's effort to unwind Polypore's illegal acquisition of rival battery separator manufacturer Microporous required five years, during which an Eleventh Circuit decision upheld the Commission's divestiture order. *See* Press Release, Fed. Trade Comm'n, ''FTC Approves Polypore International's Application to Sell Microporous to Seven Mile Capital Partners; Sale Will Unwind Illegal 2008 Acquisition'' (Dec. 18, 2013), *https://www.ftc.gov/news-events/news/press-releases/2013/12/ftc-approves-polypore-internationals-application-sell-microporous-seven-mile-capital-partners-sale. See also* Debbie Feinstein, ''Un-consummated merger,'' Fed. Trade Comm'n Competition Matters blog (Dec. 18, 2013), *https://www.ftc.gov/enforcement/competition-matters/2013/12/un-consummated-merger.*

[21] Fed. Trade Comm'n, The FTC's Merger Remedies 2006–2012, 18–19 (2017) (report of the Bureaus of Competition and Economics) (less than one-quarter of consummated merger remedies successfully restored competition), *https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.*

the same set of customers, or a merger involving a manufacturer and its main distributor that also distributes the products of competing manufacturers, may warrant closer scrutiny. On the other hand, if the Agencies can determine from review of an HSR Filing that a transaction does not present such attributes, the Agencies can more quickly and confidently determine that the transaction does not require a more in-depth review and may proceed to consummation.[22] However, the Agencies cannot make these determinations with confidence in the initial 15- or 30-day waiting period when the HSR Filings lack sufficient information about relevant premerger competitive relationships between the parties. By requiring the submission of such information, the final rule enables effective Agency decision-making during the initial 15- or 30-day waiting period.[23] The intention of the final rule is to make it possible for the Agencies to identify the most concerning transactions for more in-depth review, including through the issuance of Second Requests, and also to more quickly and confidently complete the review of those transactions that do not merit additional investigation and can proceed to closing at the end of the statutory waiting period.

The consequences of inadequate detection are revealed in a recent analysis of hospital mergers that were reported to the Agencies for premerger review co-authored by two economists from the Commission's Bureau of Economics.[24] The paper examined a set of consummated hospital mergers and measured the effect of each merger on prices. The study concluded that mergers not reportable under the HSR Act did not result in larger price increases than reportable mergers. In contrast, the authors found different outcomes among mergers that were subject to premerger review based on how much review the transaction received. Of the mergers reported to the Agencies, the largest average percentage price increase occurred for those mergers that received early termination of the initial waiting period. This suggests that the HSR Filings failed to provide sufficient information to trigger additional investigations that could have blocked these harmful mergers before they were consummated; instead, the filings resulted in early termination of the waiting period. While the study was not designed to test the impact of this rulemaking, the study supports the Commission's belief that there are information deficiencies with the current HSR Rules that prevent the Agencies from identifying mergers that may violate the antitrust laws.[25]

Hundreds of individuals submitted public comments to describe their own experiences in the aftermath of mergers and urge the antitrust agencies to do more to prevent the harmful effects of consolidation, including collecting more information in the HSR Filing. Examples of supportive comments from these individuals include the following:

- I was an employee at a mobile gaming company. . . . We went through acquisition after acquisition, to finally end up in a subsidiary of a big gaming multinational company. . . . There was a hiring freeze, there were layoffs in another subsidiary we had been affiliated with and then a month ago they cancelled our project and laid off all California employees. . . . Before the final acquisition, our company had 2 profitable games and was developing a third. After the acquisition there were harsh [Key Performance Indicators] for the new game and investment was cut back. Had our company been able to resist the wave of subsequent acquisitions, it is likely we would still be employed in a profitable and vibrant company that was able to compete on the marketplace.[26]
- I am a General Partner at a small Venture Capital firm. I support this proposal as I believe it will lead to increased transparency which benefits us all. . . . We are facing an oligopoly/monopoly crisis in this country/the world and it's important we strive for real competition. I believe this proposal will provide the government more information with which it can make sure our industries thrive.[27]
- As a retired person, I have noticed prices going up much more where a small group of suppliers have most of the market share. I see companies using near-monopoly power to stop employees from having unions. The only way the antitrust laws can be adequately enforced, is to insist that anyone proposing a merger provide full accurate information on what they are doing.[28]
- I work as a cybersecurity engineer. Leaving aside the economic concerns of monopolies, I want to bring up the security concerns of allowing unchecked mergers. Haphazard, rushed mergers increase the security risk across companies, as the engineering teams must stitch together the environments for disparate organizations quickly. . . . I look forward to these reporting requirements and I hope they cause companies to slow down and think of the knock-on effects of the mergers beyond the influx of cash and increased market power.[29]
- As an investor and financial advisor, I approve of the changes requiring more disclosure about the nature of mergers. The impacts of industry consolidation are important. . . . A thorough understanding of the purpose of mergers should help ensure that deals are not anti-competitive.[30]
- As a retired CPA and former business professor, I support these proposed changes to the HSR form. The government needs the additional information and greater clarity in order to carry out its responsibility to oversee and evaluate proposed mergers and acquisitions with a view to protecting

[22] Until 2020, the Agencies routinely granted early termination of the initial waiting period for certain transactions that did not warrant further action pursuant to 15 U.S.C. 18a(b)(2). In March 2020, in order to transition filers to an e-filing system that permitted the Agencies to continue to process filings during the COVID–19 pandemic, the Agencies temporarily suspended the discretionary granting of early termination. In February 2021, the Agencies once again suspended the granting of early termination in response to an unprecedented volume of transactions. *See* Press Release, Fed. Trade Comm'n, ''FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination'' (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination*.

[23] The HSR Act provides for a shortened 15-day initial waiting period for reportable acquisitions by means of a cash tender offer or acquisitions subject to certain Federal bankruptcy provisions. 15 U.S.C. 18a(b)(1)(B); 11 U.S.C. 363(b)(2), as amended (1994). For these transactions, the second waiting period is also shorter, 10 days (as compared to 30 days for most transactions) after appropriate certification of substantial compliance with the Second Request. 15 U.S.C. 18a(e)(2). For convenience, this rulemaking refers to the standard 30-day initial waiting period that applies to most transactions even though the Agencies have even less time to review information provided in the HSR Filing for cash tender or certain bankruptcy transactions.

[24] Keith Brand et al., ''In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,'' 66 J. L. Econ. 639 (2023).

[25] One commenter suggests that this study proves the opposite and provides evidence that the current HSR Form provides Agency staff with sufficient information to identify potentially anticompetitive mergers. *See* Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 14 n.32. The Commission disagrees with this assessment of the results. Indeed, in their study, the authors suggested that their results should encourage further study of the process of granting early termination to better illuminate why mergers that receive truncated review had higher price effects than those that received a preliminary review but not a Second Request. *See* Brand et al., *supra* note 24, at 663–64.

[26] Anonymous Comment, Doc. No. FTC–2023–0040–0134.

[27] Anonymous Comment, Doc. No. FTC–2023–0040–0203.

[28] Comment of Joan Friedman, Doc. No. FTC–2023–0040–0237.

[29] Comment of Cybersecurity Engineer, Doc. No. FTC–2023–0040–0238.

[30] Comment of Joseph Cook, Doc. No. FTC–2023–0040–0244.

the common good and promoting competition within and across industries.[31]

• Capitalism can only work with a robust system of competition, and we are lo[]sing that at an ever-increasing rate. I am in an agricultural business. There is virtually no competition for the dollars I spend, and an equal lack of competition for what I produce. This is stunningly true when looked at over the 40 years I have been in business.[32]

• Businesses certainly have a right to pursue mergers and acquisitions as a means of improving their market positions, but the public also has a right to know the ''five W's'' driving these decisions: Who is funding the HSR Action; What are the specifics of the proposed action; When are the HSR Actions taking place; Where are the affected communities/localities; and Why are the stakeholders pursuing the HSR Action (or, what is their business goal)? Another key piece of information that the public has a right to know, is WHO will be affected by the proposed merger or acquisition? The issues at stake here are National Security, fair market competition, supply chain disruptions, and negative impacts on labor markets. . . . I hope the FTC sticks to their plan and implements these common-sense and much needed reporting requirements.[33]

• I am a 25-year veteran in an industry (publishing) that has seen both jobs and innovation suffer due to unchecked consolidation by large players. It is very possible some of this consolidation might have been prevented, or at least steered in a direction that encouraged innovation and growth, if regulators had this kind of information available beforehand.[34]

• I am a private, sole-practitioner entrepreneur with a vested interest in a diversified economic ecology that supports and sustains vibrant, fair competition. . . . From my perspective, the requirements for getting approval for large mergers should include gathering enough information about the companies involved that the FTC can make a best and rational assessment of the effects of the maneuver on the industries, labor markets, consumer pricing, industry trends, trading markets, etc, that they (mergers) will potentially affect.[35]

On the other hand, several commenters stated that the Agencies have not provided any evidence that current information requirements are insufficient, or identified transactions they did not challenge due to shortcomings in the current premerger review process. One commenter suggested that if the Commission intends to expand the information requirements for the HSR Filing, it should lay a stronger legal and evidentiary foundation that would justify its need for the additional information. Another commenter urged the Commission to consider how best to balance the need to determine whether further investigation is warranted against the burden to filing parties.

In response to the comments and to explain further the need for this rulemaking, the Commission discusses below the gaps that exist in current HSR information requirements relating directly to potential violations of the antitrust laws, and identifies the new information requirements in the final rule that will provide a factual basis for the Agencies to determine whether to conduct a more searching review of a transaction based on these concerns. The gaps described below are intended to be illustrative and not exhaustive.

1. Disclosure of Entities and Individuals Within the Acquiring Person

In reviewing a transaction filed under the HSR Act, the Agencies must quickly understand the scope and nature of the buyer's business and business relationships to determine whether the acquisition may harm competition and thus violate the antitrust laws,[36] which include section 7 of the Clayton Act. The scope of section 7 is broad: it prohibits any acquisition whose effect may be substantially to lessen competition or to tend to create a monopoly, including those that result in a small ownership stake.[37] In many acquisitions, the buyer gains control of the acquired entities or assets and directs the decision-making at the combined firm post-merger. In addition, if the buyer has a complex corporate or governance structure, an acquisition can bring together individuals or investors within the buyer that control or influence decision-making at a competitively significant business, such as a competitor of the target[38] of the filed-for transaction.[39] Indeed, holdings of entities within the acquiring person that do not result in control under the HSR Rules nevertheless can result in the ability to influence competitively important decisions of the acquiring entity, and thus affect the analysis of whether the acquisition of the target may harm competition.[40]

The HSR Act states that, unless exempt, no person shall acquire, directly or indirectly, any voting securities or assets of any other person without first filing a notification with the Agencies and waiting for the statutory period to expire.[41] The HSR Rules require notification of the transaction from the entity that, pursuant to the Rules, controls the buyer (or seller), which the Commission has defined as the Ultimate Parent Entity or ''UPE.''[42] But to determine

[31] Comment of Sue Ravenscroft, Doc. No. FTC–2023–0040–0259.

[32] Comment of Jeffrey Bender, Doc. No. FTC–2023–0040–0267.

[33] Comment of Thomas Newman, Doc. No. FTC–2023–0040–0325.

[34] Anonymous Comment, Doc. No. FTC–2023–0040–0332.

[35] Comment of Marla McFadin, Doc. No. FTC–2023–0040–0377.

[36] 15 U.S.C. 12(a).

[37] 15 U.S.C. 18. *See United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 592 (1957) (any acquisition is within the reach of section 7 whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or the creation of a monopoly in any line of commerce).

[38] To aid the clarity of the Form and Instructions, the Commission defines ''target'' in the Instructions to include all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction. *See* section VI.A.1.h.

[39] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 2, 2017) (complaint) (overlapping limited partnership holdings violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (complaint) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors); *In re Dan L. Duncan,* No. C–4173 (F.T.C. Aug. 18, 2006) (complaint) (acquisition combined general partners of competing energy storage companies under common control). Competition concerns about partial stakes can arise between horizontal competitors; *United States* v. *Dairy Farmers of Am.,* 426 F.3d 850, 860 (6th Cir. 2005), or a supply relationship, *du Pont,* 353 U.S. at 602–604 (23% interest in General Motors, a key supplier, and a shared board member). Section 7 does not apply to buyers making an acquisition solely for the purpose of investment when the buyer does not intend to use its position to bring about or attempt to bring about a substantial lessening of competition. *United States* v. *Tracinda Inv. Corp.,* 477 F. Supp. 1093, 1100 (C.D. Cal. 1979).

[40] *See du Pont,* 353 U.S. at 607 n.36 (finding the influence of du Pont's 23% stock interest to be greater, due to diffusion of remaining shares); *Denver & Rio Grande W. R.R. Co.* v. *United States,* 387 U.S. 485, 504 (1967) (identifying section 7 concerns with a 20% investment). *See also Dairy Farmers of Am., Inc.,* 426 F.3d at 862 (no voting interest but leverage via its position as financier to control or influence competitor's decisions).

[41] 15 U.S.C. 18a(a). Congress rejected a proposal to limit covered acquisitions to those made by corporations, using the term ''person'' instead because the anticompetitive nature of a merger is not dependent upon the legal form of the acquiring entity. 122 Cong. Rec. 30876 (1976).

[42] One of the many initial challenges that the Commission faced in implementing the HSR Act was how to define ''control'' for the purposes of determining reportability of transactions. The Commission immediately understood that no set percentage of ownership dictated whether an individual or entity had functional control of or significant influence over a company, which is

whether the transaction may violate the antitrust laws, the Agencies need to understand the nature of the buyer's holdings pre- and post-merger, as well as the identities of others who have holdings in the buyer and thus may have influence, including possible veto power, over the buyer's decision-making, since that ability affects the evaluation of the competitive effects of the acquisition of the target. Increasingly, this includes individuals and entities with significant management rights that give them a ''seat at the table'' when the buyer is making competitively important decisions.

Today, the mechanisms of influence are not limited to equity stakes; the ability to influence corporate decision-making arises from a variety of interests beyond voting rights.[43] It may arise from sharing key decision-makers, such as executives or members of their respective boards of directors, or from a combination of a significant minority stake and rights to appoint or nominate members of the board.[44] The power of key decision-makers of one competitor to place members on the board of another competitor or veto financial decisions can result in substantial influence over the buyer, and thus the target after the transaction is consummated, rendering an acquisition of a related target potentially illegal under section 7.[45] A merger might also violate the law if it gives individuals and entities of one competitor access to officers, directors, or employees of another competitor.[46] Similarly, the existence of subsidies, among other means, may subject the buyer to additional pressures from individuals or entities not directly a party to the reportable transaction.[47] Beyond voting rights, these interest holders can have similar influence as holders of minority and non-corporate interests.

a. Trends in Private Investment

Understanding the operations of the buyer has become more challenging due to vast changes in M&A activity since the promulgation of the HSR Rules in 1978. One notable recent trend in M&A activity is that the role of private investors, including private equity, has become more pronounced.[48] In the Agencies' experience, these private investors often utilize complicated structures of ownership and managerial control. They also frequently take either majority or minority stakes in many different operating companies (which may have competitively significant relationships) and can exercise significant influence over management and strategic decision-making. In particular, the percentage of equity interest is often not a good indicator of the extent to which investors can direct the strategic decisions of the business.[49] Investors can participate in the management of companies by serving on the company's board, selecting or monitoring the management team, having veto rights, acting as sounding boards for CEOs, or stepping into management roles themselves.[50]

When these private investors take active positions in a wide variety of companies, such holdings can create direct links between competitors or other competitively relevant firms, such as critical suppliers or distributors. Economic research has shown that transactions that lead to cross-ownership of horizontal competitors or other firms in a competitively significant business relationship can create similar incentives and cause similar anticompetitive effects as a full merger.[51] But when these relationships are not well known or easy to identify, the risk that anticompetitive harm from an unlawful acquisition will go

critical to the analysis of the competitive effects of a transaction. In 1976, the Commission originally proposed that ''control'' would include not only ownership of 50% or more of the voting securities of an entity, but also the power to influence through a minority stake. 41 FR 55488, 55490 (Dec. 20, 1976). Commenters objected to such a subjective test for control. *See* 42 FR 39040, 39043 (Aug. 1, 1977). So, the Commission proposed to include the contractual power to designate a majority of the directors or trustees of an entity. *Id.* This proposal was also criticized for being overly broad and subjective. In the end, in setting up the premerger notification program, the Commission adopted the simple 50% or more threshold for control to give prospective filers certainty as to their reporting obligations. But in doing so, the Commission did not dismiss the significance of understanding who has actual or working control of the filing parties. 43 FR 33450, 33457–58 (July 31, 1978). This definition limited the number of transactions subject to the filing requirements of the HSR Act, but the Commission did not minimize the importance of examining who may have significant influence over the acquiring person while assessing antitrust risk arising from the transaction.

[43] Gabriel V. Rauterberg, ''The Separation of Voting and Control: The Role of Contract in Corporate Governance,'' 38 Yale J. Reg. 1124, 1148–54 (2021) (documenting trend of public companies being subject to stockholder agreements that provide various species of control rights to favored investors); Jill E. Fisch, ''Stealth Governance: Shareholder Agreements and Private Ordering,'' 99 Wash. U. L. Rev. 913, 930–33, 946–53 (2021) (discussing similar trend in private companies).

[44] *E.g., United States* v. *U.S. West, Inc.,* No. 96–002529, 1997 WL 269482 (D.D.C. Feb. 28, 1997) (acquired firm had 20% stake plus board seats in a competitor of acquiring firm).

[45] *E.g., United States* v. *Univision Commc'ns., Inc.,* No. 1:03–cv–00758, 2003 WL 23192527 (D.D.C. Dec. 22, 2003) (buyer held substantial equity stake plus ability to influence certain strategic decisions through issuance of equity or debt or veto of future acquisitions). *See also Dairy Farmers of Am.,* 426 F.3d at 862 (buyer had influence due to role as financier, so that acquired firm is ''locked in'' to a relationship with the buyer, which could lead to anticompetitive effects).

[46] *E.g., In re Time Warner Inc.,* No. C–3709 (F.T.C. Sept. 12, 1996) (analysis to aid public comment) (walling off two individuals and one entity to prevent them from influencing officer, directors, and employees of competitor and its day-to-day operations).

[47] As discussed elsewhere, Congress has directed the Commission to require the reporting of subsidies received from foreign countries or foreign entities of concern due to concerns that these entanglements can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition following an acquisition. Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b. Congress also enacted the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) over certain non-controlling investments and real estate transactions involving foreign persons that may be a threat to national security. Public Law 115–232, 132 Stat. 2173, Title XVII, Subtitle A (2018). For certain foreign investments in U.S. businesses operating critical technologies or infrastructure, or that collect sensitive personal data of U.S. citizens, FIRRMA regulations require notification of non-controlling investments, direct or indirect, that afford the foreign investor (1) access to material non-public technical information; (2) membership or observer rights on the board directors (or similar) or the right to nominate an individual to that board; or (3) any involvement, other than through voting of shares, in substantive decision-making of the U.S. business. 31 CFR 800.211. Such relationships are deemed a non-controlling interest in a U.S. business that afford a foreign investor access to information or involvement in substantive decision-making. *See* 85 FR 3112 (Jan. 17, 2020).

[48] Elisabeth de Fontenay, ''The Deregulation of Private Capital and the Decline of the Public Company,'' 68 Hastings L. J. 445, 447 (2017). Private equity has accounted for an increasing share of all merger activity over time, although private equity activity is highly cyclical. *See* Michael Mauboussin & Dan Callahan, ''Public to Private Equity in the United States: A Long-Term Look,'' Morgan Stanley Inv. Mgmt., Counterpoint Global Insights 1 (Aug. 2, 2020), *https://www.morganstanley.com/im/publication/insights/articles/articles_publictoprivateequityintheusalongtermlook_us.pdf*. Recent estimates suggest that private equity firms managed about 20% of U.S. corporate equity and that private equity deal-making has accounted for 40% or more of domestic M&A activity. Rogé Karma, ''The Secretive Industry Devouring the U.S. Economy,'' Atlantic (Oct. 30, 2023). *See also* Steven A. Cohen, et al., ''Private Equity in 2023—A Year (Not) to Remember,'' Harv. L. Sch. Forum on Corp. Governance (Jan. 13, 2024), *https://corpgov.law.harvard.edu/2024/01/13/private-equity-in-2023-a-year-not-to-remember/* (private equity deal volume declined in 2023 and increasingly focused on smaller deals and minority investments).

[49] *See generally* Bob Zider, ''How Venture Capital Works,'' Harv. Bus. Rev. (Nov.-Dec. 1998), *https://hbr.org/1998/11/how-venture-capital-works*; Thomas Hellman, ''The allocation of control rights in venture capital contracts,'' 29 RAND J. Econ. 57 (1998).

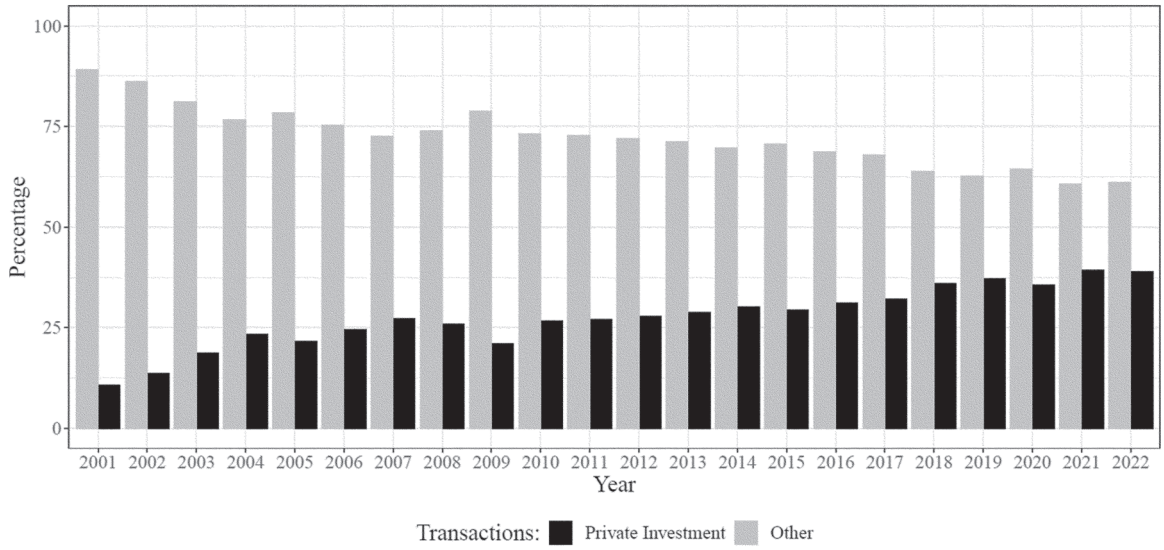
[50] *See, e.g.,* Sec. Exch. Comm'n, ''Private Equity Funds,'' *Investor.gov* (last visited Sept. 10, 2024), *https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity*.

[51] Timothy Bresnahan & Steven C. Salop, ''Quantifying the competitive effects of production joint ventures,'' 4 Int'l J. Indus. Org. 155 (1986).

undetected is greatly increased.[52] This includes the risk of collusive [53] or coordinated behavior,[54] or the risk that cross-ownership of the combined firm will lead to foreclosure of rivals.[55]

The increasing role of private capital is reflected in the shifting mix of reportable transactions. Using data from the Agencies' Annual HSR Reports for the past 20 years, Figure 2 shows that the number of transactions for which the name of the Ultimate Parent Entity of the acquiring person included ''fund'' or some variation of ''L.P.'' has increased from approximately ten percent to nearly 40 percent of all reportable transactions.[56] The acquiring person for these transactions can be shell companies that have been created by an investment group in order to make a particular acquisition, or an entity that owns a variety of other operating entities (often referred to as ''portfolio companies''). In either scenario, the entity is part of the structure of a larger investment company or group.

Figure 2: Acquisitions Involving Funds and Limited Partnerships



Note: Private Investment refers to the percentage of HSR Reportable Transactions with "Fund" or variation of "L.P." in the name of the UPE of the acquiring person.

Since the beginning of the premerger program, the Commission has required filers to report certain entities that hold minority interests in the filing parties to alert the Agencies to situations in which the potential antitrust impact of the reported transaction does not result solely or directly from the acquisition, but may arise from direct or indirect shareholder relationships between the parties to the transaction.[57] As explained in the NPRM, reporting requirements regarding the identification of certain minority holders of the filing persons have been adjusted over time to reflect market realities, including changes in investment activity and the growing role of these intermediaries.[58] Nonetheless, changes in the investment landscape discussed above have created meaningful gaps in the reporting requirements for a growing number and type of minority holders that have the ability to influence competitive decision-making and to harm competition via acquisitions that violate the antitrust laws.

b. Corporate Structure Changes

Several commenters supported the need for additional information that would identify entities holding minority

[52] Daniel P. O'Brien & Steven C. Salop, ''Competitive Effects of Partial Ownership: Financial Interest and Corporate Control,'' 67 Antitrust L. J. 559, 570 (1999) (overview of the complex corporate financial and governance structures of modern corporations, including different types of shareholding and the relationships to the boards of directors).

[53] Robert J. Reynolds & Bruce R. Snapp, ''The competitive effects of partial equity interests and joint ventures,'' 4 Int'l J. Indus. Org. 141 (1986); David Flath, ''When is it rational for firms to acquire silent interests in rivals?,'' 9 Int'l J. Indus. Org. 573 (1991); David Reitman, ''Partial Ownership Arrangements and the Potential for Collusion,'' 42 J. Indus. Econ. 313 (1994); Sandro Shelegia & Yossi Spiegel, ''Bertrand competition when firms hold passive ownership stakes in one another,'' 114 Econ. Letters 136 (2012).

[54] Rune Stenbacka & Geert Van Moer, ''Cross ownership and divestment incentives,'' 201 Econ. Letters 109748 (2021).

[55] Nadav Levy et al., ''Partial Vertical Integration, Ownership Structure, and Foreclosure,'' 10 a.m. Econ. J.: Microeconomics 132 (2018).

[56] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2010 appendix A (FY 2010) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2001–2010); Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2013 appendix A (FY 2013) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2004–2013); Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2022 appendix A (FY 2022) (reporting Adjusted Transactions in which a Second Request could have been issued from years 2013–2022). *See also* Fed. Trade Comm'n Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *https://www.ftc.gov/policy/reports/annual-competition-reports* (collecting reports). The Total Number of Adjusted Transactions omits from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, *e.g.,* filing for one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to § 801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[57] 43 FR 33450, 33531 (July 31, 1978).

[58] NPRM at 42188.

positions. One commenter stated that investors have shifted strategies since the 1980s, when portfolios consisted of unrelated companies and investors mainly focused on optimizing capital structures and improving corporate governance.[59] Another commenter stated that without a full picture of the entire corporate structure of the merging parties, it can be difficult or impossible to untangle or understand the potential anticompetitive impacts of a transaction. Several commenters supported the need to adjust information requirements to have a broader view that reflects how firms are organized today. One commenter supported the collection of more comprehensive information related to the merging entities, arguing that a more holistic and systems-level approach would examine the networks of firms involved in a market, which could expose companies that can operate as bottlenecks or supply key resources to other market participants. A group of State antitrust enforcers supported the collection of more information related to corporate control or the degree of financial interest so the Agencies can quickly assess how the resulting ownership structure may change the parties' incentives to compete, enhance the acquirer's ability to influence decision-making through changes in voting interests or governance rights, or facilitate the sharing of competitively sensitive information between rivals.

Another development that has caused the Commission to reassess its rules is that the particular corporate structure of an entity is now less indicative of its market behavior, and thus distinctions made on that basis may no longer be sound. The decision to form as a corporation, limited liability company, or limited partnership is often influenced more by risk, liability, and tax considerations than by the entity's business operations. Now more than ever, distinctions made based on corporate form have little impact on an assessment of whether and how firms compete. Moreover, corporate governance literature highlights the changing nature of decision-making within even standard organizational structures, such as corporations. Corporate law provides sufficient flexibility to alter traditional roles, including the rights of shareholders and the scope of director liability, by contract[60] or through modification of bylaws or certificates of incorporation.[61] The rise of shareholder agreements—private contracts by and among shareholders—has affected who has the ability to direct decisions of the company, separating voting and control, especially for those given veto rights via contract.[62] These forms of 'stealth governance' have implications for how decisions are made within the firm, making it difficult for investors to know who is exercising control within the company.[63]

After careful consideration of these points and others raised by commenters, the Commission has determined that the requirements of the current Form and Instructions have not kept pace with market realities and the accompanying changes in ownership structures. In light of these shifts in corporate formation and governance, the current requirements do not provide the Agencies with sufficient information that allow them to understand how decisions are made at the respective companies, let alone whether the acquiring person may have competitively relevant premerger entanglements with the target's industry and minority holders that may have significant rights to direct the acquiring entity's actions.

To keep pace with prior changes in corporate form, the Commission has adjusted the disclosure requirements for minority investors over time and in light of its experience reviewing thousands of filings each year, balancing the need to surface competitively relevant relationships without burdening filers to provide information that would not change the Agencies' premerger screening decisions. Under the current rules, it has become increasingly difficult to screen transactions because deal structures often have minority investors with significant rights that are not disclosed. See Figures 4 through 8 below, section VI.D.1.d.ii. This includes situations where an investor group is, for practical purposes, making the acquisition (or otherwise significantly involved), but the HSR Filing does not alert the Agencies to their role in the acquisition. These relationships are not currently disclosed if the minority investment is not in the UPE or acquiring entity, but rather in an entity (often a shell entity) that sits between these two in the structure of the acquiring person. Even if the minority investment is made in the UPE, if the UPE is an LP, only the name of the general partner is disclosed. For situations where the current information on the HSR Filing is unrelated to the public-facing name of the entity that controls the acquiring person, the HSR Filing does not alert the Agencies to the premerger relationships that exist solely due to that investor's relationship with and role in the buyer.[64]

To close this information gap, the Commission has determined that the Agencies need additional information about entities in between the UPE and the acquiring entity. If any of these entities or individuals has a minority stake or other rights that give them the ability to influence decision-making post-merger, then they are functionally ''in the deal'' and their existing business relationships are relevant to a thorough premerger antitrust assessment of the transaction. As explained in more detail in section VI.D.1.d.ii.a., this information was required of all corporate entities within the acquiring person prior to a rule change in 2011 that limited the requirement in order to exclude entities not related to the transaction. However, as transaction structures have become more complex, application of the 2011 change has eliminated the requirement to provide information about minority entities that are related to the acquiring entity. The final rule addresses this gap in information so that the Agencies can identify existing relationships among individuals and entities that have interests in (1) the acquiring entity (and any entities it controls or are controlled by it) and (2) other entities within the UPE that have competitive relationships

[59] *See also* Aslihan Asil et al., ''Misaligned Measures of Control: Private Equity's Antitrust Loophole,'' 18 Va. L. & Bus. Rev. 51 (2023). Asil et al. argue that the complicated structure of ownership in the typical private equity acquisition may make some anticompetitive deals technically non-reportable under the HSR act, because the investment structure under-represents the proportion of control actually conferred by the transaction. *Id.* at 53.

[60] *See* Jill E. Fisch, ''Governance by Contract: The Implications for Corporate Bylaws,'' 106 Cal. L. Rev. 373, 379 (2018).

[61] Megan Wischmeier Shaner, ''Interpreting Organizational 'Contracts' and the Private Ordering of Public Company Governance,'' 60 Wm. & Mary L. Rev. 985, 988 (2019) (the charter and bylaws of public corporations are being used as tools for restructuring key aspects of corporate governance).

[62] Rauterberg, *supra* note 43.

[63] Jill E. Fisch, ''Stealth Governance: Shareholder Agreements and Private Ordering,'' 99 Wash. U. L. Rev. 913, 947 (2021) (One investor's capacity to monitor may be limited by an agreement to support director candidates chosen by another investor, or an ownership structure that appears to involve shared power may be undermined by the contractual formation of a control group).

[64] For example, a fund that operates as Alpha Capital Partners could create an entity named 123ABC, LP to effectuate an acquisition. 123ABC, LP could be its own UPE because Alpha Fund I and Alpha Fund II each hold 49.9% of the 123ABC, LP, with the general partner, 123ABC GP, LP, holding 0.2%. Currently, the Form only requires 123ABC, LP to disclose that 123ABC GP, LP is its general partner. The issue is compounded if Alpha Capital Partners is co-investing with Beta Capital Partners and 123ABC, LP is held 49.9% by Alpha and 49.9% by Beta (or if Beta invests in an entity that is not the UPE or acquiring entity). Disclosure of these relationships are not currently required.

with the target. These minority holders are competitively relevant because they may have the ability to influence decision-making and operations of the target post-merger [65] but it is difficult for the Agencies to detect these relationships based on information available the current Form.

As discussed below in section VI.D.1.d. and VI.D.3.c., the final rule requires additional information for Minority Shareholders or Interest Holders as well as Officers and Directors from the acquiring person. Information about other individuals or entities holding a minority position or rights to serve or appoint members of the governing board will fill an existing gap that has created a blind spot for the Agencies that prevents a thorough premerger screening, especially for transactions involving complex corporate structures and investment vehicles. This information is most relevant from the entity that will be making decisions post-consummation, and so the final rule does not seek this information from the seller, other than the identification of minority interest holders that will ''roll over'' their investments post-consummation.[66] This information is necessary to identify additional areas of competitive concern created by minority stakeholders or other influential decision-makers (*i.e.,* officers and directors) that may have a relationship with entities related to the target of the acquisition.

However, in light of concerns raised by commenters about the burden and relevancy of providing this information with respect to limited partners, the Commission has modified these requirements to focus only on those limited partners that also have management rights, such as the right to appoint members to the board. Moreover, the final rule does not adopt certain proposed requirements to identify board observers, or creditors, holders of non-voting securities, or entities with management agreements. The Commission has determined not to require this information at this time but will continue to monitor market activity as it implements the final rule.

Similarly, new document requirements contained in the final rule are aimed at providing a more in-depth understanding of the motivation and purpose of the transaction, and how the combined company will be operated post-consummation. In particular, additional transaction-related documents will provide a more complete picture of the buyer's reason for pursuing the transaction, and for companies with complex investment structures, these documents may reveal whether there are other individuals or entities who will be participating in competitive decisions post-merger. The final rule also requires a small set of business plans and reports shared at the highest level of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. Together, these documents may reveal whether there are significant investors in either party that also have investments in businesses that compete with the target or if there are any other planned investments in competitively relevant businesses, such as competitors or suppliers, that would impact the Agencies' assessment of whether the transaction may violate the antitrust laws.

2. Identifying Potential Labor Market Effects

The Clayton Act's prohibition on acquisitions that may substantially lessen competition or tend to create a monopoly applies to acquisitions that have these effects on competition to purchase inputs that firms use to produce goods and services just as it does to acquisitions that threaten competition in downstream markets for goods and services themselves,[67] and the antitrust laws protect competition in markets for labor services.[68] As evidence of decreasing competition for labor continues to mount,[69] the Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets and have stepped up efforts to identify and investigate potential labor market effects arising from reportable transactions. The Agencies have challenged a few transactions that may result in labor market harms,[70] and consent agreements have included provisions that stop the use of certain non-compete clauses that limit the ability of potential market entrants to hire key employees.[71]

As stated in the NPRM, current notification requirements under the HSR Act do not require any specific information about employees. And yet virtually every firm competes for labor in at least one labor market and, more commonly, in multiple labor markets, and transactions that involve two firms

[65] *See United States* v. *Dairy Farmers of Am., Inc.,* 426 F.3d 850, 860 (6th Cir. 2005) (district court erred in focusing on control which ignored the possibility that there may be a mechanism that causes anticompetitive behavior other than control, such as leveraging position as financier).

[66] In many transactions, the acquired firm ceases to exist post-consummation. Even when some entity continues to generate revenues, possibly in competition with some aspects of the buyer's business, the Commission has determined to collect additional information about entities within the UPE only from the acquiring person at this time.

[67] *See United States* v. *Bertlesmann SE & Co.,* 646 F.Supp.3d 1 (D.D.C. 2022) (violation of section 7 where merger likely to substantially lessen competition in market for publishing rights to anticipated top-selling books due to harm to targeted sellers—authors of top-selling books); *Boardman* v. *Pac. Seafood Grp.,* 822 F.3d 1011, 1022 (9th Cir. 2016) (acquisition may violate section 7 by substantially lessening competition in multiple seafood input markets). *See also Mandeville Island Farms, Inc.,* v. *Am. Crystal Sugar Co.,* 334 U.S. 219, 235–36 (1948) (antitrust laws protects not just consumers, purchasers, competitors or sellers but all victims of illegal practices); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.,* 549 U.S. 312, 321–22 (2007); *United States* v. *Syufy Enterprises,* 903 F.2d 659, 663 n.4 (9th Cir. 1990); *In re Grifols, S.A.,* No. C–4654 (F.T.C. Aug. 1, 2018) (order requiring divestitures to prevent monopsony in three local markets for the collection of plasma).

[68] *NCAA* v. *Alston,* 594 U.S. 69, 86–87 (2021) (plaintiff student-athletes need not show harm in seller-side market as well as buyer-side labor market); *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926) (Sherman Act protects competition for labor).

[69] *See e.g.,* Anna Stansbury & Lawrence H. Summers, ''The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), *https://www.nber.org/papers/w27193*; Orley Ashenfelter et al., ''Labor Market Monopsony,'' 28 J. Lab. Econ. 203 (2010); V. Bhaskar et al., ''Oligopsony and Monopsonistic Competition in Labor Markets,'' 16 J. Econ. Perspectives 155 (2002); William M. Boal & Michael R. Ransom, ''Monopsony in the Labor Market,'' 35 J. Econ. Lit. 86 (1997); Alan B. Krueger, Luncheon Address at Kansas City Federal Reserve Bank, Reflections on Dwindling Worker Bargaining Power and Monetary Policy (Aug. 24, 2018), *https://www.kansascityfed.org/documents/6984/Lunch_JH2018.pdf*; Brianna L. Alderman et al., ''Monopsony, wage discrimination, and public policy,'' 61 Econ. Inquiry 572 (2022); David Berger et al., ''Labor Market Power,'' 112 a.m. Econ. Rev. 1147 (2022); Chen Yeh at al., ''Monopsony in the US Labor Market,'' 112 a.m. Econ. Rev. 2099 (2022); José Azar et al., ''Labor Market Concentration,'' 57 J. Hum. Resources S167 (2022).

[70] Press Release, Fed. Trade Comm'n, ''FTC Challenges Kroger's Acquisition of Albertsons'' (Feb. 26, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons*; *United States* v. *Anthem* et al., 1:16–cv–01493 ¶ 71 (D.D.C. filed July 21, 2016) (complaint); *United States* v. *Aetna, et al.,* 3–99–CV 1398 ¶ 27 (N.D. Tex. filed June 21, 1999) (complaint). *See also* Concurring Statement of Commissioner Slaughter and Chair Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England 1–2 (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf* (recommending including a count in the complaint that the proposed merger would have violated section 7 of the Clayton Act in a relevant labor market).

[71] Press Release, Fed. Trade Comm'n, ''FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics'' (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.*

that purchase labor from the same labor market(s) may substantially lessen competition between employers for labor services. Merging parties may compete in the same labor market even when they do not compete in the same product market.

The Commission received hundreds of comments from individuals, many of whom are in the entertainment industry, who supported the need for the Agencies to conduct a robust search for potential labor market effects before the acquisition is consummated. Several dozen recounted the effects that prior mergers have had on them. Examples of comments supportive of reviewing transactions for labor market effects include the following:

- I'm a working TV writer at the beginning of my career. I'm afraid for the future—the consolidation of the media companies in this town and their vertical integration has made things so much harder and less competitive, even in the time that I've been in LA and worked within the system. Now that there are so few ''shops'' in town, salaries are depressed and it's become incredibly difficult to not only demand fair pay, but treatment as well. They know that they don't have to negotiate or budge on whatever terms they set because there are increasingly few alternatives to them.[72]
- My background includes Strategy consulting for major transnational Mergers. I think the new rules are very good as they demand greater clarity from the firms before the transaction starts. I have seen a lot of waste and backtracking as executives struggle between their ego and the analytics that do not tell them the story that they want about why the transaction will succeed. And the new labor and financing provisions offer much needed transparency—layoffs are a knee jerk habit and are not really helpful for the firm or the industry.[73]
- Please collect data on labor markets. I've been affected by the monopolies in the entertainment industry and likely will lose my livelihood as well as that of my staff due to unchecked mergers within the next month. After starting a successful business 23 years ago, it's heartbreaking to lose it and will be costly to our economy as more and more of us lose our businesses due to these unchecked mergers and the power they wield to save them money.[74]
- I work in a small accounting firm and I have seen the effects of mergers on consumer satisfaction and worker wellbeing personally. . . . [M]any of the job-searching or hiring firms we'd contract with to seek additional workers are worried about raising the ire of the large firm in the region, as it comprises so much of their client base now[.] . . . As a result, we're forced to go with larger, national firms for hiring, and become part of the problem of sectoral concentration.[75]
- As a lifelong union member I also believe the requirement for detailing merger effects on workers and unions to be a vital necessity. Those of us outside the C suites, boardrooms and stockholder meetings are stakeholders too, and our livelihoods and well being should be considerations.[76]
- I personally know many folks in entertainment (writers, crew, actors, etc.) who have had such a difficult time surviving in Hollywood that they've simply had to quit or move home. And, frankly, folks who specifically represent cultures that are least visible in society are often the first to go—because they don't necessarily have the resources or didn't face as many obstacles as other artists. It's a terrible cycle, magnified greatly by vertical mergers.[77]

Numerous commenters, including State antitrust enforcers and members of Congress, expressed general support for an increasing focus on labor market competition in merger analysis and requiring additional labor market information in the Form to screen for such issues. Some commenters highlighted potential efficiencies in the merger review process from providing the Agencies with labor market information in the earlier stages of review, including a more uniform process that could result in the termination of more merger reviews within the 30-day waiting period and a more efficient use of Agency resources where no labor market issues exist.

The Commission disagrees with a commenter who stated that the analysis under the Clayton Act requires consideration of competition issues, but not labor. Antitrust law, including the Clayton Act, has always been concerned with workers and labor markets.[78] As noted by the State antitrust enforcers, in the congressional debates on the Clayton Act in 1914, legislators expressed concerns regarding the monopsonist's power to dictate to its labor the wage it will pay for the only commodity labor has to sell.[79] As recently as 2021, a unanimous Supreme Court in *NCAA* v. *Alston* affirmed that the antitrust laws are designed to prevent harm to competition in labor markets.[80] As noted in the concurring opinion: ''Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.'' [81] And there is bipartisan agreement among current Federal enforcers and their predecessors that the Agencies are empowered to enforce the Clayton Act to prevent competitive harms in labor markets caused by mergers.[82] Moreover, recent empirical work demonstrates the impact that mergers have on competition in labor markets.[83]

One commenter stated that requiring merging parties to provide labor and employment information is at odds with the consumer welfare standard. This is not correct. Judge Easterbrook, writing for the Seventh Circuit, recently rejected an employer's argument that restrictions on the movement of employees could be justified because it expanded the output of consumer products: ''One problem with this approach is that it treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it

[72] Anonymous Comment, Doc. No. FTC–2023–0040–0511.

[73] Comment of Punya Upadhyaya, Doc. No. FTC–2023–0040–0283.

[74] Comment of Karen Wood, Doc. No. FTC–2023–0040–0271.

[75] Comment of John Kurpierz, Doc. No. FTC–2023–0040–0462.

[76] Comment of Chas McClelland, Doc. No. FTC–2023–0040–0273.

[77] Comment of Alice Stanley, Doc. No. FTC–2023–0040–0508.

[78] *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926).

[79] Comment of State Atty's Gen., Doc. No. FTC–2023–0040–0695 at 21 n.123 (citing 51 Cong. Rec. 9184 (1914) (statement of Rep. Guy Helvering)). *See also* 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman asserting trusts command the price of labor).

[80] *NCAA* v. *Alston,* 594 U.S. 69 (2021). The Agencies' approach to evaluating the potential labor market effects of mergers is set forth in the Merger Guidelines. U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.10 (2023).

[81] *Alston,* 594 U.S. at 109–110 (Kavanaugh, J., concurring).

[82] *See generally* FTC Chairman Joseph J. Simons, Prepared Keynote Address at American University Washington College of Law Conference on Themes of Professor Jonathan Baker's New Book, *The Antitrust Paradigm: Restoring a Competitive Economy* 9 (Mar. 8, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1515179/simons_-_jon_baker_speech_3-8-19.pdf;* Assistant Attorney General Makan Delrahim, Remarks at the Public Workshop on Competition in Labor Markets 3 (Sept. 23, 2019), *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition.*

[83] *See* Elena Prager & Matt Schmitt, ''Employer Consolidation and Wages: Evidence from Hospitals,'' 111 a.m. Econ. Rev. 397 (2021); David Arnold, ''Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes'' (Working Paper, Oct. 27, 2019), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476369.*

is equivalent to saying that antitrust is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise.'' [84] There is a clear consensus that the consumer welfare standard is sufficiently flexible to encompass antitrust enforcement to prevent competitive harms to labor markets.[85] Because section 7 reaches these concerns, it is appropriate for the Agencies to collect information to determine if the transaction may violate the antitrust laws by substantially lessening competition in any market for labor. The fact that the Commission has not previously required this information to be reported in HSR filings does not mean that the information is not necessary and appropriate to enable the Agencies to determine whether an acquisition, if consummated, may violate the antitrust laws. While not every negative impact on workers reflects a harm to competition, growing evidence about the potential for mergers to cause harm in input markets for labor in violation of the antitrust laws shows that the Agencies have a sound basis to review transactions for potential competitive impacts on labor markets.

As discussed below in section VI.I.3., the final rule does not require filers to submit specific information about their employees as suggested in the proposed rule. Instead, the Agencies will rely on other information and documentary materials required in the final rule to conduct a preliminary assessment of whether the transaction may violate the antitrust laws with respect to any affected labor market. The Agencies have been gaining experience analyzing information about employees during ongoing merger reviews and other investigations of conduct that may harm competition for workers, and the Commission relies on this experience to determine which documents and information have been most useful in identifying those transactions that warrant an in-depth review of potential labor market effects through the issuance of Second Requests.

As discussed below in section VI.I.3., the Commission will rely on information contained in the new Overlap and Supply Relationships Descriptions, as well as additional documents required by the final rule to conduct a preliminary assessment of potential labor market effects. In the Agencies' experience, those transactions that are flagged for closer review due to concerns about effects in output markets may also require a closer look at potential impacts in input markets, including labor markets. Because the final rule will allow the Agencies to conduct a more robust screening for potential effects in output markets, it will also permit more robust screening for potential effects in input markets, including those related to labor services. In addition, the final rule requires the submission of certain plans and reports shared at the highest level of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. These documents may also indicate whether the parties view themselves as employing similar categories of employees or competing for certain types of labor services. As a result, the final rule will enhance the Agencies' ability to conduct a premerger assessment to determine if the transaction may violate the antitrust laws with respect to competition for labor. Although the Commission has determined not to require specific information about workers or workplace safety information in the HSR Filing at this time, as the Agencies acquire more experience with conducting competition analyses of labor markets, the Commission may revisit the issue in future rulemakings.

3. Identifying Acquisitions That Create a Risk of Foreclosure

Mergers between firms that are not direct competitors can still violate the antitrust laws. As stated in the NPRM, an acquisition may violate the law if it creates opportunities for post-merger foreclosure of rivals arising from vertical or non-horizontal relationships.[86] The nature and scope of potential non-horizontal competitive concerns can often be complex and unique. To fully account for all the ways in which a proposed transaction may violate the antitrust laws, the Agencies need information to determine whether there are any existing or emerging business relationships between the merging parties that would allow the merged firm to limit access to products or services that its rivals use to compete, referred to as ''foreclosure.'' [87] Current information requirements in the Rules do not reveal these existing relationships, which are well known to the parties. Even more than in horizontal mergers, which require an assessment of whether the merger may eliminate existing competition between rivals whose products are viewed as substitutes, non-horizontal concerns arise from distinct facts and industry structure that are not readily available to the Agencies from other sources.

Various commenters, including members of Congress, supported new information requirements targeting non-horizontal competitive issues. A comment from State antitrust enforcers underscored the concern about foreclosure, noting that because mergers may change the firms' incentives or ability to disadvantage or eliminate rivals at one or more levels of their supply chains, one of the anticompetitive harms that may result from a merger—particularly non-horizontal mergers—is the risk of foreclosure. The comments from a farmer-led advocacy organization warned that dominant firms have expanded across product markets—primarily through product-extension and conglomerate mergers—to insulate against cross-industry competition or to develop product-tying and other capacities for entrenchment and exclusion.

Other commenters maintained that vertical merger challenges are uncommon and that antitrust precedent does not sufficiently support non-horizontal theories of competitive harm to warrant the new information requirements. For example, commenters stated that the Agencies challenge very few vertical transactions, and the courts generally have not been receptive to those challenges. One commenter stated that an assessment of potential future competitors goes well beyond what is typically relevant because non-horizontal theories of harm are rare under section 7. The same commenter reasoned that when challenging a vertical merger the antitrust agency must prove that one party has substantial market power and that information regarding the vendor-vendee relationship is not required to assess this threshold question. A tech industry trade association stated that

[84] *Deslandes* v. *McDonald's USA, LLC,* 81 F.4th 699, 703–04 (7th Cir. 2023).

[85] *See* Herbert Hovenkamp, ''Is Antitrust's Consumer Welfare Principle Imperiled?,'' 45 J. Corp. L. 65, 78 (2019) (injury that results from the exercise of monopsony power is technically similar to the injury caused by monopoly; in both cases the defendant reduces output); Delrahim, *supra* note 82, at 3–4 (consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market, not just a downstream product market); FTC Commissioner Christine S. Wilson, Keynote Address: Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get 7 (Feb. 15, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf* (consumer welfare standard does address possible monopsony concerns, and the agencies apply the consumer welfare standard to labor markets).

[86] NPRM at 42179.

[87] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1055 (5th Cir. 2023) (violation of section 7 where merger will result in the potential foreclosure of key input by the sole supplier). *See also Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972).

most vertical mergers promote competition, so filers should not need to answer detailed questions about vertical relationships.

While in the past non-horizontal challenges were less common than those involving direct competitors, in recent years the Agencies have brought a significant number of non-horizontal merger enforcement actions that have resulted in merger abandonment and ordered divestitures,[88] and other mergers were abandoned or restructured prior to legal action.[89] The Commission also disagrees that potential harm from foreclosure is uncommon or does not warrant robust scrutiny. Empirical economic studies of vertical mergers find no basis to assume that they are either procompetitive or anticompetitive in general. Instead, each transaction must be examined on its facts and in the context of the markets served by the merging parties. A review of twenty-nine recent studies of vertical integration reports that fourteen studies found some evidence of competitive harm, while fourteen found some evidence of benefits.[90] The same review also evaluated two frequently cited surveys of vertical integration and found that the subjects and methods used limit any conclusions that can be drawn for antitrust policy purposes.[91]

The Agencies have an obligation to screen transactions for non-horizontal effects, including the risk of post-merger foreclosure, because the law clearly requires it. In 1950, Congress amended section 7 of the Clayton Act to expressly reach non-horizontal transactions to combat ''the rising tide of economic concentration . . . [providing] authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.'' [92] The Supreme Court subsequently set forth frameworks for analyzing vertical [93] and other non-horizontal [94] mergers to address concerns about foreclosure.[95] Relying on these precedents, the Agencies bring enforcement actions against transactions that create a risk that the merger will create a firm that may limit access to products or services rivals use to compete.[96] Several of these enforcement actions resulted in the parties abandoning their merger plans in the face of litigation. Just recently, the U.S. Court of Appeals for the Fifth Circuit upheld the Commission's finding that Complaint Counsel carried their initial burden of showing that Illumina's acquisition of Grail was likely to substantially lessen competition in the U.S. market for research and development of multi-cancer early detection tests and that Illumina failed to establish cognizable efficiencies.[97] The decision is significant for its application of vertical theories of harm, as well as its inclusion of products in the relevant market based on precommercial activity.

In the Agencies' experience, it can be difficult to detect whether current or potential rivals of one merging party are dependent on the other merging party for a key product, service, or route to market necessary to compete. The Agencies currently do not receive sufficient information in the HSR Filing to identify candidate ''related products'' nor to assess the degree to which rivals may be dependent on the related product.[98] Accordingly, the Agencies are not well positioned to conduct a robust initial screen for this significant mechanism of competitive harm. Being able to quickly assess whether the transaction presents a risk of foreclosure would permit the Agencies to target their investigative resources most efficiently on those transactions that are most likely to raise this competitive concern.

As discussed in more detail below, the Commission has determined that information that reveals existing supply relationships between the merging parties or their rivals is necessary to fully account for the potential that the transaction may create a firm that could limit rivals' access to key products or services they need to compete in violation of the antitrust laws. The Commission previously required information about vendor-vendee relationships, but eliminated this requirement when the reported information did not provide a sufficient basis for that analysis such that the benefit to the Agencies did not outweigh the burden of providing it.[99] The Supply Relationships Description in the final rule requires information that is specifically targeted to identifying whether rivals may be dependent on the merged firm for key inputs post-merger. Thus, the information is more relevant to the Agencies' screening for such risks than prior vendor-vendee information.

Additionally, the final rule also contains new document requirements that are intended to reveal any existing or future non-horizontal business relationships that could give rise to risks from foreclosure of rivals. For example, the buyer must indicate whether it has existing contracts with the seller in broad categories that are relevant to an initial antitrust assessment, such as leases, licensing agreements, master service agreements, operating agreements or supply agreements, or

[88] *Illumina,* 88 F.4th at 1048, 1059; *FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint); *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned). For a compilation of the Agencies' enforcement actions involving vertical mergers, see Steven C. Salop & Daniel P. Culley, ''Vertical Merger Enforcement Actions: 1994–April 2020'' (Geo. L. Faculty Pub. & Other Works No. 1529, 2020), *https://scholarship.law.georgetown.edu/facpub/1529/* (reporting 66 vertical matters over 26 years).

[89] *See, e.g.,* Press Release, U.S. Dep't of Justice, ''Antitrust AAG Kanter Statement After Adobe and Figma Abandon Merger'' (Dec. 18, 2023), *https://www.justice.gov/opa/pr/antitrust-aag-kanter-statement-after-adobe-and-figma-abandon-merger*; Cat Zakrzewski, ''Amazon ends $1.7B iRobot acquisition in rare victory for tech regulators,'' Wash. Post (Jan. 29, 2024), *https://www.washingtonpost.com/technology/2024/01/29/amazon-irobot-antitrust-europe/*.

[90] Marissa Beck & Fiona Scott Morton, ''Evaluating the Evidence on Vertical Mergers,'' 59 Rev. Indus. Org. 273, 274 (2021) (explaining many of the studies reviewed were not designed to assess the net effect of vertical integration on welfare).

[91] *Id.*

[92] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317 (1962); Celler-Kefauver Antimerger Act of 1950, Pub. L. 81–899, 64 Stat. 1125 (1950).

[93] *Brown Shoe,* 370 U.S. 294 (vertical merger violated section 7); *see also Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972) (same).

[94] *See FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 577–578 (1967) (product-extension merger violated section 7). *See also Fruehauf Corp.* v. *FTC,* 603 F.2d 345 (2d Cir. 1979); *U.S. Steel Corp.* v. *FTC,* 426 F.2d 592, 599 (6th Cir. 1970).

[95] The Agencies' analyses of how vertical and other non-horizontal transactions may harm competition are set forth in detail in the recently revised Merger Guidelines. U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 5 (2023).

[96] *See, e.g., FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint); *In re Amgen, Inc,* No. 9414 (F.T.C. Dec. 13, 2023) (consent order settling charges that the acquisition would enable Amgen to leverage its large portfolio of drugs to pressure insurance companies and PBMs into favoring Horizon's monopoly products or disadvantaging rivals); *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Microsoft Corp.,* No. 9412 (F.T.C. Dec. 8, 2022) (complaint).

[97] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1048, 1059 (5th Cir. 2023) (remanding to Commission to consider whether supply agreement offered to rivals sufficiently mitigated merger's effect). *See also United States* v. *AT&T, Inc.,* 916 F.3d 1029, 1045 (D.C. Cir. 2019) (vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation).

[98] *See* U.S. Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

[99] NPRM at 42196–97.

any noncompete or non-solicitation agreements that might be affecting current levels of competition. Filers with an existing business relationship also will submit one year's worth of plans and reports provided to a Chief Executive Officer or the Board of Directors that analyze markets and competition pertaining to any product or service both parties supply (including products or services in development). Based on the Agencies' experience, these types of high-level business documents can reveal whether and how the parties interact in the market today to understand how the merger may affect market conditions more broadly, including any risk of foreclosure that could harm other market participants as well as competition overall. Finally, the expanded set of transaction-related documents ensure that the Agencies receive key documents that have been collected for the purposes of the deal but have not yet been shared with the board of directors. In the Agencies' experience, when there is an existing non-horizontal business relationship between the parties, these documents often reference that relationship and how it might be affected by the transaction, including whether the parties believe that there are synergies or efficiencies that may be gained.

4. Identifying Potential Law Violations Involving Innovation Effects, Future Market Entry, or Nascent Competitive Threats

In markets where concentration is already great or trending in that direction, a merger may be illegal if it eliminates ongoing innovation efforts or the possibility that entry or expansion by one or both firms would have resulted in new or increased competition.[100] Relatedly, the acquisition of a firm that represents a nascent competitive threat—namely, a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise spur more robust competition in the future—may violate the antitrust laws.[101] Concerns that a transaction may violate the antitrust laws by reducing innovation efforts [102] or eliminating a future competitor [103] are core to section 7's purpose to arrest the anticompetitive effects of market power in their incipiency. Established incumbents may seek to acquire a potential entrant or a nascent competitive threat in order to eliminate beneficial future competition, especially at critical junctures when the acquired firm is poised to introduce a disruptive product.[104]

As noted in the NPRM, there has been tremendous growth in sectors of the economy that rely on technology, such as pharmaceutical, medical device, and digital markets. Given the dynamic nature of these markets and the importance of acquisition strategies to success as well as market growth and penetration, mergers and acquisitions in these markets present a unique challenge for the Agencies. In particular, the Agencies must closely examine mergers in these and other rapidly evolving markets to account for the possibility that the merger may violate the antitrust laws by eliminating a nascent competitor or potential entrant, including the acquisition's effects on ongoing innovation competition.[105]

Competition policy debates in Congress have increasingly focused on markets that lack sufficient competition, especially in critical technology sectors.[106] Concerns about the role of certain dominant companies have caused the Agencies to deploy additional resources to counter the economic power of these firms, including through costly and resource-intensive monopolization suits, some of which focus on the harmful effects of their prior acquisitions.[107] Both Agencies have hired technologists and other experts to build their in-house capacity to keep pace with developments in dynamic markets that are reliant on emerging technology.[108] The Agencies have also invested in better understanding how dominant firms can use strategic acquisitions as part of an interrelated course of monopolistic conduct. For example, the Agencies have brought challenges alleging that firms have engaged in ''buy-or-bury'' strategies against actual or potential rivals.[109] The Agencies have also alleged that firms have attempted to buy or exercise control of adjacent products or services that might be used to steer customers to their other products or exclude competing platforms.[110] These strategies can be very hard to detect because merger activity in these sectors increasingly involves firms in business lines that currently may not be related in a clearly horizontal or vertical way. Without information that identifies products in development and the firms' assessments of where potential competitive threats are likely to emerge in the future, the Agencies have no basis to identify whether a transaction may eliminate ongoing innovation competition, a potential entrant, or a nascent competitive threat.[111]

When transactions involve firms whose premerger relationship is not yet well established in the marketplace and is occurring outside the public eye through ongoing product development efforts, the Agencies cannot rely on the reporting of current overlapping revenues to spot transactions that may

[100] *United States* v. *Marine Bancorp, Inc.,* 418 U.S. 602, 630 (1974).

[101] *See FTC* v. *Procter & Gamble,* 386 U.S. 568, 577–78 (1967). *See also United States* v. *El Paso Nat. Gas Co.,* 376 U.S. 651 (1964); *Polypore Int'l* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012) (acquisitions that eliminate competitive threats violate section 7). Like the Clayton Act, the Sherman Act bars a firm from gaining or maintaining a monopoly position through anticompetitive conduct, including acquisitions that exclude nascent or potential threats to its dominance. *See, e.g., United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966) (acquisitions are among the types of conduct that may violate the Sherman Act). Acquisitions by monopolists of nascent competitive threats violate section 2 of the Sherman Act because they are reasonably capable of contributing significantly to the defendant's monopoly power. *United States* v. *Microsoft Corp.,* 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (Sherman Act does not allow monopolists free reign to squash nascent, albeit unproven, competitors at will).

[102] For a discussion of how mergers may violate section 7 by eliminating on-going innovation competition, see Note by the United States to the OECD, The Role of Innovation in Enforcement Cases (Dec. 5, 2023) (DAF/COMP/WD(2023)84), *https://one.oecd.org/document/DAF/COMP/WD(2023)84/en/pdf.*

[103] *See United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526, 561–62 (1973) (Marshall, J, concurring). *See also United States* v. *Continental Can Co.,* 378 U.S. 441, 465 (1964) (fact that merging parties were not direct competitors for all end uses at the time of the merger may actually enhance the long-run tendency of the merger to lessen competition).

[104] *See United States* v. *Visa Inc.,* No. 3:20–cv–07810 (N.D. Cal. Nov. 5, 2020) (complaint) (transaction abandoned and case dismissed) and Assoc. Attorney General Vanita Gupta, Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium (Sept. 14, 2021), *https://www.justice.gov/opa/speech/associate-attorney-general-vanita-gupta-delivers-remarks-georgetown-law-s-15th-annual. See also supra* note 15 (collecting studies).

[105] *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1505–06 (D.C. Cir. 1986) (Bork, J.).

[106] Majority Staff of H.R. Subcomm. on Antitrust, Com. & Admin L. of the Comm. On the Judiciary, 116th Cong., Majority Staff Rep. & Recommendations, Investigation of Competition in Digital Mkts. 38 (2020), *https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf* (hereinafter ''Investigation of Competition in Digital Markets'').

[107] *FTC* v. *Facebook, Inc.,* 581 F. Supp. 3d 34, 40–42 (D.D.C. 2022); *United States* v. *Google LLC,* No. 1:23–cv–00108 at 31–35, 65–68 (E.D. Va. filed Jan. 24, 2023) (complaint); *United States* v. *Live Nation Entertainment, Inc.,* No. 1:24–cv–03973 (S.D.N.Y. filed May 23, 2024); *see also Klein* v. *Meta Platforms, Inc.,* No. 3:20–cv–8570 (N.D. Cal. filed Dec. 3, 2020).

[108] *See* Note by the United States to the OECD, Theories of Harm for Digital Mergers (June 16, 2023) (DAF/COMP/WD(2023)50), *https://one.oecd.org/document/DAF/COMP/WD(2023)50/en/pdf.*

[109] *FTC* v. *Facebook, Inc.,* 581 F. Supp. 3d at 54.

[110] *United States* v. *Microsoft Corp.,* 253 F.3d 34, 73–74 (D.C. Cir. 2001).

[111] *See United States* v. *Google LLC,* No. 20–cv–3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024). (loss of nascent competitors is a clear anticompetitive effect).

eliminate areas of emerging or potential competition.[112] The Agencies need a reliable factual basis for identifying transactions that create this risk, which is not provided in the current Form. For instance, the Agencies need information about products in development that are not currently generating revenues, but that the filer expects will soon. Because legal precedent makes clear that a merger that substantially lessens competition for innovation or research and development violates the law,[113] the Agencies need information that will identify areas of pre-revenue investments and competition. The Agencies also need information that reveals the rationale for the transaction, including whether the acquired firm is considered a nascent competitive threat, and documents that reflect each firm's horizon-scanning for potential acquisition targets. This information is known only to the parties and is relevant to an initial assessment of whether the transaction may violate the antitrust laws by eliminating a potential entrant or nascent competitive threat.

Failure to account for the merger's potential impact on ongoing innovation competition can have meaningful implications. Consumers and businesses reap enormous benefits from the efficiency and convenience brought about by significant innovations. According to Nobel Prize winner Robert Solow: ''Technological progress, very broadly defined to include improvements in the human factor, was necessary to allow long-run growth in real wages and the standard of living.'' [114] Courts, academic literature and commenters confirm the importance of innovation to growth in the economy and as a source of dynamism that can shake loose entrenched incumbents.[115] Acquisitions of innovator firms may also deny the public the benefits of those investments in innovation, including any future competition those investments may have unleashed, if the acquirer does not make use of the discoveries [116] or is able to crowd out nascent competitors by foreclosing access to a key input.[117] The stakes are also high for innovators: startups may find fewer investors and lower acquisition prices in sectors where the expectation is that incumbents will ultimately identify and acquire any promising innovation.[118]

Comments from State antitrust enforcers supported proposals seeking materials and information regarding potential or nascent entrants. However, other commenters stated that the HSR Filing is not an appropriate vehicle for advancing novel legal theories such as nascent competition or research and development competition, and any related revisions should be postponed until those theories are better established in case law.

The Commission disagrees with commenters who suggested that concerns about innovation competition, potential entrants, and nascent threats are not well-grounded in existing law and economic learning. The importance of scrutinizing mergers for potential effects on innovation is well-documented.[119] Economic evidence supports current legal precedent. Research demonstrates a growing phenomenon of dominant firms—buoyed by acquisitions—taking over industries.[120] This is particularly true in the tech industry, where the markets in which digital platforms compete share several characteristics that tend toward a single dominant firm.[121] Sustained high economic profits suggest that dominant firms in these concentrated sectors possess substantial and durable market power.[122] In addition, insufficient competition and entry result in harms to investment and innovation.[123] For these reasons, economic research supports the current legal framework, and reflects the need to carefully scrutinize proposed transactions involving a dominant incumbent or monopolist seeking to acquire a nascent threat or adjacent complement that could someday challenge the incumbent's position.[124]

Going back many years, the Agencies have successfully challenged several mergers that would have eliminated a potential entrant or nascent competitive threat. These enforcement actions include the acquisition of a pipeline firm or product that, once launched, would compete directly with the incumbent merging party,[125] as well as the acquisition of a firm with products already on the market that, although small, was poised to add features or capabilities in the future that could render it a closer and more formidable competitor than it is today.[126] Other transactions challenged by the Agencies involved the acquisition of a firm whose current market share understated its future competitive significance because it did not account for new innovations, business strategies, or other factors.[127] Mergers that impact future competition between products or services that have not yet been developed can also violate the antitrust laws.[128]

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[112] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049–51 (5th Cir. 2023) (antitrust markets not limited to products that exist but may include those that are anticipated or expected or encompass research, development and commercialization of products in development); *FTC* v. *PPG Indus., Inc.,* 798 F.2d, 1500, 1504 (D.C. Cir. 1986) (merging firms competed in evolving high technology market at the request-for-proposal stage of product development).

[113] *See United States* v. *Anthem, Inc.,* 855 F.3d 345, 361 (D.C. Cir. 2017) (threat to innovation alone is anticompetitive effect from acquisition); *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1051 (5th Cir. 2023) (''Antitrust law does not countenance such a cramped view of competition, particularly in a research-and-development market.'').

[114] Robert Solow, ''Growth Theory and After,'' 78 Am. Econ. Rev. 307, 313 (1988).

[115] *See* Giulio Federico et al., ''Antitrust and Innovation: Welcoming and Protecting Disruption,'' 20 Innovation Pol'y & Econ. 125, 128–29 (2020); C. Scott Hemphill & Tim Wu, ''Nascent Competitors,'' 168 U. Pa. L. Rev. 1879, 1886 (2020).

[116] *See* Hemphill & Wu, *supra* note 115, at 1893. *See also* Mark Lemley & Andrew McCreary, ''Exit Strategy,'' 101 B.U. L. Rev. 1 (2020).

[117] *See Illumina* v. *FTC,* 88 F.4th at 1053.

[118] Sai Krishna Kamepalli et al., ''Kill Zone'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27146, May 2020 rev. June 2022), *https://www.nber.org/papers/w27146.*

[119] *See generally* Carl Shapiro, ''Competition and Innovation: Did Arrow Hit the Bull's Eye?,'' in The Rate and Direction of Econ. Activity Revisited 389–400 (Josh Lerner & Scott Stern eds., 2012).

[120] Carl Shapiro, ''Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,'' 33 J. Econ. Perspectives 69 (2019).

[121] Stigler Comm. On Digital Platforms, Final Report 7–8 (2019), *https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms-committee-report-stigler-center.pdf* (explaining network effects, returns increasing with scale, low marginal costs, high returns on amassing user data, and low distribution costs underlie trend toward monopoly).

[122] Shapiro, *supra* note 120, at 70.

[123] Stigler Comm. On Digital Platforms, *supra* note 121, at 31.

[124] Cunningham et al., *supra* note 15 (presenting empirical evidence that pipeline drug program is less likely to be developed when acquired by firm with overlapping existing product with significant market power); Stigler Comm. On Digital Platforms, *supra* note 121, at 81, 88; Shapiro, *supra* note 120, at 75; Michael L. Katz, ''Big Tech mergers: Innovation, competition for the market, and the acquisition of emerging competitors,'' 54 Info. Econ. & Policy 100883 (2021).

[125] *See, e.g., In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint) (transaction abandoned); *United States* v. *Visa Inc.,* No. 3:20–cv–07810 (N.D. Cal. Nov. 5, 2020) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120 (D.D.C. Jan. 30, 2017) (consent decree ordered license and $100 million equitable monetary relief); *United States* v. *Westinghouse Air Brake Techs. Corp.,* No.1:16–cv–02147 (D.D.C. Oct. 26, 2016) (consent decree ordered divestiture); *In re Thoratec Corp.,* No. 9339 (F.T.C. July 28, 2009) (transaction abandoned); *In re Inverness Med. Innovations, Inc.,* No. C–4244 (F.T.C. Dec. 23, 2008) (Commission order requiring divestiture and other conditions).

[126] *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1505–06 (D.C. Cir. 1986) (Bork, J.). *See also In re Illumina, Inc.,* No. 9387 (F.T.C. Dec. 17, 2019) (complaint) (transaction abandoned).

[127] *United States* v. *Novelis, Inc.,* No. 1:19–cv–02033 (N.D. Ohio Aug. 26, 2020) (arbitration-ordered divestiture); *In re The Procter & Gamble Co.,* No. 9400 (F.T.C. Dec. 8, 2020) (complaint) (transaction abandoned); *In re CDK Global, Inc.,* No. 9382 (F.T.C. Mar. 19, 2018) (complaint) (transaction abandoned).

[128] *See, e.g., PPG Indus., Inc.,* 798 F.2d at 1505–06. *See also United States* v. *Bayer AG,* No. 1:18–

Continued

A number of commenters opposed changes contained in the proposed rule over concerns that they would disproportionally impact small innovation companies and startups, which rely on venture capital and acquisitions to sustain their business model. One commenter stated that preventing such exit strategies would make it difficult for startups to obtain early-stage funding, reducing both the number and vitality of these innovative firms. Several cautioned the Commission to avoid increasing the burden and risk associated with the acquisition of startups, which they stated would damage the dynamic U.S. tech innovation system. Another stated that acquisitions that increase concentration can still be procompetitive and drive dynamic efficiency.

As the discussion above clearly demonstrates, acquisitions involving nascent or potential competitors as well as those that impact innovation competition may violate the antitrust laws. The Commission disagrees with commenters that contend that these types of acquisitions should be subjected to a more permissive standard or that the Agencies are singling them out for closer scrutiny. The Agencies routinely review acquisitions of and by innovative companies and apply the same legal standard to those mergers as any other acquisition. When the Agencies challenge these mergers, they are held to the same liability requirements necessary to establish a violation of section 7. However, as discussed above, there is a gap in the current information requirements that undermines the Agencies' ability to determine whether a transaction would eliminate nascent or future competition. To detect those types of acquisitions and to assess whether they violate the antitrust laws, the Agencies need information regarding these forms of ongoing or emerging competition, even if some commenters disagree with the law as applied by the courts in this area.

The Commission acknowledges that the sale of a business to an incumbent may represent a valuable exit strategy for startups. But when such exits are effectuated by a dominant firm to absorb a future or emerging competitor, the overall effect may be to reduce innovation and violate the law.[129] In fact, antitrust enforcement can drive innovation and growth by ensuring that market outcomes are determined through competition rather than left to the decisions of a dominant incumbent who can on its own determine the fate of innovative companies and the future of competition. The history of U.S. antitrust enforcement contains many examples of how government action was required to unleash the forces of competition and innovation, creating new opportunities for investments and startups.[130] Recent research suggests that existing firms may be acquiring innovative capacity not for the purpose of advancing those discoveries but rather to shelve those discoveries, leading to a reduction in innovative output and eliminating an independent source of future competition.[131] Two individual commenters shared their experiences with acquisitions that have had that effect:

- I work in the software industry and despite the constant talk of ''innovation,'' I have seen many mergers that eliminate new product development. Mergers/acquisitions often consist of a company acquiring a product and immediately discontinuing either the acquired product or their own competing product. Most engineers I know want to develop new products and many mergers stop this from happening.[132]
- I work in the tech industry for a large technology firm. It's disgusting that our philosophy is now to buy other companies and never grow organic products because it is too hard. There's no innovation anymore it is simply make enough money to buy out the actual innovators in an industry. Any new startup is now faced with a massive hill to climb as getting VC money is paramount, but then the moment you do well your VC's will just sell to the highest bidder. This is stagnating tech, and you won't see the effects for some years down the road when 5 tech companies are left in this country. We need tighter oversight on mergers . . . .[133]

In light of all these considerations, the Commission believes this rulemaking strikes the right balance that permits the Agencies to evaluate transactions for their potential effects on innovation while not standing in the way of acquisitions and other investments that do not present antitrust risks that need to be addressed prior to consummation. The critical task for the Agencies is to identify which transactions may substantially lessen competition or tend to create a monopoly, prior to consummation and before the possibility of future competition is snuffed out.[134] The Commission is not subjecting acquisitions of startups or innovative firms to heightened scrutiny, as some commenters suggest. Rather, the Agencies are modernizing premerger requirements in light of the changes in M&A activity for all transactions that must be reported under the HSR Act, including those involving innovative firms.[135] However, the final rule has been adjusted to lessen the burden on the targets of acquisitions generally. Moreover, many of the new requirements focus on increasing visibility into complex entities and therefore would not be applicable to the relatively straightforward structures of many startup companies.

The Commission notes that many acquisitions of startups and small innovator firms are not reportable and thus are not subject to antitrust scrutiny prior to consummation. In September 2021, the Commission released its findings from an inquiry into past acquisitions by the largest technology platforms that did not require reporting under the HSR Act.[136] Launched in

cv–01241 (D.D.C. Feb. 8, 2019) (consent decree ordered divestiture); Press Release, U.S. Dep't of Justice, ''Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy'' (Apr. 27, 2015), *https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department*; *In re Nielsen Holdings N.V.,* No. C–4439 (F.T.C. Feb. 28, 2014) (Commission order requiring divestiture).

[129] *See* Lemley & McCreary, *supra* note 116 (exit by acquisition leads to concentration in the tech industry and short-circuits the development of truly disruptive new technologies that have historically displaced incumbents in innovative industries).

[130] *See* Giovanna Massarotto, ''Driving Innovation with Antitrust,'' Promarket (Apr. 10, 2024) *https://www.promarket.org/2024/04/10/driving-innovation-with-antitrust/*.

[131] *See* Cunningham et al., *supra* note 15. *See also* Florian Szücs, ''M&A and R&D: Asymmetric Effects on acquirers and targets?'' 43 Rsch. Pol'y 1264 (2014); Carmine Ornaghi, ''Mergers and innovation in big pharma,'' 27 Int'l J. Indus. Org. 70 (2009); Justus Haucap et al., ''How mergers affect innovation: Theory and evidence,'' 63 Int'l J. Indus. Org. 283 (2019) (showing a reduction in innovation competition post-merger).

[132] Comment of Darryl Pretto, Doc. No. FTC–2023–0040–0434.

[133] Anonymous Comment, Doc. No. FTC–2023–0040–0600.

[134] *See* Cristina Caffarra et al., '''How Tech Rolls:' Potential Competition and 'Reverse' Killer Acquisitions,'' 2 CPI Antitrust Chron. 13, 15 (May 2020).

[135] According to a recent study, investment in U.S. startups continues to grow each year, reaching a combined deal value of $165.8 billion for 12,235 such deals in 2020. *See* Gary Dushnitsky & D. Daniel Sokol, ''Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments That Fund It,'' 24 Vand. J. Ent. & Tech. L. 255, 271 Table 1 (2022). The authors note that a case-by-case analysis of particular deals allows for a more nuanced approach to address particular potentially problematic deals in such settings. *Id.* at 277–78. *See also* D. Daniel Sokol, ''Merger Law for Biotech and Killer Acquisitions,'' 72 Fla. L. Rev. Forum 1, 8 (2020) (explaining that innovation effect is fact-dependent).

[136] *See* Press Release, Fed. Trade Comm'n, ''FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies'' (Sept. 15, 2021), *https://www.ftc.gov/*

February 2020, this inquiry analyzed the terms, scope, structure, and purpose of exempted transactions by five large technology companies: Alphabet, Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. The study covered ten years of acquisitions (from January 1, 2010 to December 31, 2019) and found that the companies collectively made 819 acquisitions that were not reported under the HSR Act.[137] None of these acquisitions was filed under HSR, although many of them were concentrated in just a few categories of technology, such as mobility, application software, and internet content and commerce.[138]

This study provided other insights into these companies' practices and acquisition strategies, including how they structured acquisitions and how these acquisitions fit into the companies' overall business strategies.[139] For instance, not only were many of the acquisitions ''small'' in deal value (*i.e.,* under the various HSR reporting thresholds), they were also ''young,'' with nearly 40 percent of the acquisitions involving target firms that were less than five years old.[140] Most of the acquisitions involved the buyer taking control of the acquired assets or entity, although there were also a significant number of investments that resulted in the large company holding a minority interest in the target firm.[141] Moreover, over three-quarters of the transactions included non-compete clauses for founders and key employees of the acquired entities, with relatively small variation in the percentage of transactions with non-compete clauses across the five respondents. [142] Together, these findings indicate that during the study period, these five companies acquired many small, nascent firms operating in related business lines and their founders and other key employees agreed to refrain from continuing their own efforts to innovate outside the company for some period of time. While the study focused on transactions that were not reportable under the HSR Act, the information collected from these tech companies provided the Commission with insight into information that is available to parties in all types of acquisitions but that is not required by the current Form and Instructions.

In light of the benefits to the public from preventing mergers that violate the antitrust laws by reducing innovation competition or eliminating a potential entrant or nascent threat, the Commission has determined that the Agencies need certain additional information with the HSR Filing to conduct an initial antitrust assessment prior to consummation. In the Agencies' experience, it is necessary to obtain this type of information directly from the filing parties because typically their plans regarding future products or business lines are not public.

Several new information requirements in the final rule are aimed at providing the Agencies with sufficient information to determine if the transaction is likely to raise concerns about potential, emerging, or nascent competition. For instance, the new Overlap Description and Supply Relationships Description directly address the scope of existing and emerging competition between the parties. In particular, the Overlap Description requires filers to identify their own products and services, including those that are pre-revenue, that compete with the products and services of the other party that are known to the filer.[143] This information will provide a basis for the Agencies to know that there are areas of emerging and direct competition beyond existing products or services, including important ongoing innovation competition. The Overlap Description also requires filers to produce measurement information for products or services not yet generating revenue, or those whose performance is not measured by revenue, such as projected revenue, estimated volume, or any other applicable performance metric. This change recognizes the importance of capturing the competitive significance of nascent or emerging products and services.

The final rule also requires the buyer to indicate whether there are any existing contracts between the parties, including non-compete, non-solicitation, or licensing agreements, which would alert the Agencies to any limits on future competition that are created by these agreements, especially when the buyer is not acquiring all of the acquired entity. The existence of non-compete or non-solicitation agreements can be especially useful in revealing that the parties consider themselves to be 'in competition' with one another, now or in the future, such that there is value in contracting away the ability to compete for or solicit business or workers. In addition, the Supply Relationships Description requires information for products, services, or assets (including data) that the other party or any other business uses or could use to compete. This forward-looking assessment, based on each filer's business experience, would reveal whether there are future uses of either party's products that could give rise to concerns about non-horizontal effects from the transaction. The inclusion of data as a potentially key asset is purposeful, given the competitive significance of data access for effective competition in so many modern markets.[144]

Similarly, new document requirements contained in the final rule are aimed at revealing each firm's assessment of market conditions and horizon-scanning for competitive threats. For instance, the final rule requires a broader search for documents that evaluate or analyze the transaction to include not only those provided to board members but also to the person who has primary responsibility for supervising the deal. These documents, along with certain ordinary course plans and reports shared at the highest level of management described above and in section VI.G.2., will reveal additional information about how each filer views the competitive landscape more broadly, including in ways that may impact current or future competition. Together, these documents may signal whether either party has identified emerging threats to competition—from the other party or from firms not involved in the transaction—that would impact the Agencies' assessment of whether the transaction may violate the antitrust laws.

As discussed above in section II.B.1., new information contained in the

news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.

[137] *See* Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010–2019: An FTC Study 10–11 Fig. 1 (2021), *https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf* (hereinafter ''Non-HSR Reported Acquisitions''). Data supplied by commenter Engine confirms that the vast majority of startup acquisitions are valued below $50 million, meaning that they are rarely reported to the Agencies in advance. *See* Comment of Engine, Doc. No. FTC–2023–0040–0681, appendix B at 16.

[138] Non-HSR Reported Acquisitions, *supra* note 137, at 27–35.

[139] Other competition enforcement agencies around the world conducted similar studies involving acquisitions of digital platform companies. *Id.* at 2 n.6.

[140] *Id.* at 23–26.

[141] *Id.* at 15.

[142] *Id.* at 21–22.

[143] As explained in section VI.I., the parties should not exchange information for the purpose of responding to the Competition Descriptions.

[144] *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23 Civ. 06188 (S.D.N.Y. Dec. 29, 2023) (order granting preliminary injunction on horizontal theories of harm without addressing FTC allegations that the acquisition would allow IQVIA to foreclose other industry participants from accessing its data as a key input for healthcare professional programmatic advertising).

Minority Shareholders or Interest Holders and Officers and Directors sections will provide a basis for the Agencies to identify any existing or potential management relationships between the acquiring person and target, including through entities or individuals who can influence decision-making of the acquiring person post-merger. These relationships can be especially concerning if used to gain access to non-public information about future plans or investments in products-in-development when those same individuals also have interests in competitively relevant businesses.

Finally, the final rule collects additional information about the acquisition rationale of the buyer to assist the Agencies in understanding the purpose of the transaction. For example, the final rule requires the buyer to describe any rationale for the transaction and to indicate any document submitted with the HSR Filing that confirms or discusses that rationale. These answers will provide context for the Agencies' initial antitrust assessment through a deeper understanding of what purpose the buyer has for engaging in a transaction that is large enough to require premerger review. In addition, the final rule for the first time requires the seller to report prior acquisitions in the same or related lines of business, which would provide a basis for the Agencies to better assess whether the transaction implicates emerging, nascent, or potential competition, especially through the combined effects of roll-up or serial acquisition strategies or ''killer'' acquisitions in which assets were purchased but not used as a means of eliminating a competitor.

5. Disclosing Roll-Up or Serial Acquisition Strategies

Another trend in M&A activity has been the rise of serial acquirers, firms that engage in strategic acquisitions in the same industry, often ''rolling up'' many small competitors in the same or adjacent markets to establish a large, sometimes dominant, position.[145] Serial acquisition strategies have been subject to antitrust scrutiny for over 100 years.[146] In the seminal merger case, *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), the Supreme Court noted that both the buyer and the seller had previously acquired many other independent banks,[147] driving a trend toward concentration that rendered their merger suspect.[148] Given the popularity and prevalence of these serial acquisition strategies in recent years, especially in healthcare and technology markets, this trend has attracted the attention of academics and policymakers alike.[149] A pattern or strategy of buying up smaller competitors or firms in the same or related lines of business can lead to harm of the same magnitude and type as mergers of larger or established firms, but serial acquisitions are less likely to attract the attention of enforcers until the strategy is identified. A series of small acquisitions can lead to consolidation within an industry, often without ever triggering the obligation to report these acquisitions under the HSR Act. This strategy has been particularly prevalent in healthcare markets involving private equity buyers.[150]

Often the Agencies are not able to detect these strategies until it is too late, after the serial acquirer has established a dominant position and is able to exercise market power to the detriment of market participants. For instance, in September 2023, the FTC charged U.S. Anesthesia Partners, a for-profit corporation, with a multi-year anticompetitive scheme to consolidate anesthesia practices in Texas.[151] This lawsuit, which is pending in Federal court in Texas, alleges that the company acquired over a dozen anesthesiology practices in Texas to eliminate competition and create a single dominant provider with the power to demand higher prices.

The Commission is aware of the impact of serial acquisitions based on its experience with the dialysis industry, which is an area in which economic research has documented adverse effects from serial acquisitions. Throughout the 2000s, the Commission reviewed a series of large acquisitions by DaVita, the largest U.S. provider of life-sustaining treatments for end stage renal disease patients. In 2006, in conjunction with DaVita's $3.1 billion acquisition of rival Gambro Healthcare, Inc., the Commission required DaVita to divest 69 dialysis clinics in 35 markets across the United States to resolve charges that the acquisition violated section 7. In 2011, DaVita sought to acquire rival DSI for $689 million, and the Commission required divestitures to preserve competition for dialysis services in 22 local markets. Then in 2017, the Commission ordered DaVita to divest seven clinics in New Jersey and Dallas to proceed with its $358 million acquisition of Renal Ventures. During roughly the same period, the Commission also reviewed a series of acquisitions by Fresenius, the other leading U.S. provider of dialysis services, and required significant divestitures to maintain competition.[152]

Notwithstanding these enforcement actions, the dialysis industry has experienced growing concentration, mostly as a result of acquisitions that were not reportable under the HSR Act. According to one 2020 study, there were more than 1,200 acquisitions of independent dialysis facilities over a 12-year period, resulting in DaVita and Fresenius operating more than 60 percent of all clinics nationwide.[153] The study concluded that these changes in

[145] NPRM at 42202 n.62 (citing Gerry Hansell et al., ''Lessons from Successful Serial Acquirers: Unlocking Acquisitive Growth,'' Boston Consulting Grp. (Oct. 1, 2014), *https://www.bcg.com/publications/2014/mergers-acquisitions-unlocking-acquisitive-growth*); ''Stealth Consolidation,'' *supra* note 18.

[146] *See, e.g., United States* v. *Grinnell Corp.,* 384 U.S. 563, 576, 578, 580 (1966); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 31–42 (1911); *United States* v. *Am. Tobacco Co.,* 221 U.S. 106, 157–60 (1911). *See also* Note by the United States to the OECD, Serial Acquisitions and Industry Roll-ups (Dec. 6, 2023) (DAF/COMP/WD(2023)99), *https://one.oecd.org/document/DAF/COMP/WD(2023)99/en/pdf* (discussing the history and roots of antitrust enforcement against anticompetitive serial acquisitions). Serial acquisition strategies may also violate section 2 of the Sherman Act when a firm with monopoly power relies on acquisitions, among other conduct, to acquire or maintain its monopoly. *See Credit Bureau Reps., Inc.* v. *Retail Credit Co.,* 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd,* 476 F.2d 989 (5th Cir. 1973); *United States* v. *Jerrold Elecs. Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960).

[147] *See United States* v. *Phila. Nat'l Bank,* 374 U.S. 321, 331 (1963) (PNB previously acquired nine independent banks while Girard acquired six).

[148] *Id.* at 367 (evidence of several remaining competitors insufficient to rebut inherently anticompetitive tendencies of high post-merger market shares, in light of strong trend toward mergers, including those of the defendants).

[149] *See* Investigation of Competition in Digital Markets, *supra* note 106, at 24–25.

[150] Richard M. Scheffler et al., Am. Antitrust Inst., ''Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk'' 8–16 (May 18, 2021), *https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf.* The Commission recently hosted a public workshop to discuss the growing body of economic research examining the role of private equity investment in health care markets. Fed. Trade Comm'n, Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care (Mar. 5, 2024), *https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care.*

[151] *FTC* v. *U.S. Anesthesia Partners, Inc.,* No. 4:23cv3560 (S.D. Tex. Sept. 21, 2023) (complaint).

[152] *See In re Fresenius AG,* No. C–4159 (F.T.C. July 5, 2006) (decision and order requiring divestiture of ninety-one clinics and financial interests in twelve more); *In re Am. Renal Assocs. Inc.,* No. C–4202 (F.T.C. Oct. 23, 2007) (consent order terminating purchase agreement for five clinics and closure of three additional clinics); *In re Fresenius Med. Care AG,* No. C–4348 (F.T.C. May 25, 2012) (decision and order requiring divestiture of sixty dialysis clinics).

[153] Paul J. Eliason et al., ''How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry,'' 135 Q. J. Econ. 221, 222 (2020) (from 1990 to 2020, the share of independent dialysis facilities fell from 86% to 21%).

ownership resulted in higher prices, lower levels of service, and worse outcomes for patients.[154] One commenter stated that, based on his research, merger enforcement against reportable acquisitions prevented illegal consolidation 95 percent of the time, while the many non-reportable acquisitions of dialysis clinics were blocked only 5 percent of the time. He contended that these 'stealth' acquisitions accounted for much of the increase in within-market concentration.[155]

In light of the failure of prior interventions to stem the adverse consequences of roll-up acquisitions in this industry, when DaVita in 2022 sought to buy 18 clinics in a non-HSR-reportable transaction, the Commission unanimously voted to require DaVita not only to divest three clinics but also to obtain prior Commission approval before buying any new ownership interest in dialysis clinics in Utah.[156] The Commission determined that imposing a prior approval obligation was appropriate in light of the company's history of attempting anticompetitive transactions that do not trigger a notification under the HSR Act.[157]

The Commission has also imposed prior notice or prior approval provisions on another serial acquirer, JAB Consumer Partners, a private equity firm that has made several significant acquisitions in the emergency and specialty veterinary services markets across the United States. JAB is the parent company of two large veterinary clinic chains, Compassion-First Pet Hospitals and National Veterinary Associates Inc., that have been built through a series of acquisitions. In 2020, Compassion-First bought NVA for $5 billion, and the Commission required JAB to divest clinics in three local markets.[158] In June 2022, Compassion-First/NVA acquired Sage Veterinary Partners for $1.1 billion, and the Commission required divestitures in three additional local markets.[159] The Commission also determined that, in light of JAB's ongoing acquisition strategy, it would require prior approval and prior notice requirements on JAB's future acquisitions of specialty and emergency veterinary clinics.[160] Later in 2022, when JAB also sought to acquire another veterinary chain with significant competitive overlap in four geographic markets, the Commission again required divestitures and prior approval requirements in the affected local markets for emergency and specialty veterinary services markets.[161]

But resorting to imposing prior approval obligations after an industry has already experienced significant concentration due to roll-up strategies is suboptimal. A central purpose of the HSR Act is to allow the Agencies to arrest trends toward concentration through effective premerger review. For any reportable transaction under the HSR Act, the Agencies have an obligation to determine whether the transaction is one of a series of acquisitions that could lead to harm in the affected markets. Information about each party's prior acquisitions will provide a basis for the Agencies to assess this risk to competition during their initial antitrust assessment for any reportable transaction.

Several commenters supported the need for more information related to prior acquisitions, including a group of State antitrust enforcers. One commenter noted that the private equity industry pioneered and perfected the serial 'roll-up' acquisitions that were too small to attract antitrust agency attention but nonetheless amassed considerable market power over time. The same commenter pointed out that private equity firms use these add-on buyout deals to purchase multiple competitors of an existing portfolio company or expand their geographic reach to create a much bigger player in an industry—and that this strategy can in aggregate substantially lessen competition or tend to create a monopoly. Another commenter raised similar concerns that the business strategy of making a series of small acquisitions—whether an intentional tactic to avoid regulatory scrutiny or not—has become concerningly common in recent decades and led to many consolidated industries. An individual commenter shared their experience with the broader impact of rollup acquisitions on local communities:

• As the wife of a small business owner and member of a community, I'm dismayed at seeing how many small local and regional businesses have disappeared after becoming the target of mergers and rollups. Those businesses—funeral homes, hospice care, newspapers, hardware stores, coffee shops, veterinarians—were [] an important part of the community. Now it is nearly impossible to start local businesses in those sectors and turn any sort of profit while competing with PE backed rollups.[162]

Other commenters stated that the proposed changes are unnecessary because they lack sufficient justification, are out of step with their view of case law and market realities, and do not seem to have a strong factual basis. One commenter stated that the proposal to expand the lookback period for prior acquisitions would invite the Agencies to scrutinize long-consummated deals, including those that the HSR Act were never intended to capture. Some raised concerns that the proposed changes will substantially increase the burden of reporting on prior acquisitions beyond what is currently required for the HSR Form. Another stated that the costs of the proposed changes regarding prior acquisitions far outweigh the potential benefit that information about immaterial prior transactions could provide to the evaluation of the transaction. One commenter stated that requiring disclosure of non-reported transactions will reduce investments in startups.

The Commission has determined that, to detect whether serial or roll-up acquisition strategies have changed the market dynamics such that the transaction under review could have widespread harmful effects that will be hard to undo, the Agencies need additional information about prior acquisitions, including from the acquired firm. Knowing each party's record of prior acquisitions in the same business lines will allow the Agencies to understand the long-term competitive strategy for the transaction at issue, including whether it is one in a series of prior or planned acquisitions in the same industry and whether the

[154] *Id.* at 223.

[155] *See* Comment of Thomas Wollmann, Doc. No. FTC–2023–0040–0680 at 1 n.2 (citing to Thomas G. Wollmann, ''Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act,'' 1 a.m. Econ. Rev.: Insights 77–94 (2019) and Thomas G. Wollman, ''How to Get Away with Merger: Stealth Consolidation and Its Effects on US Healthcare'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 27274, May 2020 rev. Mar. 2024), *https://www.nber.org/papers/w27274*).

[156] *In re DaVita Inc.,* No. C–4677 (F.T.C. Oct. 25, 2021) (decision).

[157] *See* Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.*

[158] *In re Agnaten SE,* No. C–4707 (F.T.C. Apr. 9, 2020) (decision and order).

[159] *In re JAB Consumer Partners SCA SICAR,* No. C–4766 (F.T.C. Aug. 2, 2022) (decision and order).

[160] The Commission's order requires JAB to obtain prior Commission approval before acquiring a specialty or emergency veterinary clinic within twenty-five miles of any JAB clinic in California or Texas, and prior notice to the Commission thirty days prior to a similar acquisition anywhere in the United States that is not required to be reported under the HSR Act. *Id.* (decision and order).

[161] *In re JAB Consumer Partners SCA SICAR,* No. C–4770 (F.T.C. Oct. 10, 2022) (decision and final order).

[162] Comment of Nora Johnson, Doc. No. FTC–2023–0040–0618.

transaction is a merger of ''consolidators.'' The additional information would also permit the Agencies to better identify transactions whose effects should not be viewed in isolation but rather as a pattern of consolidation.[163]

The Commission has always required information about prior acquisitions in the HSR Filing to help identify strategies aimed at gaining market share through acquisitions rather than internal expansion or more vigorous competition, and the Commission disagrees that it is outside its rulemaking authority under the HSR Act to require filers (including the target) to report prior acquisitions in the same or related business lines even if they were not previously reported to the Agencies for premerger review. The final rule contains modest expansions of this long-standing requirement, to better account for the increased number of firms engaged in roll-up strategies. Nonetheless, the final rule does not contain certain expansions suggested in the proposed rule, such as eliminating the $10 million exception or expanding the lookback period from 5 to 10 years in response to comments that providing this level of information about prior acquisitions would be costly and burdensome. The modest expansion of this information requirement should provide the Agencies with a more complete record of consolidation in the relevant business lines that has been driven by the merging parties in order to identify when a reported transaction is the latest in a series of acquisitions, and thus one that may violate the antitrust laws.

As noted elsewhere, the Agencies remain committed to identifying consummated mergers that have resulted in harm and to take steps to unwind them as resources permit. But regardless of the legality or reportability of any particular prior acquisition, the fact that it occurred and involved the same business lines under review is directly relevant to whether the reported transaction may violate the antitrust laws, including through a series of mergers that ''convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.'' [164] For these reasons, the Commission has determined there is a need to collect information about prior acquisitions from the seller as well as the buyer. The cost of complying with this requirement should be minimal except in instances where the seller has made many acquisitions in the same or related business lines, in which case the information may prove highly relevant to Agency review.

Other new requirements in the final rule will also help the Agencies identify these roll-up strategies. In particular, the Overlap Description will provide an alternative basis for identifying product or service market overlaps for which prior acquisitions should be reported. Information about the buyer's acquisition rationale will reveal the purpose of the transaction, including whether is it part of a strategy of pursuing transactions in similar business lines. The new requirement to submit a small set of business plans and reports shared with the highest levels of management that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity may reveal whether there are other acquisition targets identified by either the acquiring or acquired person.

III. Statutory Authority and Economic Analysis

The HSR Act directs the Commission, with the concurrence of the Assistant Attorney General and consistent with the purposes of the Act, to issue rules requiring the submission of documentary material and information relevant to a proposed acquisition as is ''necessary and appropriate to enable [the Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [165] The HSR Act was enacted to assist the Agencies in enforcing other provisions of the Clayton Act, and to give the FTC and the Department of Justice a tool—premerger notification—to identify problematic mergers and acquisitions before they are consummated and a short period of time to complete their analysis.[166] The statute grants the Commission explicit authority to require the submission of documents and information the Agencies determine are necessary and appropriate to identify proposed acquisitions that may result in an antitrust violation.[167]

In the administrative law context, the Supreme Court has held that Congress' use of terms such as ''appropriate'' or ''reasonable'' in a statute authorizing agency rulemaking gives the agency ''flexibility'' to regulate.[168] As the Supreme Court has explained, ''[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, 'appropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'' [169] The phrase ''leaves agencies with flexibility,'' although ''an agency may not entirely fail to consider an important aspect of the problem.'' [170] In at least some contexts, courts have held that ''necessary and appropriate'' requires consideration of a rule's costs and benefits.[171]

The Commission is not convinced that Congress intended the words ''necessary and appropriate'' to require a cost-benefit analysis in this context. Had Congress intended to require the Commission to consider costs and benefits, it could easily have done so.[172] Instead, it gave the Commission broad authority to establish requirements it deems necessary and appropriate for determining whether a proposed acquisition may violate the antitrust laws during premerger review, and even gave the Commission express authority to define statutory terms. Nonetheless, in the particular circumstances of this rule, the Commission has considered the reasonableness of requiring additional information in the HSR Filing in light of the statutory scheme established by Congress to more effectively prevent undue consolidation that violates the antitrust laws, including the costs and the benefits of the final rule. The Commission has evaluated, on the one hand, the benefits to the Agencies, the parties, third parties and the public in making premerger review more efficient and effective by obtaining information necessary to properly assess the competitive effects of proposed acquisitions; and on the other hand, the need to reduce unnecessary burden, costs, and delay on filers and the transactions they hope to pursue in a manner consistent with the

[163] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 334 (1962).

[164] *Id.* (quoting S. Rep. 81–1775, at 5 (1950) and citing H.R. No. Rep. 81–1191, at 8 (1949)).

[165] 15 U.S.C. 18a(d)(1).

[166] *PhRMA,* 790 F.3d at 199, 206.

[167] *Id.* at 199, 201, 205.

[168] *Loper Bright Enterprises* v. *Raimondo,* 144 S.Ct. 2244 (2024).

[169] *Michigan* v. *EPA,* 576 U.S. 743, 752 (2015) (citation and internal quotation marks omitted).

[170] *Id.* (citation and internal quotation marks omitted).

[171] *See id.; Mex. Gulf Fishing Co.* v. *U.S. Dep't of Commerce,* 60 F.4th 956, 965 (5th Cir. 2023) (finding that the necessary and appropriate standard at a minimum requires that a rule's benefits reasonably outweigh its costs).

[172] *See Chamber of Com* v. *Sec. Exch. Comm'n.,* 412 F.3d 133, 142 (D.C. Cir. 2005) (statute requires SEC to consider whether rule will promote efficiency, competition, and capital formation which requires a consideration of the costs of the conditions imposed by the rule).

mandatory premerger notification regime of the HSR Act.

In determining what information is necessary and appropriate to determine whether a reported transaction merits the issuance of Second Requests, the Commission also draws on the Agencies' decades of experience reviewing filings and responding to informal requests for guidance.[173] This operational experience informs the Commission's assessment of the existing rules' shortcomings and supports its decision that it is necessary and appropriate—and consistent with the text and purpose of the HSR Act—for the Agencies to require the merging parties to provide sufficient information to enable the Agencies to conduct a preliminary assessment of the risk that the filed-for transaction may violate the antitrust laws, particularly where some information is available only from the parties.

After careful consideration of the public comments as well as the costs and benefits of the proposed changes, the Commission has determined to adopt a modified version of the information requirements proposed in the NPRM. As modified, the final rule will facilitate the provision of relevant documentary materials and information that allow the Agencies to assess whether a proposed acquisition may violate the law within the statutory period available for their initial review while minimizing the cost and burden of producing such materials as much as practicable.

The following analysis considers the potential economic effects that may result from the final rule consistent with the Commission's statutory power to obtain information necessary and appropriate to conduct an effective premerger review, including the benefits and costs to market participants. In conducting this assessment, the Commission has identified existing costs to filers, the Agencies, and third parties that could be avoided by adjusting the information requirements for HSR Filings. Avoiding such costs would generate benefits for filers, the Agencies, and third parties in addition to broader public benefits of effective premerger screening to identify potentially unlawful mergers prior to consummation.

The Commission believes that the final rule will improve the efficiency of the premerger review process and help the Agencies identify transactions that may violate the antitrust laws along all parameters of potential harm, but not all of these benefits can be quantified. Wherever possible, the Commission quantifies the likely economic effects of its final rule. However, some economic effects are inherently less conducive to sound quantification either due to the lack of reliable data or the lack of a well-established economic methodology that would provide estimates or ranges of costs. For example, producing quantitative estimates of certain costs and benefits would require numerous assumptions to generate a behavioral forecast of how parties contemplating an acquisition and other affected third parties would respond to the rule, and how those behavioral responses would in turn affect the overall cost of compliance and the merger review process. In addition, some factors determining certain economic effects of the rule are transaction-, firm- and industry-specific and thus inherently difficult to quantify. Even if it were possible to calculate a range of potential quantitative estimates for these effects, the range would be so wide as to not be informative about the magnitude of the associated benefits or costs. Where sound economic methodology is not available to measure particular benefits or costs, the Commission addresses those qualitatively.[174] In sum, to show the connection between the facts found and the agency's decision, the Commission provides, where feasible and appropriate, a quantified estimate of the economic effects of the final rule, and a qualitative description of the benefits and costs.

A. Statutory Authority and Congressional Intent

The HSR Act provides that the Commission ''shall require'' that premerger notifications be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether such acquisition may, if consummated, violate the antitrust laws.[175] Thus, the HSR Act explicitly requires the Commission, with the concurrence of the Assistant Attorney General, to determine what types of documents and information are required to conduct an initial assessment of antitrust risk. Mandatory premerger review strengthens merger enforcement by giving the Agencies a fair and reasonable opportunity to detect and investigate large mergers before consummation.[176] The ability to spot ''problem areas'' during the initial screen is the key feature of the HSR Act that converts merger enforcement from ineffective ex-post litigation to expeditious and effective premerger proceedings.[177]

To that end, Congress passed the HSR Act to provide the Agencies with advance notice of planned acquisitions and an opportunity to challenge such acquisitions as unlawful prior to consummation. The overall intent was to avoid lengthy, costly post-consummation enforcement that is ineffective at preventing undue concentration and permits an illegal acquisition to cause harm until unwound:

> The problem this bill cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to the Federal Trade Commission and the Department of Justice. But if the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.[178]

[173] *See PhRMA,* 790 F.3d at 210 (the Commission may provide the factual predicate for a finding through its cumulative experience and resulting expertise).

[174] *See Chamber of Com* v. *Sec. Exch. Comm'n.,* 85 F.4th 760, 768 (5th Cir. 2023) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). *See also id.* at 773–74 (explaining that securities law provisions providing rulemaking authority do not require the agency to conduct a quantitative inquiry to ascertain the economic effects of a rule, that the agency could instead rely on a qualitative assessment of the rule's economic implications, and that the agency can determine the analysis that most effectively reflects the economic consequences of its rule) (citation omitted); *All. For Fair Bd. Recruitment* v. *Sec. Exch. Comm'n.,* 85 F.4th 226, 263 (5th Cir. 2023) (agency's analysis of unquantifiable benefits sufficiently supports a rule as long as it provides an adequate explanation for its determination, and agency need not support its analysis with hard data where it reasonably relied on intangible benefits that were difficult to quantify) (citations omitted); *Mex. Gulf Fishing.,* 60 F.4th at 965–66 (a necessary-and-appropriate condition does not require applying a strict cost-benefit analysis but simply a showing that expected benefits are reasonably related to anticipated costs) (citations omitted).

[175] 15 U.S.C. 18a(d)(1).

[176] H.R. Rep. No. 94–1373, at 5 (1976).

[177] *Id.* at 10–11 (chief virtue of the Act is to help eliminate endless post-merger proceedings and replace them with far more expeditious and effective premerger review generating considerable savings; if the initial notification form reveals 'problem areas,' the government can request additional data during the initial 30-day period).

[178] 122 Cong. Rec. 25051 (1976) (remarks of Rep. Rodino). Premerger review was not the only tool given the Agencies to rectify the inadequacy of post-consummation merger enforcement. In 1973, Congress amended the FTC Act to authorize the Commission to seek injunctions in Federal court in recognition of the inadequacy of post-consummation divestitures. *See FTC* v. *H.J. Heinz Co.,* 246 F.3d 708, 726 (D.C. Cir. 2001) (Section 13(b) of the FTC Act reflects congressional recognition that divestiture is an inadequate and unsatisfactory remedy in a merger case, citing 119 Cong. Rec. 36612 (1973)). The inability of the

Continued

As noted by the Antitrust Modernization Commission (AMC)—a special body commissioned by Congress in 2002 to conduct a comprehensive review and make recommendations for revisions to U.S. antitrust laws—the HSR Act addressed the defects of post-consummation merger enforcement, which ''could neither fully compensate society for the interim loss of competition, nor fully restore a competitive market structure, particularly if the companies had already integrated their productive assets, or 'scrambled the eggs.' '' [179] Congress also intended to avoid deterring or impeding the consummation of the vast majority of acquisitions and therefore fashioned a regime that reflected ''a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays.'' [180]

The Agencies have administered the premerger notification program required by the HSR Act for more than 45 years, and the Commission has engaged in numerous rulemakings to change the information requirements for premerger notification in response to changes in market realities. Although many commenters object in whole or in part to the proposals contained in the NPRM, several conceded that some updates to the Rules are reasonable or justified by increasingly complex markets. Others commended the Commission for undertaking a periodic review of its rules. Even so, some argue that the Commission lacks the authority to make any changes to its current process that would increase the burden or delay HSR-reportable transactions, asserting that Congress intended to reduce costs and delay and to focus the Agencies' scrutiny on only the largest corporate transactions. The Commission disagrees with certain commenters that the Commission lacks the authority to adjust information requirements over time to make premerger review efficient and effective for the purpose of detecting potentially illegal mergers in light of changing market conditions.

Given the number of comments that assert that the proposed rule violated the intent of the HSR Act, the Commission responds first to these broad objections. The Commission also responds to assertions that it has failed to properly weigh the benefits and costs of changing the notification requirements in light of the statutory premerger scheme.

As an initial matter, the Commission disagrees that avoiding potential cost or delay to those involved in dealmaking is the primary focus of the HSR Act. The legislative history and plain text of the HSR Act make clear that the goal of establishing a premerger review regime was not to minimize the number of transactions that are reviewed by the Agencies or to reduce the delay for reported transactions below the statutory obligations.[181] In fact, it is clear that Congress explicitly contemplated that a mandatory premerger notification regime would impose burdens on merging parties. Prior to the passage of the HSR Act, parties were free to merge without providing any notification and without any delay, which led to concerns that the Agencies were practically unable to block or unwind illegal transactions.[182] Congress determined that new and meaningful requirements were necessary to achieve the overarching Congressional goal of promoting vigorous and effective enforcement of the antitrust laws:

> Amended Section 7 has failed to achieve its objectives—not because of its substantive standards, but because of the lack of an effective mechanism to detect and prevent illegal mergers prior to consummation. . . . The Committee believes that [premerger notification] represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays . . . Complex mergers or acquisitions of the kind encompassed within this subsection generally require a great deal of prior planning, and this provision will provide the Government appropriate opportunity to evaluate the legality of significant business behavior at the most propitious moment for all parties, with the least possible disaccommodation.[183]

When setting up the premerger notification program, the Commission rejected assertions that the term ''notification'' implies only a minimal burden for the initial HSR Filing. Some commenters at the time maintained that the initial notification should do little more than inform the Agencies of the participants to the transaction, the projected date of consummation, and other noncontroversial and generally uninformative data, leaving a fuller information demand to the Second Request. The Commission disagreed that the HSR Act should be read this way, stating that this position is contrary to the statutory text and fundamentally misconceives the amount of information necessary to make even a tentative determination whether a transaction may violate the antitrust laws.[184] The Commission explained that the HSR Filing should contain information necessary and appropriate for an effective premerger notification program.[185] The Commission reasoned that requiring perfunctory information in the HSR Filing would not fulfill the statutory provision and would result in more Second Requests that would extend the average waiting period under the HSR Act.[186] Then and now, to fulfill the purpose of premerger review, there must be sufficient information provided in an HSR Filing to determine whether to issue Second Requests and what information those requests would seek. Consistent with Congress' expectations that HSR Filings would consist of data and documents reasonably available to filing companies, such as the information and documents they relied

Commission to obtain injunctive relief sooner to prevent widespread harm from mergers was a widely acknowledged shortcoming of its agency design. *See, e.g., FTC* v. *Dean Foods Co.,* 384 U.S. 597, 606 n.5 (1966) (experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture).

[179] Antitrust Modernization Comm'n, Rep. & Recommendations 155 & n.21 (2007), *https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm* (citing H.R. Rep. No. 94–1373 at 7–11) (hereinafter ''AMC Report''). The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. 107–273, 116 Stat. 1856, Div. C., Title I, Subtitle D (2002). The AMC was charged with examining whether there was a need to modernize the antitrust laws and to identify and study related issues; to solicit views; and to evaluate proposals for change. The AMC provided its Report and Recommendations to Congress and the President on April 2, 2007, and was terminated on May 31, 2007, having completed its statutory duties.

[180] S. Rep. No. 94–803, at 65 (1976).

[181] Efforts to require premerger notification date back to 1908. Leading up to the passage of the HSR Act, the Commission regularly urged Congress to pass legislation that would require advance notice for acquisitions. For a short time, the Commission relied on its authority under section 6 of the FTC Act to require merging parties to file special reports 60 days prior to consummation in certain industries, such as food distribution and cement. None of these programs required the parties to stay their merger plans. After passage of the HSR Act, the Commission discontinued reliance on special reports for prior notice of pending mergers. *See* Kelly Signs, ''Milestones in FTC History: HSR Act launches effective premerger review,'' Fed. Trade Comm'n Competition Matters blog (Mar. 16, 2015), *https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review.*

[182] *See* S. Rep. No. 94–803, at 64 (1976).

[183] *Id.* at 63–66. *See also id.* at 9–10.

[184] 43 FR 33450, 33519–20 (July 31, 1978).

[185] *Id.* The Commission also rejected suggestions that it make certain burdensome requests optional for the parties, finding that such an approach would undermine the usefulness of the second request mechanism, hinder the Agencies in their efforts to carry out their congressionally mandated review, and be administratively unworkable. *Id.* at 33520.

[186] *Id.* at 33520. *See also* 42 FR 39040, 39043 (Aug. 1, 1977).

on when contemplating the deal,[187] the final rule seeks information that is readily available to the parties to fill information gaps that the Agencies have identified in the current HSR Form.

As discussed above, information reported in the current HSR Form is not sufficient due to differences in corporate structure and investment activity as well as profound changes in economic activity. In this rulemaking, the Commission is responding to these changes and how they have affected the Agencies' ability to conduct premerger screening in light of today's market realities. The Agencies need information to be able to spot all types of potential harm and the Commission has determined that the information requirements contained in the final rule are necessary and appropriate to conduct effective and efficient premerger screening and avoid even greater costs associated with collecting additional information through issuing more Second Requests. Without sufficient information available in the HSR Filing on the first day of the statutory review period, the Agencies cannot fulfill their mandate to identify and prevent illegal mergers or avoid potentially costly and protracted investigations.

Several commenters suggested that because Congress recently authorized the collection of additional information relating to foreign subsidies, that is the only information the Commission has the authority to collect.[188] The Commission disagrees that in passing this new requirement, Congress intended to repeal or in any way limit the Commission's statutory authority under 15 U.S.C. 18a(d) to impose other reporting requirements that are necessary and appropriate to determine whether the transaction may violate the antitrust laws. Indeed, the Commission is relying on its section 18a(d) authority to require the submission of information related to foreign subsidies in the final rule. The other changes contained in the final rule are a reasonable exercise of the Commission's rulemaking authority to require information that is necessary and appropriate for detecting problematic mergers during the initial waiting period of the HSR Act. The final rule updates the premerger notification regime based on the Agencies' experience in reviewing thousands of HSR Filings each year and in light of observable changes in market dynamics, contemporary investor behavior, investment arrangements, and acquisition strategies, as discussed in section II.B. above.

Some commenters suggested that the Commission lacks authority to make changes to the notification requirements because doing so increases the likelihood that the Agencies will subject more transactions to close scrutiny or seek to block them as illegal, and that this increased scrutiny will disincentivize dealmaking. This line of argument is contrary to the purpose of the HSR Act and the final rule.

Congress passed the HSR Act to create an effective mechanism to detect, deter, and prevent large transactions that violate the antitrust laws. The inadequacy of current notification requirements may encourage parties to enter into unlawful transactions due to the low risk of premerger detection.[189] One commenter supporting the need for change noted that the gaps created by the existing HSR Form and Instructions make it possible for anticompetitive mergers to go through unnoticed. Parties considering a merger are aware of this, so under the current system, parties are likely more willing to consider or attempt a merger that would be more obviously unlawful under a more rigorous disclosure regime. To the extent that one effect of the final rule would deter unlawful dealmaking, that effect is clearly consistent with Congress' intent that mandatory premerger review more effectively prevent illegal mergers.[190] Filing parties cannot claim an interest in inadequate detection or in avoiding an in-depth antitrust investigation that may lead to a court injunction blocking the merger because these concerns directly contravene U.S. law. Based on statutory text and clear Congressional intent, the Commission must ensure that HSR notification requirements enable the Agencies to detect the potential for harm before the harm occurs; that is the purpose of premerger review. When the Agencies' ability to detect the violation is compromised by inadequate disclosures in the HSR Filing, the Commission must use the authority expressly conferred by Congress to adjust the Agencies' detection tools to fulfill the purpose of premerger review.

Other commentors suggested that the Agencies' infrequent challenges to consummated mergers, including those reported but not challenged prior to consummation, are proof that the Agencies are not ''missing deals'' that cause harm. But given the significant effort required to unwind completed mergers, the frequent lack of information about the effects of consummated mergers, and the limited resources the Agencies have available to devote to all types of merger enforcement, in addition to their other statutory responsibilities,[191] the relatively low number of challenges to consummated mergers does not indicate that the current information requirements for premerger screening are sufficient to detect illegal deals. The Agencies must make difficult decisions about how to use their resources to address consummated mergers that may be causing real and ongoing harm while also working to fulfill their obligations to conduct a robust premerger screening of reported transactions. The critical task of screening reported transactions for antitrust risks can be especially challenging during times of peak M&A activity. See Figure 1.

According to one commenter whose members have been directly affected by consolidation in the retail food sector, third parties sometimes alert the Agencies to competitive issues, but that may not occur until after the waiting period has expired or the deal has been consummated. This commenter noted that these untimely scenarios are exactly the opposite of the HSR Act's legislative intent and force the Agencies and courts into a precarious position to preserve competition or obtain effective remedies. Congress certainly did not provide immunity for reported mergers that are not challenged prior to consummation (as most jurisdictions do) [192] so it is not a binary choice for the

[187] 122 Cong. Rec. 30877 (1976) (remarks of Rep. Rodino).

[188] *See* Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 (2022).

[189] *See* ''Stealth Consolidation,'' *supra* note 18.

[190] *See* S. Rep. No. 94–803, at 65 n.28 (the purposes underlying enactment of section 7 of the Clayton Act could have been accomplished if premerger notification had been enacted when originally proposed, and that if it had the economy would be less concentrated.).

[191] In addition to merger enforcement, both Agencies investigate and challenge anticompetitive conduct that may violate the antitrust laws. The Antitrust Division has sole responsibility to prosecute criminal violations of the antitrust laws, while the Commission has authority under section 5 of the FTC Act (15 U.S.C. 45) to challenge unfair methods of competition beyond the scope of the Sherman or Clayton Acts. In addition, the Commission's budget supports its consumer protection work, which is devoted to stopping unfair or deceptive acts or practices that violate the FTC Act as well as enforcement of more than 80 other statutes. *See generally* Fed. Trade Comm'n, ''Legal Library: Statutes,'' *https://www.ftc.gov/legal-library/browse/statutes.*

[192] *See* The Merger Control Review Preface, x (Ilene Knable Gotts, ed., 14th ed., 2023) (in most jurisdictions, a transaction that is not notified is not subject to review or challenge by the competition authority), *https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.28469.24.pdf.* Canada recently extended its lookback period from one year to three years for non-notified transactions but left unchanged the one-year limitation to challenge notified transactions. *See* Competition Bureau Canada, ''Guide to the June 2024 amendments to

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Agencies to ''act or stand down'' on a reported merger. But once a merger is consummated (whether reported in advance or not), the Agencies face decisions about the significant costs of mounting a merger challenge to unwind the deal as well as the opportunity costs of doing so. Given the limited resources the Agencies have to devote to merger enforcement, the Agencies will often focus on enforcement of reported mergers due to these opportunity costs.[193]

The legislative record leading to the HSR Act is replete with references to the costs, delays, and ineffectiveness of relying on post-consummation enforcement to interdict mergers that may cause harm in their incipiency.[194] In the Agencies' experience, unwinding illegal consummated mergers continues to be a costly exercise, and there remain significant delays in obtaining effective relief through unwinding. A merged firm has strong incentives to delay the outcome, and Commission orders requiring divestiture of acquired assets are often appealed, further deferring relief.[195] Moreover, smaller or seemingly inconsequential acquisitions can later be revealed as potentially illegal exclusionary conduct when they are used by firms with dominant market positions to maintain or extend a monopoly in violation of section 2.[196] There are enormous costs and delays associated with prosecuting section 2 cases involving the largest companies in the world to unwind harmful acquisitions.[197]

In mandating government review of acquisitions prior to consummation, Congress intended for the Agencies to avoid these types of protracted antitrust cases when possible. Instead, Congress envisioned that merger enforcement would occur mostly through a system of premerger review, even at the cost of requiring premerger review for many mergers that may not ultimately warrant an in-depth investigation let alone a challenge in court.[198] The Commission has determined that imposing some limited additional upfront costs on filers so that they submit sufficient information to allow the Agencies to conduct the mandatory initial antitrust review fulfills the Agencies' statutory responsibilities and should be weighed against the benefit of avoiding large expensive antitrust actions required to unwind illegal acquisitions that were not detected at the screening phase. Importantly, the final rule imposes fewer information requirements on transactions that are reportable but have low antitrust risk while seeking the most information from those transactions most likely to require in-depth review at the screening phase. Otherwise, the consequences of poor detection are improperly shifted to those harmed by illegal consummated mergers—which is plainly at odds with the purpose of the HSR Act.

The benefits of stopping an illegal merger before it happens can be significant, especially for those who would bear the consequences of harm induced by the merger. The chart below collects estimates of avoided harm due to likely price changes for affected products or services in cases litigated by the Agencies and accepted by Federal courts as a basis for enjoining illegal mergers in recent years.

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the Competition Act'' (June 25, 2024), *https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-june-2024-amendments-competition-act*.

[193] *See* Zarek Brot-Goldberg, et al., ''Is There Too Little Antitrust Enforcement in the US Hospital Sector?'' (U. Chi., Becker Friedman Inst. for Econ. Working Paper No. 2024–59, May 2024) (forthcoming, Am. Econ. Rev.: Insights), *https://bfi.uchicago.edu/working-paper/is-there-too-little-antitrust-enforcement-in-the-us-hospital-sector/* (FTC is intervening in the most anticompetitive transactions but not preventing a significant number of hospital mergers that nonetheless cause harm).

[194] *See* H.R. Rep. No. 94–1373, at 7–10 (1976).

[195] *See, e.g., Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023); *ProMedica Health Sys., Inc.* v. *FTC,* 749 F.3d 559 (6th Cir. 2014), *cert. denied,* 575 U.S. 996 (2015); *Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012).

[196] *See supra* note 107 (collecting cases).

[197] The Commission filed its monopolization complaint against Facebook (now Meta) on December 9, 2020, and was joined by a coalition of forty-six States, the District of Columbia and Guam. *See* Press Release, Fed. Trade Comm'n, ''FTC Sues Facebook for Illegal Monopolization'' (Dec. 9, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization*. The FTC is seeking a permanent injunction that would, among other things, require the divestiture of previously acquired assets. As of September 27, 2024, the parties have concluded pretrial discovery; a trial date has not been set.

[198] The Agencies can and do challenge reportable mergers after the expiration of the waiting period. *See, e.g., Chi. Bridge & Iron Co. N.V.* v. *FTC,* 534 F.3d 410 (5th Cir. 2008); *United States.* v. *Parker Hannifin Corp.,* No. 17–cv–01354 (D. Del. Sept. 26, 2017) (complaint). *See also* Note by the United States to the OECD, Investigations of Consummated and Non-Notifiable Mergers (Feb. 25, 2014) (DAF/COMP/WP3/WD(2014)23), *https://one.oecd.org/document/DAF/COMP/WP3/WD(2014)23/En/pdf* (discussing Agencies' challenges of consummated mergers); Menesh S. Patel, ''Merger Breakups,'' 2020 Wisc. L. Rev. 975, 990 (2020) (observing that, since 2001, the Agencies have challenged at least four mergers that previously underwent HSR review). Because of the confidentiality protections afforded HSR filings, market participants are often not aware of the merger or the timing of the expiration of the statutory waiting periods. *See* Comment of Strategic Org. Ctr., Doc. No. FTC–2023–0040–0708 at 3 (urging public notice of the date of HSR filings and the identity of the filers so that interested and affected parties can contact the Agencies during the initial review period). Many investigations of consummated mergers, including reported but not challenged transactions, are initiated after market participants reach out to the Agencies about the observed effects of the merger.

Table 2: Estimates of Harm in Blocked Mergers

Case	Estimate of Harm
U.S. v. JetBlue/Spirit Airlines	$1 billion per year[a]
FTC v. IQVIA/PMI	Post-merger price increase of 7.4%[b]
U.S. v. Bertelsmann SE & Co.	Post-merger decreases in advances range from 4% to 11.5%[c]
FTC v. Hackensack	$31 million per year[d]
FTC v. Peabody Energy	$1 billion over 10 years[e]
FTC v. Wilhelmsen	$14.4 million to $23 million per year[f]
FTC v. Sanford	$16 million to $27 million per year[g]

[a] United States v. JetBlue Airways Corp., No. 1:23-cv-10511 (Dec. 16, 2024) (Findings of Fact and Conclusions of Law) and Plaintiff's Post-Trial Brief at 18-19 (Dec. 13, 2023) (Proposed Acquisition Is Conservatively Projected to Cause Nearly $1 Billion of Harm Each Year to American Consumers in the Relevant Markets).
[b] FTC v. IQVIA Holdings Inc., No. 1:23-cv-06188 at 81-82 (S.D.N.Y. Jan. 8, 2024) (Op. & Order).
[c] United States v. Bertelsmann SE & Co., No. 1:21-cv-2886 at 54 (D.D.C. Nov. 7, 2022) (Mem. Op.).
[d] FTC v. Hackensack Meridian Health, Inc., No. 2:20-cv-18140 at 48-49 & n.26 (D.N.J. Aug. 4, 2021), aff'd, 30 F.4th 160, 174 (3d Cir. 2022).
[e] FTC v. Peabody Energy Corp. 492 F. Supp.3d 865, 906 (E.D. Mo. 2020).
[f] FTC v. Wilh. Wilhemsen Holding ASA, 341 F. Supp.3d 27, 65 (D.D.C. 2018).
[g] FTC v. Sanford Health, No. 1:17-cv-00133 at 28, 2017 WL 10810016 at *13 (D. N.D. Dec. 15, 2017) (Mem. Decision), aff'd, 926 F.3d 959, (8th Cir. 2019).

In addition to merger-induced price effects, which can vary widely due to differences in the economic size of the relevant markets affected by the merger, there can also be harm to customers from the loss of non-price competition. For example, the court found that JetBlue's anticipated reconfiguration of Spirit's aircraft would result in a decrease in the number of seats available on JetBlue flights of more than 6,100,000 per year.[199] These types of effects reduce output and result in a welfare loss due to the exercise of market power. In a vertical merger context, the Fifth Circuit affirmed the Commission's findings that Illumina's acquisition of Grail lessened competition via a different mechanism: the potential foreclosure of a key input by the sole supplier would lead to chilled investment by firms reliant on those inputs for their own competitive success.[200]

Moreover, merger retrospectives document merger-induced effects such as increased prices and decreased product quality or availability across a range of industries.[201] Given the significant economic costs imposed on market participants harmed by an illegal consummated merger, the Agencies will continue to challenge consummated mergers when practical and as resources permit. But relying on post-consummation merger enforcement to correct for information deficiencies in the HSR Form is contrary to Congressional intent that premerger review be used to stop illegal mergers before they occur.

1. Congress Determined Which Acquisitions Must Bear the Costs Associated With Premerger Review

Congress determined that the burden of premerger review should apply, regardless of antitrust risk, to a small subset of mergers where that burden would not be so great in comparison to the size of the deal and the size of the parties involved. Because the final rule does not require reporting for any additional transactions, it maintains the balance struck by Congress that only some mergers be subject to mandatory premerger review.

Congress incorporated several features in the HSR Act to lessen the burden on dealmaking, especially for small business and small transactions.[202] For instance, the HSR Act as first passed in 1976 contained three specific requirements that determined reportability for a planned transaction: the acquiring person is engaged in interstate commerce (the commerce test); one of the parties was worth at least $10 million and the other worth at

[199] *United States* v. *JetBlue Airways Corp.,* No. 1:23–cv–10511 at 43 (D. Mass., Jan. 16, 2024) (Findings of Fact and Conclusions of Law).

[200] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1055 (5th Cir. 2023).

[201] *See generally* Vivek Bhattacharya et al., ''Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods'' (Nat'l Bureau of Econ. Rsch., Working Paper No. 31123, Apr. 2023, rev. June 2024), *https://www.nber.org/papers/w31123* (studying fifty mergers in the consumer-packaged goods industry and finding that, on average, these mergers raised prices by 1.5 percent and decreased quantities sold by 2.3 percent); Daniel Hosken et al., ''Do Retail Mergers Affect Competition? Evidence from Grocery Retailing,'' 27 J. Econ. & Mgmt. Strategy 3 (2018) (finding that the majority of grocery mergers in highly concentrated markets resulted in price increases of more than 2 percent); John E. Kwoka, Jr., Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 110–11 (2014) (providing a meta-analysis of retrospective literature, finding that more than 80 percent of mergers resulted in price increases and the mean price increase was 5.88 percent across all studied transactions); Orley C. Ashenfelter et al., ''Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers,'' 57 J. L. & Econ. S67 (2014) (reviewing prior retrospectives and concluding that mergers in oligopolistic markets can result in economically meaningful price increases, as 36 of 49 studies surveyed found evidence of merger-induced price increases); Leemore Dafny et al., ''Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry,'' 102 a.m. Econ. Rev. 1161 (2012) (examining healthcare mergers and finding the mean increase in local market HHI during the studied period raised premiums by roughly 7 percent); Orley Ashenfelter & Daniel Hosken, ''The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin,'' 53 J. L. & Econ. 417 (2010) (examining a set of mergers that were unchallenged by the government and finding that the majority resulted in a significant increase in consumer prices in the short run); Thomas Koch & Shawn W. Ulrick, ''Price Effects of a Merger: Evidence from a Physicians' Market,'' 59 Econ. Inquiry 790 (2021) (concluding that a merger of orthopedic physicians' practices increased prices to some payors by ten to twenty percent while prices in nearby areas not affected by the merger remained unchanged); Zack Cooper et al., ''The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,'' 134 Q. J. Econ. 51 (2019) (examining 366 hospital mergers and finding that prices increased by over six percent when merging hospitals were geographically close); Prager & Schmitt, *supra* note 83 (examining hospital mergers and finding reduced wage growth when merger significantly increases concentration).

[202] The Senate version of the premerger notification bill would have given the Commission authority to require reporting from additional ''small'' mergers, but the House bill and the final law did not include this provision. 122 Cong. Rec. 30877 (1976).

least $100 million (the size-of-person test); and as a result of the transaction, the acquiring person would hold at least 15 percent or $15 million of the acquired entity (the size-of-transaction test). These thresholds were adopted in response to concerns that requiring reporting for all mergers would unduly affect capital markets.[203] The size-of-person test was seen as especially important to limit the impact of premerger reporting on small businesses:

> Approximately the largest 700 U.S. companies meet the $100 million jurisdictional requirement. Although $100 million companies account for roughly 40 percent of mergers and acquisitions, Title V's *dual* requirement of (i) a $100 million acquiring company, and (ii) a $10 million acquired company would have required such 30-day notification, over the past 5 years, in less than 100 acquisitions per annum. With this limitation, the Committee sought to include within the ambit of the premerger notification provision primarily those mergers or acquisitions that were most likely to have a substantial effect on competition. That is not to say that smaller mergers may not run afoul of the Clayton Act. To include the bulk of the approximately 3,000 mergers that would have occurred annually in the course of the past several years would, however, in the Committee's judgement, impose an undue and unnecessary burden on business.[204]

Together, these criteria were designed to focus mandatory premerger review on the largest transactions and limit the number of transactions that would have to be reported to the Agencies. See Table 1 (on average 16.5% of mergers reported during FY 2018 to FY 2022).

During the 1990s, several years of intense M&A activity drove merger filings ever higher, so that by FY 2000, the Agencies reviewed over 4,900 reported transactions.[205] This dramatic increase in HSR filings led to calls for Congress to amend the HSR Act to reduce its broad sweep, and to especially address its impact on small businesses. In response, Congress made several changes in 2000 to reduce the number of transactions subject to reporting: (1) increased the size-of-transaction threshold from $15 million to $50 million and required the Commission, starting in 2005, to adjust the thresholds in the HSR Act annually based on changes in the gross national product; (2) eliminated the 15 percent size-of-transaction threshold, making $50 million (as adjusted) an absolute floor; and (3) eliminated the size-of-person test for larger transactions, making transactions valued in excess of $200 million (as adjusted) reportable without regard to the size of the parties.[206] Today, as a result of these adjustments and with annual indexing, HSR filings are required for only a small fraction of overall merger activity in the United States. See Table 1.

Many commenters pointed out that the Congress that enacted the HSR Act envisioned the Agencies reviewing only 150 of the largest mergers.[207] In 1976 when the HSR Act was passed, 150 mergers represented approximately 12.8 percent of M&A deal volume, given that there were 1,171 completed acquisitions in 1976.[208] Overall, the burden imposed on M&A activity by the HSR Act is not that different today than in 1976. See Table 1 (HSR reportable mergers on average 16.5 percent of M&A from FY 2018 to 2022). At the same time, the size of the U.S. economy has grown exponentially: in 1976, the seasonally adjusted U.S. Gross Domestic Product was $1.934 trillion; today it is over $28 trillion.[209] From these figures, it appears that M&A activity, and the economy in general, has not been affected by the obligations imposed on those pursuing certain large acquisitions to submit to mandatory premerger review.

Moreover, Congress enacted several explicit statutory exemptions to reduce the burden of reporting,[210] and also authorized the Commission to issue rules exempting persons and acquisitions that it deemed at the time as posing little to no antitrust risk, which eliminated the burden of reporting for many additional transactions.[211] The Commission has also faithfully implemented Congress' mandate to annually index the HSR thresholds, which keeps premerger review limited to those acquisitions Congress wants the Agencies to review prior to consummation.[212]

Some commenters noted that the current process is inefficient because of the over-inclusiveness of HSR reporting standards. They pointed out that of all reported transactions, the Agencies issue Second Requests in only 2 to 3 percent per year, suggesting that this is a reason for the Commission to keep the status quo and not adopt any adjustments to current information requirements.

The Commission believes that the low percentage of transactions that have received Second Requests is not a reliable indicator that the Agencies have achieved the goals of mandatory premerger review or that the current

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[203] *See* S. Rep. No. 94–803, at 65–66 (1976).

[204] *Id.* at 66.

[205] Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Report to Congress Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 1 (Twenty-Third Report) (FY 2000).

[206] Public Law 106–553, 114 Stat. 2762 (2000) (codified at 15 U.S.C. 18a(a)). *See also* 146 Cong. Rec. S11872 (daily ed. Dec. 15, 2000) (statement of Sen. Kohl) (exempting small transactions from premerger review will significantly lessen regulatory burdens and expenses imposed on small businesses). This legislation also provided the Agencies more time to review materials submitted in response to a Second Request, extending the second waiting period under the HSR Act from 20 to 30 days after substantial compliance. *See* 15 U.S.C. 18a(e)(1)(A). *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Report to Congress Pursuant to Subsection (j) of Section 7A of the Clayton Act, Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Twenty-Fifth Report) appendix A (FY 2002) (from FY 2000 to 2002, reported transactions dropped from 4,926 to 1,187).

[207] The prediction of 150 mergers turned out to be unrealistic from the start. In just the first three months of the premerger program, the Agencies received notifications for 292 transactions, nearly double the expected amount. *See* Fed. Trade Comm'n, Second Annual Report to Congress pursuant to Section 201 of Hart-Scott-Rodino Antitrust Improvements Act of 1976 3 (FY 1978). In the first full year of the HSR program, the Agencies received filings for 814 transactions. Fed. Trade Comm'n, Third Annual Report to Congress pursuant to Section 201 of Hart-Scott-Rodino Antitrust Improvements Act of 1976 3 n.4 (FY 1979). The Commission moved quickly to amend the HSR Rules to exempt additional types of transactions to further reduce the burden of the premerger reporting program. 44 FR 66781 (Nov. 21, 1979). *See also* David A. Balto, ''Antitrust Enforcement in the Clinton Administration,'' 9 Cornell J. L. & Pub. Pol'y 61, 119–20 (1999) (discussing two early HSR exemptions which resulted in approximately 20% and 10% reductions in filings).

[208] *See* Fed. Trade Comm'n, Statistical Report on Mergers and Acquisitions 25 Table 10 (1978), *https://www.ftc.gov/system/files/documents/reports/statistical-report-mergers-acquisitions-1978/statistical_report_on_mergers_aug1980.pdf*. This number does not include partial acquisitions which did not confer control on the buyer.

[209] U.S. Bureau Econ. Analysis, Gross Domestic Product (updated Aug. 29, 2024) (retrieved from FRED, Fed. Reserve Bank of St. Louis), *https://fred.stlouisfed.org/series/GDP*.

[210] *See* 15 U.S.C. 18a(c) and 16 CFR part 802.

[211] *See* 15 U.S.C. 18a(d)(2)(B) and 16 CFR part 802. Several commenters urge the Commission to engage in rulemaking to exempt additional transactions from HSR filing obligations. These suggestions are outside the scope of this rulemaking. Due to deficiencies in the information currently collected in the Form, as explained elsewhere in this document, the Commission is not able to identify any additional types of transactions that could be exempted at this time. Until the Commission has sufficient information to provide a reasonable basis to exempt additional categories of transactions from HSR reporting requirements, the Commission is not in a position to reduce the total number of reported transactions. As discussed in section VI.A.1.f., the Commission is excusing certain types of transactions (select 801.30 transactions) from many requirements of the final rule and has modified the proposed rule in many places to apply only where certain conditions have been met.

[212] To the extent that commenters suggest that the NPRM expands reporting requirements for additional transactions, they are wrong. Nor would changing the information requirements of the HSR Filing affect the obligations of public companies to comply with disclosure requirements of the Securities and Exchange Commission (''SEC''). *See* Comment of Am. Sec. Ass'n, Doc. No. FTC–2023–0040–0682 at 2.

process is efficient in identifying problematic transactions and effective in deterring illegal mergers. As discussed above in section II.B., the Commission has identified significant deficiencies in the information provided in the HSR Filing that prevent the Agencies from assessing the potential harm presented by reportable transactions. In light of these deficiencies, the number of mergers investigated through the issuance of Second Requests is not instructive on whether the Agencies are fulfilling their duty to the American public to screen large mergers in advance of consummation. The Agencies must continue to review reportable transactions to determine which ones warrant the issuance of Second Requests regardless of, and despite, fluctuations in the overall number of filings.

2. Delays Associated With Premerger Review Depend on Antitrust Risk

Congress also determined how much delay would be associated with those transactions subject to mandatory premerger review, and this rulemaking attempts to adjust the information required for premerger screening in light of legislative intent to avoid delays for any deal other than those with the highest antitrust risk. The main statutory feature of the HSR Act is the suspensory waiting period, which requires that the parties not consummate the proposed acquisition until the prescribed waiting period has expired. For all transactions, the statute limits that delay by keeping the waiting period short: 30 days for most transactions and 15 days for those most at risk of not happening at all due to delay, such as cash tenders and acquisitions of assets out of bankruptcy. Congress determined to hold up cash tender offers and the purchase of assets in bankruptcy only briefly due to heightened concerns over timing. For cash tender offers, which do not require consent of the target and can sometimes be actively opposed by the target, Congress shortened the suspensory waiting period to 15 days to balance premerger notice with the intent of the securities laws, specifically the Williams Act, so as not to ''tip the balance'' in favor of the incumbent management of the target firm.[213] Similarly, for acquisitions of assets subject to bankruptcy proceedings, Congress understood that time is of the essence to prevent liquidation of productive assets and applied the shortened 15-day initial waiting period to these transactions as well. Congress thus recognized that a particular subset of transactions require especially speedy review.

At the same time, Congress provided that the Agencies can extend the waiting period for any type of reportable acquisition by requiring the submission of additional information or documentary material in response to a Second Request. The decision to issue Second Requests has significant consequences for the transaction because if that happens, the parties cannot consummate the transaction until 30 days after each party has substantially complied with the Second Requests.[214]

The Commission disagrees that the final rule entails any delay beyond that which was expressly contemplated in the HSR Act. First, the final rule does not extend the statutory waiting periods, which are established by Congress.[215] Second, Congress made clear that the initial waiting period will commence once the Agencies have received a completed Form, or a partially completed Form with a specific statement of the reasons for partial non-compliance.[216] Third, Congress directed the Commission to devise and maintain a mandatory notification program that would give the Agencies the information that is necessary and appropriate to conduct an initial antitrust assessment during the initial 15- or 30-day waiting period.

That said, the Commission does not question the need, when appropriate, to minimize delay for notified transactions, especially for non-problematic deals. In fact, the Commission believes that the final rule may shorten the overall waiting period for a significant number of transactions and perhaps even reduce the overall number of delayed transactions. As discussed above, Congress determined that 30 days was the appropriate delay for the majority of reportable transactions (other than cash tenders and acquisitions in bankruptcy), regardless of their size or economic impact. It is a feature of the HSR Act that an open market stock purchase by an individual can be subject to the same 30-day initial waiting period as a multi-billion-dollar merger of competitors operating in multiple local markets throughout the country. Yet these two transactions present very different antitrust risks.

In order to quickly dispense with those transactions that present low risk of a law violation so as to focus on those with moderate to high risk, the Agencies need more information in the HSR Filing. Any time and effort the Agencies must spend collecting necessary information that is not contained in the HSR Filing is time and effort taken away from quickly determining which deals do not warrant an in-depth investigation. Especially as it relates to cash tender acquisitions—which are among some of the largest deals reviewed by the Agencies over the years and yet are subject to a 15-day initial waiting period—the short time given for the initial antitrust assessment severely strains the Agencies' limited resources, especially during periods of intense M&A activity. See Figure 1. But the statutory time limit is absolute and if the Agencies do not issue Second Requests before the end of the initial waiting period, the parties are free to consummate the transaction.[217] This is as Congress intended, but Congress also gave the Commission the authority to determine the necessary and appropriate information that must be included in HSR Filings to make the

[213] 122 Cong. Rec. 30877 (1976) (listing a number of defensive actions the target could take to undermine the offer if it had enough time, effectively denying shareholders of the target firm the choice to accept the offer).

[214] The Agency that issued the Second Requests can grant early termination of the waiting period, permitting the parties to consummate their proposed acquisition, or a Federal court may extend the waiting period if the Agency applies for preliminary relief and the court finds that the party has not substantially complied with the information requirements of the HSR Act. 15 U.S.C. 18a(g)(2).

[215] As discussed in section V.D. below, if the parties have not executed a definitive agreement, the final rule requires that they submit a document with the HSR Filing that contains sufficient details of the transaction they intend to consummate. This may be the executed preliminary agreement, or the agreement may be supplemented by one additional dated document, such as a term sheet or the latest draft agreement. While this new requirement may cause some filers to delay notification compared to the current rules, the Commission believes this change is necessary and the delay is appropriate to avoid wasting the Agencies' time and attention on deals that may never occur or are too hypothetical or lacking material details to assess.

[216] 122 Cong. Rec. 30876 (1976). The Commission does not dispute that the HSR Act allows for substantial compliance with its requirements. In response to such arguments, the sponsors dropped the ''automatic stay'' provisions and adopted a requirement that filers ''substantially comply'' with the Second Request so that arguments that the parties had not fully complied could not hold up the deal. Under 15 U.S.C. 18a(g)(2), a district court may extend the statutory waiting periods of the HSR Act if filers fail to substantially comply with the requirements of the HSR Act.

[217] As part of the 2000 amendments to the HSR Act, Congress made plain that if the end of the waiting period falls on a Saturday, Sunday, or legal public holiday, then the waiting period is extended to the next day that is not one of those days. 15 U.S.C. 18a(k). This change was necessary to eliminate gamesmanship by parties who timed their compliance so that the waiting period ended on a weekend or holiday, effectively shortening the waiting period to the previous business day. 146 Cong. Rec. S11872 (daily ed. Dec. 15, 2000) (statement of Sen. Kohl).

statutory scheme work—not for the purpose of minimizing delay but for the purpose of enforcing the antitrust laws for the benefit of the public. That is the problem this rulemaking addresses: by adjusting the amount of information available to the Agencies on the first day of the waiting period, the final rule makes possible quick but thorough premerger review for all reportable transactions.

For many years, and mainly due to the lack of sufficient information contained in HSR Filings, many filers and practitioners have become accustomed to artificially lengthened waiting periods. In 2013, the Commission issued a rule that formalized a previously informal process that offers filers the option to withdraw and refile their filings without paying an additional filing fee. The option to withdraw-and-refile was intended to benefit both the parties and the Agencies by providing an additional 15- or 30-day waiting period for the Agencies to review the transaction without issuing Second Requests while seeking additional relevant information on a voluntary basis from the merging parties or from third parties.[218]

As shown in Table 3 below, the option to withdraw-and-refile has been used with some frequency by filers to give the Agencies more time to conduct an initial premerger assessment. Based on the Agencies' review of their HSR-related investigations during the five-year period of FY 2018 to 2022, parties withdrew their HSR filing and refiled in a total of 546 transactions. In the majority of these extended investigations, the Agencies determined not to issue a Second Request: nearly two-thirds of the time, opting to withdraw and refile resulted in the transaction closing at the end of the initial waiting period, thereby avoiding the cost and burden of a Second Request investigation. That is, once the filing parties submitted information beyond what was submitted with the HSR Form, the investigating Agency was able to determine that the transaction did not warrant Second Requests.

Table 3: Withdrawn & Refiled Transactions Fiscal Years 2018 – 2022

	5 Year Total
Transactions	546
Transactions Not Issued Second Request	365
Percentage Not Issued Second Request	67%

While the parties can rely on the option to withdraw and refile as an ad hoc tactic to avoid the issuance of Second Requests, the Agencies' experience illustrates in a very tangible way the inefficiencies associated with the current HSR Form. Over the five years sampled, an average of 73 transactions each year (546 in total) were delayed by an additional 30 days and filers were burdened by having to submit additional materials on a voluntary basis even though the investigation did not lead to the issuance of Second Requests. These delays impose costs on the parties and the Agencies, as well as third parties contacted during the extended initial review period.

Moreover, getting more time to review the transaction does not address the information deficiencies outlined above and addressed by the final rule. While serving as an existing work-around to give the Agencies more time to collect additional information not contained in the HSR Filing, the option to withdraw-and-refile is a poor substitute for having the necessary information submitted with the HSR Filing for several reasons. First, the current information requirements leave important gaps, as detailed above in section II.B., leading staff to flag filings for no-action when in fact they may warrant a closer review.[219] In practical terms, the HSR Filing must contain sufficient information from the filers to allow the Agencies to spot transactions that may warrant follow up. Merely adding time on the clock does not fill the information gaps identified above.

Second, withdraw-and-refile is optional for filers and thus is not a tool the Agencies can rely on to collect more information when needed. While parties may decide to delay their transaction to lower the chances of receiving a Second Request, in many instances the parties do not withdraw and refile precisely because they fully expect to receive Second Requests. When the parties do withdraw and refile, the Agencies spend considerable time waiting for answers to key questions; in any event, having more time is not the same as having the information needed to conduct an initial antitrust assessment. The Agencies' experience is that these voluntary submissions are often late or incomplete. When the information arrives near the end of the extended waiting period, there is often not enough time to review and verify the information. As a result, investigations that are extended through a withdrawal and refile are costly in time and effort for both Agency staff and the parties: extra time does not always translate to collecting the right information to make the initial determination whether the transaction should be fully investigated through the issuance of Second Requests.

Finally and most importantly, a filer's submission of any additional information beyond what is required for an HSR Filing is voluntary. Given that the Agencies have no ability to demand compliance with voluntary requests, there is an overwhelming incentive for filers to prioritize the collection and submission of information suggesting that there is no competitive problem, rather than supplying the necessary information in an objective and neutral manner. Thus, while the agency may receive additional relevant information on a voluntary basis, it remains extremely challenging for the Agencies to both review and verify this information in whatever short period of time is available to decide whether to issue Second Requests.

Expending so many resources on withdraw-and-refile investigations is

[218] 78 FR 10574, 10576 (Feb. 14, 2013).

[219] *See supra* note 24 (citing research finding that consummated hospital mergers that received early termination resulted in the largest average percentage price increase).

inefficient both for the parties and the Agencies and is a source of undue delays for many deals every year, because having more time is not a substitute for having sufficient and reliable information provided on a mandatory basis on the first day of the waiting period. The Commission believes that requiring more information in the HSR Filing through a final rule that is focused on surfacing competition problem areas will reduce the need for extended withdraw-and-refile investigations for a significant number of transactions that do not require Second Requests.

Expanding the information that filers are required to provide upfront has certain benefits for filers and gives full effect to the purpose of a very short initial waiting period: because the information will be available to the Agencies on the first day of the initial waiting period, this will reduce delays for deals that do not receive Second Requests but nonetheless are delayed because staff must collect information from third parties or public sources, including when the parties withdraw and refile their HSR Filing. In addition, having this information upfront may allow Agency staff to narrow the areas of focus to only those business lines that require further investigation.[220] Based on the Commission's experience, the additional information will allow the Agencies to significantly reduce burdens on filing parties in many circumstances.

Moreover, the additional information required by the final rule addresses the fundamental information asymmetry that currently exists between what the parties know about their business and what information they are required to reveal to the Agencies in the HSR Filing. Shifting the burden of information collection from the Agencies to the filing parties minimizes the burden on Agency staff to collect basic business information about the filers from other sources, such as their customers or other market participants, or from public sources, which may not surface key confidential business information known only to the parties. It also minimizes the burden on those third parties. This basic business information is relevant to the Agencies' antitrust assessment and often comes in late in the initial waiting period close to when the Agencies need to determine whether to issue Second Requests.

Moreover, certain information is most readily and reliably available from the parties to the transaction. Although Agency staff collect relevant information from other sources including third parties during the initial waiting period, the benefit of getting this information from the filing parties is that it is likely more accurate and up-to-date and therefore more reliable for the purpose of quickly conducting a premerger assessment of antitrust risk. Obtaining basic business information about the operations of the filing parties secondhand from third parties and public sources is no substitute for getting that information directly from the parties themselves. The parties will have the most reliable and relevant information necessary to conduct a preliminary assessment of the transaction during the initial waiting period.

Having reliable and accurate information directly from the entity most likely to have it reduces overall information-collection costs and delays. That is just good government, according to some members of Congress: ''Requiring transacting parties to provide regulators with the information necessary to examine a proposed merger is a commonsense way to save taxpayer dollars and enable antitrust enforcers to fulfill their congressional mandate and protect consumers, the economy, and national security.'' [221]

To further reduce delays for transactions that pose little or no antitrust risk based on information contained in the HSR Filing, the statute also provides the Agencies with the discretion to grant an early termination of the initial waiting period, reducing the statutory 15- or 30-day delay to something less.[222] For many years, the Agencies routinely granted early termination to those filers that requested it.[223] Contrary to the assertions of some commenters, the Commission reviews the information provided in *every* filing (typically two filings per transaction) [224] to ensure compliance with the requirements of the HSR Act and to conduct a preliminary assessment of antitrust risk. The decision to grant discretionary termination of the waiting period prior to the statutory deadline is the result of staff review of the information contained in the HSR Filing, a determination that takes time, knowledge of the HSR Rules, and often additional research from public sources to ensure that there is little to no risk that the transaction requires additional investigation prior to consummation. There is also the additional time spent coordinating both Agencies' conclusions as well as processing the granting of early termination through publication in the **Federal Register**.[225]

Prioritizing staff resources to reduce delays through early termination over the identification of problematic deals became impractical during the latest surge in HSR-reportable transactions, beginning in the fall of 2020 when the Agencies were faced with an unprecedented increase in merger filings.[226] As reflected in Figure 1 above, the number of HSR-reportable transactions spiked in FY 2021, resulting in more than twice the number of filings as compared to the prior year. Given the time and effort required to collect additional information during the initial waiting period—information that is not contained in the current Form but that bears directly on whether the Agencies should conduct a more in-depth investigation or grant early termination—the Agencies temporarily suspended the granting of early termination, first briefly in order to adjust to the challenges of processing premerger filings during the COVID–19 pandemic, and then again due to a surge in merger filings.[227]

As an additional measure, the Commission determined that it would

[220] As discussed elsewhere, the Commission did not consider any ''burden'' associated with better detection of illegal mergers. Identifying additional transactions for investigation and possible challenge is a benefit of effective and efficient premerger review.

[221] Comment of Sen. Elizabeth Warren et al., Doc. No. FTC–2023–0040–0711 at 5.

[222] 15 U.S.C. 18a(b)(2).

[223] Not all parties request early termination; whether to request early termination is solely at the discretion of the filing parties. Because the Agencies are required to make public grants of early termination through publication in the **Federal Register**, some filers may prefer not to have their acquisitions made public in this way.

[224] As reflected in appendix A of the Annual HSR Reports, the Agencies typically receive two filings for each transaction, one from the acquiring person and one from the acquired person. In FY 2022, the Agencies reviewed 6,288 filings for 3,152 reported transactions. Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Report, Fiscal Year 2022 appendix A (FY 2022).

[225] Commission staff take seriously the statutory obligation not to disclose information about an HSR Filing. Because the granting of early termination requires public notice in the **Federal Register** and is often the first indication that a proposed acquisition is in the works, staff must take great care to avoid mistakes when processing these requests.

[226] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix B (FY 2021) (reporting monthly HSR filings for FY 2012 to FY 2021). *See* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020, Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021) (''FY 2020 HSR Statement''), *https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf.*

[227] *See* Press Release, Fed. Trade Comm'n, ''FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination'' (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

provide notice to filers whose deals could not be adequately screened during the initial waiting period, warning them that although the waiting period had expired, the transaction remains subject to antitrust challenge under section 7.[228] In the Commission's view, these pre-consummation warning letters are consistent with the legislative intent that lack of agency action prior to the expiration of the initial 15- or 30-day waiting period does not bar the Agencies (or other enforcers of the Clayton Act such as States or private parties) from later challenging the notified transaction. That is, premerger review provides the Agencies with the opportunity to investigate and challenge suspect transactions as violative of section 7; it does not require nor allow the Agencies to determine that the merger does not or would never violate section 7.

These recent adjustments to the Agencies' premerger review process reflect the burdens on Agency staff to triage filings during the very limited statutory period allowed for the initial review, which underscores the need for additional information at the outset of the initial waiting period. Even for those transactions in which the parties give the Agencies additional time by withdrawing and refiling their notification, relying on voluntary submissions has not been sufficient to overcome the lack of relevant information needed to conduct a robust screening for a significant number of deals.

As several commentators noted, it is appropriate that the Agencies, who have the responsibility to identify which transactions should be challenged, address the significant information asymmetry between the parties and the Agencies by collecting more information from the parties upfront. The Commission agrees. The Commission has determined that the information deficiencies of the current reporting requirements are imposing undue delay on those transactions that the Agencies determine do not require intervention prior to consummation. The final rule addresses these inefficiencies by shifting more of the costs of information acquisition to the merging parties, both because they are the most reliable and ready sources for that information and to reduce the costs and delays associated with information acquisition from other sources, including third parties. The Commission believes that the final rule represents a reasonable adjustment to the information requirements for premerger notification that will reduce the number of transactions that are delayed beyond the initial review period.

3. The Purpose of the HSR Form Versus Second Requests

Several commenters asserted that if the Agencies need more information, they should issue more Second Requests as an alternative to issuing this final rule, because that is the mechanism Congress gave the agencies to collect more information. Commenters also compared the requirements of the proposed rule to those contained in a Second Request, asserting that this rulemaking would inappropriately convert the HSR Filing into the equivalent of a Second Request in terms of scope and burden. As discussed below, the Commission disagrees with these commenters. Congress gave the Agencies a mandate to collect information that is necessary and appropriate in the HSR Filing to determine whether the reported transaction may violate the antitrust laws, which would justify the burden (on both the parties and the Agency) associated with issuing Second Requests. The purpose of requiring an HSR Filing is to give the Agencies time and information to conduct mandatory premerger screening. The purpose of issuing Second Requests is to conduct an in-depth review of other information and documentary materials that would allow the Agency to determine whether to challenge the transaction prior to consummation. The Commission has concluded that the final rule more appropriately reflects the purpose of the statutory scheme, which requires the information from all filers that is necessary for premerger screening but requires extensive information in response to a Second Request (which today, often represents millions of documents and terabytes of data) only from those filers whose transactions warrant an in-depth antitrust investigation. Thus the final rule is a reasonable exercise of the Commission's rulemaking authority to address the information deficiencies identified in section II.B. rather than rely on the extraordinarily costly alternative of using Second Requests to address those deficiencies.

Commenters point to research that indicates there is a high probability that a transaction will be challenged if the Agencies issue Second Requests and suggest that this means that Second Requests are the most reliable tool for the Agencies to identify potentially harmful deals. But a close read of the study cited by commenters reveals that there are reasons to question the conclusions commenters have drawn from the low number or high through-rates of Second Requests. Billman and Salop examined the Agencies' enforcement record and calculated that for those transactions that receive a Second Request, 28 percent are cleared as proposed.[229] Billman and Salop also report that the percentage of Second Request investigations has fallen over time, from about 3.49 percent in 2001 to 2.92 percent in 2020. These figures are consistent with information reported by the Agencies in annual HSR Reports.[230] In their report, Billman and Salop contend that the reason behind the falling number of Second Requests is limited agency resources, not diminishing antitrust risk due to mergers:

> The agencies issue so few second requests because they have been budget constrained during this entire period. Under these circumstances, the agencies must engage in a type of triage process. Being limited in the number of second requests they can issue and cases that they can afford to litigate in court, the agencies target only the limited number of most problematical looking mergers for second requests. Not surprisingly, they generally discover evidence of potential anticompetitive effects. And not surprisingly, the firms generally consider the validity of the concerns, and most are then willing to accept a consent decree or abandon the transaction. Indeed about 26% (*i.e.,* 254/969) of the firms that receive second requests choose to abandon the transaction even *before* a complaint is issued.[231]

The Commission is well aware of the challenges of fulfilling its mission to prevent harmful mergers with existing resources. Fully resourcing the Commission's competition mission—especially merger review—has been an ongoing challenge. For instance, the Commission's headcount remains well below what is needed in light of the volume and complexity of proposed deals. Over the past ten years, the absolute number of HSR filings has nearly doubled, while the number of FTC employees assigned to competition work has remained nearly flat. As a result, the Commission has been forced to make difficult triage decisions and forgo potentially worthy investigations.[232] Moreover, funding

[228] *See* FY 2020 HSR Statement, *supra* note 226.

[229] Logan Billman & Steven C. Salop, ''Merger Enforcement Statistics: 2001–2020,'' 85 Antitrust L. J. 1, 6 (2023).

[230] *See* appendix A of HSR Annual Reports, available at Fed. Trade Comm'n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56.

[231] Billman & Salop, *supra* note 229, at 7.

[232] *See* Statement of Chair Lina M. Khan, joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY 2022 HSR Annual Report to Congress (Dec. 21,

levels for the antitrust agencies has not kept pace with the impressive growth of the U.S. economy: according to one report, from 2010 to 2019, U.S. GDP increased 37 percent but appropriations for the Antitrust Division and the FTC increased only 3 percent.[233]

Commenters who supported expanded information requirements suggested that limited resources justify this rulemaking, while those opposed claimed that resource limitations are the real source of underenforcement of the antitrust laws, a problem that will not be solved by adding burdensome new information requirements. Whatever the funding levels, the Agencies must deploy their resources to be good stewards of public funds and make resource allocation decisions to pursue their mutual mission to enforce the antitrust laws for the benefit of the public. The Commission has concluded that regardless of resource levels, it is critical to the task of detecting illegal mergers that the HSR Filing contain sufficient information for an effective premerger antitrust assessment of the transaction rather than relying on issuing more Second Requests to compensate for information deficiencies in the HSR Filing.

The Commission has determined there are several reasons why issuing more Second Requests is not a reasonable alternative to address the information gaps discussed in section II.B. above. First, without the additional information required by the final rule, the Agencies would continue to struggle to uncover key facts necessary to determine whether to issue Second Requests for reported transactions that warrant in-depth review. The Agencies are currently making these assessments and relying on Second Requests when necessary, but they are doing so knowing that there are deficiencies in the information currently collected on the HSR Form, resulting in significant extra effort to generate sufficient information to make that determination prior to the expiration of the initial waiting period. In light of the deficiencies in the information currently collected that are discussed in section II.B., the Commission has determined that the status quo does not permit the Agencies to fulfill their statutory mandate to identify those transactions that warrant the issuance of Second Requests.

Second, issuing more Second Requests is an extremely costly alternative to the final rule. The costs, burdens, and delay associated with Second Requests—for both the parties and the Agencies—are well documented. In 2000, Congress amended the HSR Act to provide for an optional internal review process for Second Request recipients to object to the breadth and cost of complying with those requests [234] and requiring the Agencies to conduct ''an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.'' [235] Yet despite Agency reforms to reduce burdens and costs, [236] the AMC noted the widespread belief that complying with a Second Request imposed significant costs. The AMC cited a survey conducted by the Antitrust Section of the American Bar Association which reported that, on average, investigations during the second waiting period took seven months and resulted in median compliance costs of $3.3 million.[237] A more recent survey conducted in 2014 by the Mergers & Acquisitions Committee of the ABA reported that average cost of compliance with a Second Request was $4.3 million among respondents.[238] Another study shows that Second Requests impose significant delays and risks, even for deals that are ultimately not challenged by the Agencies, increasing the time required for premerger review from an average of 98 days (3.3 months) for acquisitions that do not receive a Second Requests to 237 days (7.9 months) from announcement to closing.[239]

The Commission has determined that the final rule is a better regulatory alternative than issuing more Second Requests because the final rule provides the Agencies with the information necessary for an efficient and effective premerger assessment and to determine which reportable transactions warrant the issuance of Second Requests. The Commission considers the costs that would be associated with issuing more Second Requests as an alternative to the final rule to be unnecessary and unjustified. By relying on only the information contained in current HSR requirements and issuing more Second Requests, the Agencies would be imposing these significant costs on deals that are even more ''on the margin'' than the ones that are currently identified for a Second Request investigation. Issuing more Second Requests without adjusting the information in the HSR Filing would most likely result in significant costs for additional transactions and undue delay for even more deals that are not ultimately challenged in court.

More importantly, without addressing the information deficiencies outlined in section II.B., the Agencies would miss certain transactions that warrant further review. For these transactions, which are currently not subject to Second Requests, the costs of complying with the additional information requests for the HSR Filing are justified by the enhanced ability of the Agencies to detect the potential for the transaction to violate the antitrust laws. In other words, the final rule makes it more likely that the transactions that present the most significant risk violating the antitrust laws, and therefore most clearly warrant the costs and delays associated with an in-depth investigation, are those that will receive Second Requests.

As an added benefit, the additional information contained in the HSR Filing will allow the Agencies to focus their investigation on those aspects of the transaction that create antitrust risk, and

2023). *https://www.ftc.gov/system/files/ftc_gov/pdf/StatementofChairKhanJoinedbyComm%27rSlaughterandComm%27rBedoyareFY2022HSRAnnualReport.pdf.*

[233] Michael Kades, ''The state of U.S. federal antitrust enforcement,'' Wash. Ctr. Equitable Growth 22–23 & Fig. 12 (Sept. 17, 2019), *https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true.*

[234] 15 U.S.C. 18a(e)(1)(B).

[235] *Id.* sec. 18a(e)(1)(B)(iii).

[236] *See* Prepared Statement of the Fed. Trade Comm'n Before the Comm. on the Judiciary, Subcomm. on Antitrust, Competition, and Small Bus. and Consumer Rights, United States Senate Concerning An Overview of Fed. Trade Comm'n Antitrust Activities 3 (Sept. 19, 2002), *https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-overview-enforcement-antitrust-laws/020919overviewtestimony.pdf.* In 2002, the Commission's Bureau of Competition issued Guidelines on Merger Investigations, which eliminated some of the more onerous requirements of compliance. *See* Debbie Feinstein, ''A fine balance: toward efficient merger review,'' Fed. Trade Comm'n Competition Matters blog (Aug. 4, 2015), *https://www.ftc.gov/enforcement/competition-matters/2015/08/fine-balance-toward-efficient-merger-review.*

[237] AMC Report, *supra* note 179, at 163. The AMC noted that the survey's value was limited due to reliance on a non-scientific, self-selected sample of only twenty-three responses, and that the median values for most measures of cost were much lower than the means, suggesting the average values were influenced by a few very high observations. *Id.*

[238] Peter Boberg & Andrew Dick, ''Findings from the Second Request Compliance Burden Survey,'' Vol. XIV No. 3 Threshold: Newsletter of the Mergers & Acquisitions Comm. 26, 37 (Summer 2014) (A.B.A. Antitrust L. Sec.). In about one-third of these investigations, parties had withdrawn and refiled their notification, indicating that the strategy was not always effective in avoiding a Second Request. This is consistent with the Commission's assessment of withdraw and refile data, reflected in Table 3 *supra.*

[239] Jana Fidrmuc et al., ''Antitrust merger review costs and acquirer lobbying,'' 51 J. Corp. Fin. 72, 73 (2018).

minimize ''overly broad'' Second Requests, which can also impose unnecessary costs and delays. Specifically, the final rule provides the Agencies with the information that is necessary to make the critical decision whether and how to burden the filers and the Agencies with the costs and delays associated with an in-depth investigation of the reported transaction.

Indeed, one goal of this rulemaking is to reduce the number of Second Request investigations that do not lead to an enforcement action. Imposing substantial costs in addition to undue delay on transactions that are unlikely to face a court challenge is the wrong response to the information deficiencies outlined in section II.B. The Commission has determined that imposing minimal additional costs on all filers to properly conduct premerger screening will likely reduce the number of transactions that receive a Second Request but do not face a court challenge, a very significant benefit to filers. The Commission expects that, on balance, the final rule will reduce the number of unnecessary or overly broad Second Requests and that this outcome is consistent with the statutory scheme created by Congress.

Much of the increased cost of a Second Request investigation (for both the parties and the Agencies) is due to the increasing complexity of merger litigation, and including the costs associated with post-complaint discovery. Federal judges overseeing merger trials routinely remark on the scope and effort of proving and refuting the facts needed to assess whether a proposed transaction violates the antitrust laws.[240] The Agencies' costs in litigating these cases have also increased significantly in recent years, especially the cost of hiring outside experts to support the litigation.[241] To a large extent, the scope and burden of a Second Request is driven by the growing need for data and other evidence required to make an informed decision whether to devote scarce resources to a particular case in light of the likelihood that the agency can establish liability under section 7 of the Clayton Act.

Of the commenters objecting to the proposed rule, some argued that the final rule would collapse the distinction between the notification form and a Second Request. The Second Request is the Congressionally mandated tool for the collection of additional information to determine whether to challenge the transaction prior to consummation. The Commission states that it is not its intention in any way to require in the initial notification all the information that may be necessary to determine whether to file a complaint alleging an antitrust violation. Instead, the final rule ensures that the Agencies have the information necessary to identify those transactions that require the issuance of Second Requests, a decision that must be made prior to the expiration of the statutory waiting period. The Commission disagrees that the final rule requires anything near the amount of data and documents sought in Second Requests, which are tailored for each recipient. For example, the Commission's Model Second Request requires the submission of all documents related to pricing for any relevant product for the last three years[242] and the Department of Justice's Model Second Request requires the submission of each database or data set containing a range of information about the relevant product.[243] That level of detail and analysis is not required by the final rule and is not warranted in an HSR Filing. In the final rule, the Commission has identified the information that the Agencies need to conduct a preliminary screen for antitrust risks. A Second Request represents a whole different level of detail and analysis, one much more aligned with determining whether there are facts sufficient to establish to a court that the merger may substantially lessen competition or tend to create a monopoly.

As discussed in section III.A., the Commission believes that it is consistent with the statutory premerger regime to collect certain critical information directly from those involved in the transaction and to have that information available on the first day of the initial waiting period. The Commission believes that it is well within its statutory authority to require minimally sufficient information in the HSR Filing that is necessary and appropriate to screen each reported transaction for antitrust risk without resorting to issuing more Second Requests to require information that is not currently submitted with the HSR Form.

Moreover, the Commission believes that Second Requests should continue to be reserved for those transactions more likely to violate the antitrust laws and to result in measurable harm if not blocked prior to consummation. Issuing more Second Requests as a remedy for deficient HSR Filings imposes opportunity costs on the Agencies, diverting resources that could be used to address other potential violations of the antitrust laws. Moreover, as discussed above, one potential benefit of the final rule is that it may reduce the number of Second Requests or limit their scope. Issuing more Second Requests runs counter to that goal and would also impose significant additional costs on the Agencies, the filing parties, and third parties. In the words of one commenter: ''These proposed changes exemplify good government. They would save regulators valuable time and resources in evaluating merger proposals, making the agency's processes more efficient.'' [244]

In sum, in adopting this final rule, the Commission believes that it has identified the specific additional information that, in the Agencies' experience, is most relevant to determining whether to issue Second Requests or narrow their scope. Moreover, as detailed below in sections IV. through VI., the Commission has made significant modifications in the final rule to better balance the need for additional relevant information while avoiding undue delay and cost where the likely benefit to the Agencies is low, especially for those deals that they can quickly determine are not likely to violate the antitrust laws. The Commission believes that the final rule, as modified, would better address the information deficiencies outlined above as compared to other available regulatory options such as relying on more Second Requests.

The Commission has also considered whether to rely on the expanded use of voluntary supplemental submissions from the parties, including as part of a pull-and-refile investigation, as an alternative to the final rule. See section III.A.2. But this alternative does not address the information deficiencies that this rulemaking has identified with

[240] *See, e.g., FTC* v. *Peabody Energy Corp.,* 492 F. Supp. 3d 865, 874 (E.D. Mo. 2020); *FTC* v. *Staples, Inc.,* 190 F. Supp. 3d 100, 110 (D.D.C. 2016); *FTC* v. *Sysco Corp.,* 113 F. Supp. 3d 1, 15 (D.D.C. 2015); *United States* v. *JetBlue Airways Corp.,* cv–23–10511 (D. Mass. Jan. 16, 2024).

[241] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n to Rep. Thomas P. Tiffany 5–6 (Nov. 3, 2023) *https://www.ftc.gov/system/files/ftc_gov/pdf/2023.11.3_chair_khan_letter_to_rep._tiffany_re_merger_challenges.pdf* (citing expert witness costs related to merger enforcement in Federal court).

[242] *See* Fed. Trade Comm'n, Bureau of Competition, Model Second Request Specifications 8 (rev. Jan. 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/Final-Rev-Model-Second-Request-01-26-2024.pdf.*

[243] U.S. Dep't of Justice, Model Second Request, Specification 2, *https://www.justice.gov/atr/file/706636/dl.*

[244] Comment of SEIU, Doc. No. FTC–2023–0040–0699 at 2.

the current information requirements. Without the collection of information related to the antitrust risks identified in section II.B., the Agencies lack a basis to identify the need for additional voluntary submissions from the parties. The Agencies are already relying on supplemental submissions from a large number of filers, often resulting in the parties withdrawing and refiling their notification. See Table 3. Routinely requiring voluntary submissions from even more filers as an alternative to obtaining needed information in the HSR Filing would impose unnecessary burden and delay on filings that are not currently flagged for follow up.

Based on the Agencies' experience of conducting premerger review for over four decades, the Commission identified the additional data and documents that, if submitted with the HSR Filing, would reduce delays and burdens associated with information-gathering during the initial waiting period and satisfy the Agencies' mandate to conduct a premerger assessment of each reported transaction. To that end, the final rule targets information that is likely already available to filers, such as documents related to the transaction, as well as historical data and documents about their business, including ordinary course business plans and reports. The final rule marries descriptive responses with documents submitted with the HSR Filing, providing the Agencies with a holistic view of the operations of each party, including any existing business relationships that would be affected by the transaction. Overall, the final rule aligns the information requirements of the HSR Filing with the Agencies' task of identifying transactions that may violate the antitrust laws. For many of the new requirements, parties only have to respond if they identify an existing business relationship (*e.g.,* one party is the other party's competitor or supplier). Based on the Agencies' experience, parties in most cases do their own assessment of the antitrust risk associated with the planned transaction before submitting an HSR Filing and will therefore already have relevant information about any existing business relationship. In short, the Commission has calibrated the HSR Filing's reporting requirements so that the filing contains sufficient information for the Agencies to determine whether the transaction is one that is likely to raise antitrust concerns. The Commission believes that the final rule is well within the authority given to it by Congress to implement a notification scheme that minimizes costs and delays associated with mandatory premerger review and yet generates the benefits of preventing illegal mergers prior to consummation.

B. Major Questions Doctrine

Two commenters suggested that the proposed rule implicates the major questions doctrine.[245] The Commission disagrees. According to the Supreme Court, the major questions doctrine is implicated in ''extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [246]

This rulemaking does not involve a major question as the Supreme Court has used that term. The final rule merely updates the disclosure requirements for acquisitions that already are required to submit to mandatory premerger notification. As reflected in Table 1, transactions reported under the HSR Act constitute only a fraction of the total number of mergers and acquisitions that occur each year in the United States. Congress has determined that most acquisitions should not be subject to premerger review, and this rule does not impact them.

Considerations of history and breadth also demonstrate that the final rule does not involve a major question. The breadth of the Commission's authority here ''fits neatly within the language of the statute. . . .'' and is well established.[247] The Commission has clear congressional authorization to issue rules and a long history of exercising its authority to promulgate HSR Rules under section 18a(d). The Commission has made both substantive and ministerial amendments to the rules dozens of times to improve the program's effectiveness and to adjust the reporting requirements to keep pace with market realities.[248] Requiring

[245] One commenter also argues that the Commission's rule runs afoul of the non-delegation doctrine. The Commission disagrees. First, the Commission's rule has no bearing on the authority Congress delegated to the Commission when it passed the HSR Act. Second, Congress' delegation of rulemaking authority to the Commission does not run afoul of the non-delegation doctrine. The non-delegation doctrine is based on the Supreme Court's interpretation of Article I, Section 1 of the Constitution, which vests all legislative powers in Congress. The Court has interpreted this clause to mean that Congress cannot delegate its legislative power to another branch of government without supplying an intelligible principle. *See J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, 409 (1928); *Gundy* v. *United States,* 139 S. Ct. 2116, 2129 (2019). Congress provided several intelligible principles in the HSR Act to guide the Commission's exercise of authority. For instance, it directed the Commission to require notification in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether the acquisition may, if consummated, violate the antitrust laws. Congress also stated that the Commission may define terms and exempt classes of persons, acquisitions, transfers, or transactions not likely to violate the antitrust laws from the reporting requirements.

[246] *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022) (cleaned up); *see also Biden* v. *Nebraska,* 143 S. Ct. 2355, 2372 (2023).

[247] *Biden* v. *Missouri,* 595 U.S. 87, 93 (2022).

[248] *See* 43 FR 33450 (July 31, 1978) (publishing final rules for premerger notification); 44 FR 66781 (Nov. 21, 1979) (increasing minimum dollar value exemption contained in 16 CFR 802.20); 45 FR 14205 (Mar. 5, 1980) (replacing requirement that certain revenue data for the year 1972 be provided in the Notification and Report Form with a requirement that comparable data be provided for the year 1977); 48 FR 34427 (July 29, 1983) (amending premerger notification rules to clarify and improve the effectiveness of the rules and of the Form and reduce the burden of filing notification); 50 FR 46633 (Nov. 12, 1985) (revising Form at 16 CFR part 803 appendix); 51 FR 10368 (Mar. 26, 1986) (same); 52 FR 7066 (Mar. 6, 1987) (amending rules to reduce cost of complying with the rules and to improve the program's effectiveness); 52 FR 20058 (May 29, 1987) (amending definition of the term ''control'' as it applies to partnerships and other entities that do not have outstanding voting securities); 54 FR 21425 (May 18, 1989) (interim rule codifying practices that make public administrative grants of early termination of the waiting period through means other than publication in the **Federal Register**); 55 FR 31371 (Aug. 2, 1990) (revising revenue reporting); 60 FR 40704 (Aug. 9, 1995) (same); 61 FR 13666 (Mar. 28, 1996) (defining or creating exemptions to filing); 63 FR 34592 (June 25, 1998) (exempting divestitures pursuant to consent agreements); 66 FR 8680 (Feb. 1, 2001) (interim rule implementing changes to the HSR Act); 66 FR 23561 (May 9, 2001) (interim rule revising revenue reporting); 66 FR 35541 (July 6, 2001) (implementing May 9, 2001 interim rule with slight changes); 67 FR 11898 (Mar. 18, 2002) (amending certain exemptions); 67 FR 11904 (Mar. 18, 2002) (clarifying); 68 FR 2425 (Jan. 17, 2003) (same); 70 FR 4988 (Jan. 31, 2005) (amending the premerger notification rules to reflect adjustment and publication of reporting thresholds required by the 2000 amendments to section 7A of the Clayton Act, 15 U.S.C. 18a); 70 FR 11502 (Mar. 8, 2005) (amending rules to address treatment of corporations, partnerships, limited liability companies and other types of non-corporate entities and the application of certain exemptions); 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to relieve some of the burden of complying with Items 4(a) and (b) and specifying that notifications in certain types of transactions expire after eighteen months if a second request remains outstanding); 70 FR 77312 (Dec. 30, 2005) (requiring that 2002 revenue data, identified by the 2002 NAICS, be provided in response to certain items on the Form); 71 FR 35995 (June 23, 2006) (allowing submission of notification and report forms electronically via the internet); 76 FR 42471 (July 19, 2011) (implementing changes to streamline the Form, adding Items 4(d), 6(c)(ii) and 7(d) to capture additional information that would significantly assist the Agencies in their initial review, addressing omissions from 2005 rulemaking involving unincorporated entities); 78 FR 41293 (July 10, 2013) (setting forth the procedure for voluntarily withdrawing an HSR filing, establishing when an HSR filing will be automatically withdrawn if a filing publicly announcing the termination of a transaction is made with the SEC, and setting forth the procedure for resubmitting a filing after a withdrawal without incurring an

Continued

information necessary and appropriate to determine whether a transaction, if consummated, may violate the antitrust laws is certainly a ''tool'' in the Commission's ''toolbox,'' given the Commission's history of taking action against anticompetitive mergers.[249] Since 1977, the Commission and the Antitrust Division of the Department of Justice have published an annual report outlining their efforts to protect competition by identifying and investigating mergers and acquisitions that may violate the antitrust laws.[250] These reports demonstrate that premerger notification and merger enforcement is an area that falls squarely within the Commission's ''wheelhouse.''[251]

Even if the final rule could be characterized as implicating a major question, the HSR Act provides ''clear congressional authorization'' for the rule.[252] Congress spoke clearly when it granted the Commission authority to determine the form and content of premerger notifications as necessary and appropriate to enable the Agencies to determine whether a proposed acquisition may, if consummated, violate the antitrust laws,[253] and the final rule falls squarely within that delegation of authority. The Commission is asking filers to provide information necessary to evaluate whether a transaction may violate the antitrust laws. This information is missing from the current filings, and it is appropriate that filers, who are in the best position to report basic information about their own businesses, provide that information. The rule updates are necessary and appropriate for the Commission to accomplish the goals Congress set out for it: effective premerger review as a tool to prevent illegal mergers prior to consummation and fully enforce the antitrust laws' proscription against undue concentration. And just recently, Congress increased the requirements of the premerger notification program by requiring the Commission to collect information about foreign subsidies in order to use this data as part of the Agencies' premerger review.[254] Congress has left it to the Commission to ''fill up the details'' based on the many clear principles articulated in the HSR Act [255] and in furtherance of sound and effective enforcement of the U.S. antitrust laws. Accordingly, even if the major questions doctrine applies, the Commission's authority to issue the final rule is clear.

C. Benefits and Costs of the Final Rule

The final rule is intended to address existing information deficiencies in the current HSR Rules so the Agencies can identify transactions that may violate the antitrust laws during the short period of mandatory premerger review provided in the HSR Act. The Commission has determined that the status quo is insufficient because it leaves information gaps that prevent the Agencies from efficient and effective premerger screening to identify which transactions require in-depth review. The final rule also addresses significant information asymmetries between the parties and the Agencies by shifting more of the costs of information acquisition to the parties, who are most familiar with their business operations and structure and who are pursuing the transaction under review. The Commission has considered alternatives to the final rule that would rely on other regulatory options, including the Short Form Alternative discussed in section III.E., and has determined that those alternatives offer different tradeoffs between benefits and costs. The Commission believes that the final rule has the best balance of benefits and costs within the statutory scheme of the HSR Act because it imposes less delay and is less costly than issuing more Second Requests, and it imposes less delay and provides more certainty regarding the completeness of the information than relying on more extensive voluntary submissions of information. Moreover, the final rule is superior to the short form alternative, an option suggested by commenters and discussed below in section III.E., because the Commission lacks a basis at this time to identify a set of transactions that should be eligible for short form treatment using the current information requirements. Most importantly, none of the other alternatives close the information gaps identified in section II.B. to permit the Agencies to effectively and appropriately identify a subset of filings for which Second Requests are warranted and to make critical resource decisions, preventing the Agencies from fulfilling their mandate to conduct a premerger antitrust assessment of reported transactions.

Given that the final rule is the best of the available alternatives, the Commission now addresses comments on whether it is a reasonable exercise of the Commission's statutory authority to adopt the final rule to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws in fulfillment of their premerger review obligations under the HSR Act.

1. Benefits

The Commission has determined that, due to evolving commercial realities, the current information requirements for the HSR Form and Instructions are not delivering the benefits of mandatory premerger review as contemplated by Congress. As discussed in section II.B., changes in M&A activity, corporate structures, and investment strategies have exposed significant information gaps that undermine the Agencies' ability to efficiently and effectively identify transactions that may violate the antitrust laws during the initial 30-day waiting period based on information contained in the current HSR Form. As a result, the Agencies lack sufficient information about the parties and transaction to conduct an initial antitrust assessment for all types of potential harm that could occur due to the merger. Moreover, these changes have amplified information asymmetries between what the parties know about their business activities and how the Agencies collect the information necessary to decide whether to issue Second Requests. The Commission has determined that to realize the benefit of detecting illegal mergers prior to

additional filing fee); 78 FR 68705 (Nov. 15, 2013) (defining and applying the concepts of ''all commercially significant rights,'' ''limited manufacturing rights,'' and ''co-rights'' in determining whether the rights transferred with regard to a patent or a part of a patent in the pharmaceutical industry constitute a potentially reportable asset acquisition under the Act); 81 FR 60257 (Sept. 1, 2016) (allowing DVD submissions and clarifying the Instructions to the Form); 82 FR 3212 (July 12, 2017) (amending the Form); 83 FR 32768 (July 16, 2018) (amending rules for clarity, allowing use of email, and updating Instructions); 84 FR 30595 (June 27, 2019) (requiring use of 10-digit codes based upon the North American Product Classification System in place of the 10-digit codes based upon the North American Industry Classification System); 88 FR 5748 (Jan. 30, 2023) (amending the Rules to conform to the new filing fee tiers enacted by the Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b); 89 FR 7609 (Feb. 5, 2024) (amending Parts 801 and 803 of the Rules to make ministerial changes required to reflect the annual adjustment of the filing fee thresholds and amounts required by 2022 Amendments).

[249] *West Virginia* v. *EPA,* 597 U.S. at 730.

[250] *See* Fed. Trade Comm'n Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56 (collecting reports).

[251] *Biden* v. *Nebraska,* 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring).

[252] *West Virginia* v. *EPA,* 597 U.S. at 723–24.

[253] 15 U.S.C. 18a(d)(1).

[254] *See* Merger Filing Fee Modernization Act of 2022, 15 U.S.C. 18b (requiring the Commission to promulgate a rule requiring HSR filings to include information on subsidies received from certain foreign governments or entities that are identified as foreign entities of concern).

[255] *Gundy* v. *United States,* 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman* v. *Southard,* 23 U.S. 1, 31, 43 (1825)).

consummation through mandatory premerger review, the Agencies need more information relevant to the antitrust risk of reportable acquisitions in the HSR Filing.

The Commission has considered the extent to which the final rule furthers the Congressional goal of preventing illegal mergers prior to consummation through mandatory premerger review. The benefit of having sufficient information in the HSR Filing to screen for all types of antitrust risks derives from several sources:

(1) the non-consummation of harmful mergers that otherwise would not have been caught during premerger screening, whose harm continues unless and until the merger is unwound and competition in the affected market is restored, if it can be restored at all;

(2) the reallocation of staff hours from attempting to collect additional necessary information from the parties on a voluntary basis and reduced uncertainty that delay and insufficiency create for resource allocation decisions;

(3) the reallocation of staff hours from collecting additional necessary information from third parties regarding the parties' business operations;

(4) the reduction in burden required for third parties to respond to the Agencies' outreach to provide information known to the filing parties, but not currently required by the Form;

(5) improvements in premerger screening through

(i) more accurate identification of transactions requiring in-depth review;

(ii) the reduction in the number of HSR Filings withdrawn and refiled for the purpose of allowing Agency staff to collect and review more information from the parties;

(iii) reduction in delays associated with HSR Filings, including those that are withdrawn and refiled but do not receive Second Requests;

(iv) the narrowing of issues required to properly focus any in-depth review, including through the issuance of more targeted and less burdensome Second Requests;

(v) the reduction in the number of Second Request investigations that do not ultimately result in enforcement or voluntary restructuring; and

(6) a more efficient allocation of resources devoted to merger enforcement, including by avoiding expensive and time-consuming litigation to unwind consummated mergers that cause harm but were not identified under the current rules.

Consistent with Congressional intent, all of these benefits accrue to the American public in the form of reductions in the harmful effects of illegal consummated mergers, including price increases or reductions in output, reductions in quality and innovative activity, lower wages, and other effects, and more effective use of public resources devoted to antitrust enforcement. Other market participants that would otherwise be harmed by an illegal merger also benefit from improved detection that leads to enforcement that prevents or neutralizes the harm from that merger.

Many of these benefits cannot be quantified, or quantification cannot be done with a high degree of reliability. Where the Commission is unable to estimate a benefit quantitively, it provides a qualitative description of the benefit using the best available methods,[256] and in light of the purpose of mandatory premerger review. Based on its experience gathered over decades of premerger review of transactions reported under the HSR Act, the Commission considered the following benefits that would derive from the final rule as compared to the status quo.

a. Detecting Additional Harmful Mergers

Section 7 of the Clayton Act prohibits an acquisition where the effect of such acquisition may be to substantially lessen competition or to tend to create a monopoly. Acquisitions that have these effects deprive the public of the benefits of competition, which include lower prices, improved wages and working conditions, higher quality and resiliency in the supply chain, and more innovation and choice, among other benefits. section 7 of the Clayton Act was designed to arrest anticompetitive tendencies in their incipiency,[257] and mandatory premerger review gives the Agencies time and information to assess whether a reported transaction may violate the antitrust laws and seek to block it in Federal court prior to consummation. While it is difficult to calculate with precision the likely ill effects of an acquisition before it happens, Table 2 above contains estimates of potential harm from mergers in cases that were litigated by the Agencies in recent years, representing a range of outcomes from mergers that were not consummated as a result of premerger review and a subsequent Agency enforcement action. For any particular illegal merger, the potential for harm may be small or large and depends on many factors, including the size of the companies involved, the geographic scope of their operations, the number of customers they serve, and the value of their products. Many of the benefits of competition that may be lost due to a merger are more difficult to quantify, such as the loss of innovation competition or degradation in the quality of products or services offered. Thus, the magnitude of the anticompetitive effect of any particular merger that would have occurred but for the Agencies' intervention is imprecise at best and does not capture the full impact of the loss of dynamic and beneficial competition now and in the future.

In connection with their enforcement and reporting mandates, the Agencies also provide public estimates of the average consumer savings resulting from antitrust enforcement, including mergers that the Agencies challenge in an enforcement action (which include negotiated settlements requiring divestitures or transactions that are restructured prior to consummation). These estimates are contained in each agency's budget justification submitted to Congress.[258] Table 4 below summarizes the Agencies' estimates of harms to consumers and other market participants that would have occurred in the affected markets but for the agency's antitrust enforcement action. These savings reflect all civil antitrust enforcement activities, which include merger enforcement.

[256] *See generally* Anthony E. Boardman et al., Cost-Benefit Analysis: Concepts and Practice 44 (5th ed. 2018); Office of Management and Budget, Circular A–4 at 5 (Nov. 9, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

[257] *See, e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318 nn.32–33 (1962); *see also United States* v. *AT&T, Inc.,* 916 F.3d 1029, 1032 (D.C. Cir. 2019); *Saint Alphonsus Med. Ctr.-Nampa* v. *St. Luke's,* 778 F.3d 775, 783 (9th Cir 2015); *Polypore Int'l., Inc.* v. *FTC,* 686 F.3d 1208, 1213–14 (11th Cir. 2012); *FTC* v. *IQVIA Holdings Inc.,* No. 1:23 Civ. 06188 (S.D.N.Y. Dec. 29, 2023).

[258] The Agencies provide annual budget justifications to Congress which contain these estimates. *See* Fed. Trade Comm'n, ''Budget, Performance, and Financial Reporting,'' *https://www.ftc.gov/about-ftc/budget-strategy/budget-performance-financial-reporting* (collecting reports) and U.S. Dep't of Justice, ''Budget and Performance,'' *https://www.justice.gov/doj/budget-and-performance* (collecting reports).

Table 4: Annual Estimated Consumer Savings from Antitrust Enforcement (Millions of Dollars)

Fiscal Year	FTC	DOJ	Total
2014	1,419	3,378	4,797
2015	3,400	3,387	6,787
2016	3,610	2,271	5,881
2017	3,710	1,408	5,118
2018	3,760	928	4,688
2019	4,860	3,939	8,799
2020	2,681	712	3,279
2021	2,840	1,567	4,407
2022	3,190	529	3,719
2023	3,290	1,822	5,112
		Average Annual Savings	**5,259**

The Agencies' estimates of consumer savings in Table 4 are calculated based on the relevant product and geographic markets that were alleged (or would have been alleged) in either a litigation or settlement complaint. However, sometimes litigation or settlements do not address the full scope of the Agencies' competitive concerns. Due to various reasons (resource constraints, investigative efficiency, litigation strategy, etc.), a complaint may, for example, exclude certain markets of concern or theories of harm. When such a merger is blocked or abandoned in its entirety, any expected harm is avoided in all implicated markets and for all theories of harm. In those cases, limiting the calculations to just those markets and theories that would have appeared in a filed complaint further understates the full scope of consumer benefit.[259] These calculations also do not include less quantifiable harms that are avoided through antitrust enforcement, such as reduced innovation or quality.

The Commission believes that the enhanced ability of the Agencies to detect illegal mergers under the final rule will result in similar benefits to additional consumers and other market participants that would have been affected by an illegal merger but for the enhanced detection made possible by the final rule. In addition to these benefits, the final rule permits the Agencies to fulfill their statutory mandate to conduct premerger review for the purpose of preventing illegal mergers prior to consummation, which is a key competition policy directive that undergirds our nation's reliance on open and competitive markets to drive innovation and economic growth.

b. Avoidable Costs and Delays Arising From Insufficient Information on the HSR Form

To understand the inefficiencies created by inadequate information in the current HSR Filing, the Agencies conducted a review of the effort required to collect additional information beyond what is contained in the HSR Filing for investigations that did not result in an enforcement action.[260] The Agencies examined all HSR Filings in FY 2021, when they received 7,002 HSR Filings for an associated 3,520 transactions.[261] The Agencies identified those transactions for which either Agency opened an investigation that did not result in (1) an action brought in Federal court to block the transaction, (2) a negotiated settlement with divestitures, or (3) the transaction being abandoned or restructured as a result of one agency's antitrust investigation.[262] On the basis of this review, the Agencies determined that they conducted 100 investigations in FY 2021 for which they collected information from non-public sources but that did not result in an enforcement action, referred to here as ''no-action investigations.'' [263] Investigational costs associated with these no-action investigations are one product of inefficiencies created by insufficient information in the HSR Filing because they create unnecessary burdens for the parties, the Agencies, and third parties that could be avoided if the HSR Filing contained sufficient information to determine that the transaction is not one that requires challenge via litigation prior to consummation. In addition to the benefits of improved detection outlined above, these benefits represent opportunity costs for Agency staff (who would spend their time on other tasks if not collecting necessary information for transactions that do not warrant enforcement action prior to

[259] Most calculations seek to use quantification tools that align theories of harm being pursued, but not all theories are associated with readily available tools. Thus, for some merger wins, the Agencies' estimates of consumer savings will not reflect the full scope of theories due to the challenges of quantification. This is most relevant for coordinated effects; when a merger raises both unilateral and coordinated effects concerns, the calculations put forward will often reflect only the unilateral concerns (due to the greater availability of unilateral merger simulation tools) but not a robust estimation of additional harm arising from the threat of increased coordination.

[260] The Agencies selected FY 2021 for this effort because of the large number of reportable transactions that year, 3,520, which provided for a robust data set. The Agencies have no basis to believe that the mergers that occurred in that year were different in any material way from the mergers that occurred in other years and so consider them to be representative of HSR-reportable merger activity in general.

[261] Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix A (FY 2021). As appendix A n.1 notes, there are typically two filings for each transaction, one from the acquiring person and one from the acquired person.

[262] These criteria are the ones used by the Agencies to report publicly on their merger enforcement activities.

[263] In FY 2021, the Agencies took action against 32 transactions. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix A (FY 2021) at 2. The Agencies provide data on HSR reportable mergers on a fiscal year basis, but enforcement decisions may occur in a fiscal year after the transaction was first reported. As a result, the number of enforcement actions reported in the annual HSR reports are not necessarily related to the transactions that are reported for that fiscal year. For this exercise, the Agencies tracked the outcomes of transactions that were reported to the Agencies in FY 2021 but decisions about those transactions may have occurred in the following fiscal year.

consummation), as well as burdens and costs for the parties and third parties who respond to staff inquiries designed to collect the information necessary to conduct a premerger assessment of a reported transaction.

In the 100 no-action investigations, staff contacted at least one third party, with an average number of 18 third-party interviews per investigation. Each of these interviews required significant time from these third parties to identify the knowledgeable personnel in the related business operations, and prepare for questions in advance of talking to Agency staff. While some third parties rely on in-house counsel to help prepare for these interviews, some retain outside legal counsel who have experience with antitrust investigations. The Commission lacks a reliable methodology to calculate or estimate the costs borne by third parties to provide necessary information relevant to the Agencies' initial antitrust assessment. The Commission believes that it is appropriate to shift some of this information-gathering burden to the merging parties and away from other market participants—including customers who may suffer harm if the merger is consummated—who currently absorb this burden due to deficiencies in the existing HSR Form. The final rule realigns the burden of providing necessary information toward the parties themselves and away from other third-party companies, including smaller entities who are saddled with unexpected compliance and legal costs solely because they operate in the same or adjacent business lines as the merging parties. As a result, the Commission anticipates a reduction in third parties' costs from adopting the final rule.

Moreover, given the effort that is required to obtain this information from third parties, there is often a delay in collecting critical business facts until late in the initial waiting period, near the time when a decision must be made about issuing Second Requests. As discussed above, additional information from the parties and third parties that is submitted on a voluntary basis often arrives late in the review period. These delays contribute to additional avoidable costs through the issuance of Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing.[264]

One source of delay is the parties' voluntary decision to withdraw and refile their HSR Filing. In 53 of the 100 no-action investigations, the parties voluntarily withdrew and refiled their HSR Filings, which restarted the initial waiting period and gave Agency staff additional time to conduct the review. As discussed above, the Commission believes that most of the investigations in which the parties withdraw and refile their HSR Filings are the result of the parties' concern that the Agency may issue Second Requests when they are not warranted or that the Agency will issue a Second Request that is too broad. As Table 3 shows, when the parties withdrew and refiled, they avoided Second Requests nearly 70 percent of the time in the period FY 2018 through FY 2022. For the remaining 30 percent, the additional time allowed the parties to engage in additional advocacy to avoid or potentially narrow any Second Requests. For withdraw and refile transactions that avoid Second Requests altogether, there is unnecessary delay and uncertainty that could be avoided if the information required to make a no-action decision was provided sooner, including with the HSR Filing.

But for transactions that receive Second Requests, the delay can be substantial; seventeen of the 100 no-action investigations referenced above involved a Second Request. The decision to issue Second Requests, which requires approval from Agency leaders,[265] has significant consequences. As discussed in section III.A.3., the costs and delays associated with Second Requests are substantial, and for any no-action Second Request investigation, those burdens may be avoided if sufficient information were available at an earlier time in the investigation, including in the HSR Filing. For the Agencies, there are significant consequences as well. A Second Request investigation requires a team of lawyers, economists, and support staff. The broader the scope of the investigation (*e.g.,* covering many different products or many different geographic areas), the more staff must be assigned. As a result, avoiding unnecessary or unfocused Second Requests would provide a benefit to the parties, the Agencies, and any third parties contacted during the investigation.

Based on this experience, the Commission believes that the final rule will provide a substantial benefit to the Agencies, the parties, and third parties by reducing the number of Second Requests issued or narrowing the scope of any Second Request. A more efficient process that better identifies transactions that do not require additional investigation benefits parties as well.

Many commenters asserted that the Commission failed to take into account the increased burden on staff of reviewing additional information in HSR Filings. Several stated that given the purportedly huge volume of materials generated by the new requirements, especially the expanded document demands, Agency staff would be overwhelmed, thereby undermining effective screening even for deals they could evaluate with current information requirements. One commenter estimates that the proposed rule would result in over 177,000 additional staff hours (100 full-time attorneys) needed to review the information contained in the revised HSR Filing. On the other hand, other commenters asserted that the proposed changes would modernize the premerger process to better account for the evolving complexities of today's mergers and address potential shortcomings of past merger review that have become clearer in retrospect.

Based on its own experience and in light of the significant reductions contained in the final rule as compared to the proposed rule, the Commission believes that the additional information required by the final rule would result in an overall reduction in the number of staff hours spent collecting additional information from all sources, including the parties, as well as a reduction in associated burdens of reviewing and processing that information. For example, while Agency staff may need to review the transaction documents and additional information submitted with an HSR Filing, they would spend less time on more costly and time-consuming tasks such as conducting independent research or outreach to third parties, preparing voluntary information requests, reviewing additional information submitted by the parties, drafting Second Requests, reviewing voluminous submissions from the parties in response to those requests, and preparing internal reports and memoranda for review by managers. The Commission also acknowledges that it may incur minimal additional administrative and support system costs associated with the revised HSR Form,

[264] For any investigation that results in Second Requests, staff spends a significant amount of time during the initial 30-day waiting period trying to identify the areas of a potential antitrust violation. Both Agencies make public their Model Second Requests. *See supra* notes 242–43. Starting from these models, staff customize each request by identifying areas of existing competition and modifying the terms to fit the particular industry dynamics, products and services, or geographic reach.

[265] For the Commission, the Chair issues the Second Requests; for the Antitrust Division, that determination is made by the Assistant Attorney General. 15 U.S.C. 18a(c)(1)(A).

such as technology costs to process and host additional documents and filings. Overall, however, the work of Agency staff will be more efficient and effective as they will be able to more readily and accurately identify those transactions that pose a risk that they may violate the antitrust laws.

In sum, under the existing HSR reporting requirements, inadequate information in the HSR Filing leads to significant time and effort for Agency staff, third parties, and merging parties even for transactions that do not warrant a legal challenge. These costs (and associated delays) represent an opportunity for the Agencies to realize benefits from the enhanced information requirements contained in the final rule by (1) streamlining the Agencies' internal processes and resources devoted to merger review; (2) reducing costly delays for certain parties whose deals are eventually consummated; and (3) reducing the burden on third parties to collect information for premerger screening. By requiring more of the information to be collected upfront from the parties as part of the HSR Filing, the final rule will reduce some of the costs and effort currently associated with premerger review for transactions that the Agencies ultimately determine do not require enforcement action.

The Commission acknowledges that for some filings, Agency staff will still engage in some of these activities to verify the information in the HSR Filing and reach out to stakeholders who may be affected by the transaction. However, the Agencies will not need to spend as much time and resources to acquire the basic business information about the parties and the transaction that is needed to evaluate the antitrust risk, because more of that basic information will now be contained in the HSR Filing. The reduction in those information-acquisition costs will allow resources to be redeployed to other critical tasks of the Agencies, such as investigating other mergers (including consummated mergers) or other antitrust violations. In addition, any reduction in the costs and burdens imposed on third parties during no-action investigations is a direct benefit of the final rule.

2. Costs

The Commission anticipates that the incremental costs attributable to the final rule will primarily fall on individuals and companies who must make HSR Filings because they are a party to a reportable transaction. The final rule may have effects on other individuals or companies who are considering a reportable transaction but do not eventually pursue one, although these costs will be indirect and hard to quantify. This indirect effect does not include those potential deal partners who decide not to pursue an unlawful transaction because the final rule decreases the likelihood that it will go undetected. That is, any improvement in the Agencies' ability to detect potentially illegal mergers is a benefit of the final rule and cannot reasonably be viewed as imposing unnecessary or unreasonable costs on parties contemplating a reportable transaction. The final rule may also impose additional costs on the Agencies to ensure compliance and review additional information contained in the HSR Filing, although these costs will be more than offset by other reductions in costs, as discussed above.

For those individuals and companies that must submit an HSR filing, the burden of complying with the final rule will primarily consist of the additional cost of completing and submitting an HSR Filing to the Agencies. This includes internal costs (for employees tasked with collecting and reviewing relevant information as well as in-house compliance attorneys and other non-legal support staff) and external costs (including outside experts hired to assist in preparing the HSR Filing such as counsel expert in HSR rules or other tasks that filers chose to outsource to a third-party service provider). The majority of filers hire experienced attorneys who are familiar with current HSR Rules. The Commission expects that filers will continue to do so and that those professionals (and other legal and technical support staff) will require some additional time to prepare filings.[266] Current requirements also require knowledgeable personnel from the filing entity to collect and prepare data and documents for the Filing, and the Commission expects that these individuals will expend some additional time and effort to comply with the final rule.

The Commission anticipates that the final rule will result in incrementally higher direct costs for all filers.[267] As discussed above, some of these information acquisition costs are currently borne by third parties and the Agencies and will now be borne directly by the filers themselves. Incremental direct costs associated with the final rule will be borne primarily by those UPEs (and the entities they control) that must submit an HSR Filing, though some portion of the costs may be borne by officers or directors of entities within the acquiring person that will have to provide information to the acquiring person related to other entities for which they serve as officers and directors to complete the HSR Filing.[268] Direct costs vary depending on a number of factors that are different for each reportable transaction: the type of interest being acquired; the complexity of the transaction; the complexity of the UPE and its related entities and investors; the scope and number of existing business relationships between the merging parties; whether the filer is the acquiring or the acquired person; and the size and scope of each filer's business operations. Generally, costs are lower for simple transactions (such as for open market purchases of stock or conversion of stock options), for acquisitions of non-controlling stakes, and for acquisitions of control where the merging parties do not have an existing business relationship. Costs are highest for strategic acquisitions of a competitor or of a key supplier or customer where the Agencies must engage in a thorough review and are more likely to engage in an in-depth investigation including through the issuance of Second Requests. The key variable that is likely to determine the monetary impact of the final rule on any particular filer is the level of the antitrust risk associated with the reported transaction. The Commission believes that this outcome is consistent with the legislative intent in imposing mandatory premerger review as a means of preventing illegal mergers prior to consummation.

The Commission expects that the incremental increase in costs associated with the final rule will be most significant for the first HSR Filing prepared by a given filer because there will be costs associated with becoming familiar with the new reporting Form and Instructions and to gather the required information about the filer's operations. In addition, the Commission believes that some filers (or their counsel) will find it efficient to

[266] The Agencies receive a small number of filings from companies or individuals who do not hire attorneys to prepare their HSR Form.

[267] As compared to the current rules, the proposed rule contained modifications that eliminated certain information requirements that the Commission has determined no longer provide a benefit for premerger screening. These reductions in burden are incorporated in the final rule and are reflected in the analysis of incremental costs associated with the final rule.

[268] Sometimes, the parties will allocate the costs associated with premerger review between them by contract. These provisions are typical for strategic acquisitions where the parties expect some level of antitrust scrutiny and often require the acquiring party to compensate the acquired party for costs related to the HSR Filing as part of the purchase price. In conducting its cost assessment, the Commission has assumed that each filer is responsible for its own costs.

automate some portion of the reporting process, which will increase the burden of the first filing. For any subsequent HSR filing related to another acquisition, these repeat filers will incur lower costs because some of this prior work will not be necessary to the extent that they made investments to put processes in place to maintain or automate the collection of relevant business information. In other words, any estimated incremental costs are expected to decline over time.

Nothing in this rulemaking affects the filing fees for making an HSR Filing, which are mandated by Congress and adjusted by the Commission annually.[269] While the final rule does not alter these HSR-related costs, recent congressional changes in these fees use an approach that takes into account the size of the reportable transaction and the size of the parties involved. Last year, Congress revised the schedule of HSR filing fees, creating a new fee structure with five tiers, which increased fees for some transactions while reducing them for others.[270] Specifically, the new fee structure lowered fees for some mergers valued under $500 million and increased fees for transactions valued at $1 billion and more. Prior to this law, HSR filing fees had a three-tier structure, with thresholds adjusted every year. The purpose of creating a new five-tier fee structure was two-fold: to provide the Agencies with additional resources to review mergers and enforce the antitrust laws, and to better reflect that reviews of larger mergers generally consume more Agency resources.[271] Effective February 28, 2023, the Commission implemented the new fee levels, and on March 6, 2024, the Commission published the adjusted fees for 2024.[272]

Table 5: HSR Filing Fees

HSR Fees Effective February 23, 2022		HSR Fees Effective March 6, 2024	
Size of Transaction	Fee	Size of Transaction	Fee
$101 million to $202 million	$45,000	$119.5 million to $173.3 million	$30,000
		$173.3 million to $536.5 million	$105,000
$202 million to $1.0098 billion	$125,000	$536.5 million to $1.073 billion	$260,000
		$1.073 billion to $2.146 billion	$415,000
$1.0098 billion or greater	$280,000	$2.146 billion to $5.365 billion	$830,000
		$5.365 billion or greater	$2,335,000

The Commission has identified significant deficiencies in existing information requirements, and those gaps are hindering the Agencies' ability to obtain key facts needed for an initial assessment of whether the transaction may violate the antitrust laws and to determine whether to issue a Second Request. See section II.B. Congress authorized the Commission to issue rules to collect information that is necessary and appropriate for the Agencies to conduct premerger review within the statutory time frame. The final rule requires filers to gather information relevant for screening the transaction and results in relatively higher costs for those reported transactions that are more likely to pose competition issues, including transactions with complex party or deal structures, or transactions involving two entities with many overlapping business operations or existing business relationships in the supply chain, or transactions in which the parties have a history of acquisitions in the same business lines. This is consistent with the HSR Act's focus on the largest transactions, which are often the most complex, and the overall intent to reduce cost and delay for reportable transactions other than those that may violate the antitrust laws.

As discussed in more detail in section V.D., the Commission believes that most filers will not experience delays because the final rule requires collection of business information that should be readily available or collected as part of each filer's due diligence efforts related to the transaction. Filers who would prefer to submit a letter of intent or other preliminary agreement that is no longer compliant with the final rule may need to come to an agreement on more details of the planned-for transaction. But the Commission has determined that this represents less than 10 percent of current filers, meaning that most parties are already coming to agreement on the key terms that are required by the final rule even if their transaction documents are referred to as a letter of intent.

a. Calculation of Direct Costs

To estimate the potential increase in direct costs for filers attributable to the changes in the final rule, the Commission calculated the average compliance burden by conducting a survey of experienced HSR attorneys who now work for the Agencies. See section VIII. That survey revealed a range of estimated costs for each new information requirement in the final rule. These estimates include the amount of additional time required from a variety of knowledgeable individuals, including, for example, HSR specialists at law firms hired to prepare the Filing as well as individuals associated with the UPE who collect and verify the business information and responsive documents, as well as costs associated with any outside vendors hired to complete the HSR Filing, such as data vendors.

As explained in section VIII., the Commission estimates that the amendments contained in the final rule would increase the time required for a filer to prepare an HSR Filing, on average, 68 hours, resulting in

[269] Each year, the thresholds that determine reportability under the HSR Act are adjusted based on changes in the gross national product, 15 U.S.C. 18a note, while filing fees are adjusted in line with the Consumer Price Index, Public Law 117–328, 136 Stat. 5967–68, Div. GG, Title I, sec. 101.

[270] Public Law 117–328, 136 Stat. 5967, Div. GG, Title I.

[271] H.R. Rep. No. 117–493 pt. 1, at 3–5 (2022).

[272] *See* Fed. Trade Comm'n, ''New HSR thresholds and filing fees for 2024,'' Fed. Trade Comm'n Competition Matters blog (Feb. 5, 2024), *https://www.ftc.gov/enforcement/competition-matters/2024/02/new-hsr-thresholds-filing-fees-2024*.

additional costs of approximately $39,644 per filing on average.[273] The Commission believes that this level of direct costs is small in relation to other merger costs. Indeed, these total costs are small in relation to the value of the deals that must be reported under the Act. The current minimum size for a reportable transaction is $119.5 million; as outlined in section VIII, for FY 2023, the Commission estimates that the total direct costs associated with the final rule would have been only slightly more than the value of a single reportable transaction. Moreover, the Commission believes that these direct costs may be overstated and should decline over time as parties and their lawyers become more familiar with the requirements of the final rule. Finally, these direct costs do not take account of the substantial benefits to the Agencies, the parties, and third parties generated from a more efficient premerger review process that shifts some of the burden of information collection and reporting away from third parties to merging parties and allows the Agencies to obtain critical business facts earlier in the initial waiting period, which in turn helps mitigate avoidable costs associated with Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing.

In addition, the costs associated with completing an HSR Filing are often minimal compared to other fees associated with mergers and acquisitions. Based on publicly available data, the 20 largest M&A transactions during 2021 and 2022 ranged in size from $1.44 billion to over $70 billion, with average deal size of $10.6 billion.[274] Using the current Congressionally mandated HSR filing fees associated with deals of this size, the average HSR filing fee for these transactions would be $1,198,500, ranging from $415,000 to $2,335,000. For 18 of these deals, the fees paid by the target to financial advisors are available from public sources. These fees varied considerably, ranging from $800,000 to $96 million. In 14 out of these 18 cases, the fees paid by the targets to just their financial advisors were more than ten times the estimate by one commenter of the average total cost per filing for completing the HSR Form ($437,314) [275] and in five cases, fees to financial advisors were more than 100 times of that estimate. In any of these cases, financial adviser fees are several multiples of the estimated average new costs associated with the final rule of $79,288 per transaction ($39,644 + $39,644) based on the Commission's estimates. See section VIII. These advisor fees are instructive in demonstrating that HSR filing fees and HSR-related transaction costs for most transactions do not comprise a significant share of total transaction costs and therefore would have minimal impact on costs of dealmaking across the economy.[276]

Another survey of middle-market investment bankers, brokers and other advisors reports that merger advisory fees for deals valued up to $150 million come in the form of retainers, monthly or hourly charges, or success fees, which are paid if the deal closes.[277] For deals in the $100 to $150 million range, namely those most likely to be reportable under the HSR Act, success fees paid to financial advisors represented 1 to 2 percent of deal value, or $1,500,000 to $3,000,000 for a $150 million deal. As with higher valued transactions, the other merger-related costs for transactions on the lower end of HSR reportability dwarf the costs associated with the final rule.

One commenter commissioned a report (''the Kothari Report'') that projected that the direct cost of the proposed changes may be nearly seven times greater than the Commission estimated for the proposed rule, after accounting for both direct monetary costs and further costs to the economy.[278] The Kothari Report critiqued the Commission's methodology of calculating direct costs in the NPRM's PRA analysis in several respects. The Commission considered these comments and those of other commenters and, as discussed in section VIII, made adjustments to its cost estimate methodology for the final rule.

As a result, the Commission disagrees that the final rule will impose the level of costs presented in the Kothari Report for several reasons. First, the Commission made significant modifications to all aspects of the proposed rule in response to concerns raised in this report and in other comments. As a result, the estimates contained in the Kothari Report reflect costs for a very different rule, one that the Commission has determined not to adopt. The Kothari Report relied on a survey of experienced practitioners and so did the Commission. The survey of practitioners relied on in the Kothari Report estimated that the proposed rule would require an additional 242 hours of time from outside counsel and internal personnel. While the Commission's estimate was much lower, that comparison is no longer relevant because the Commission is not adopting the rule it proposed. Instead, the Commission is adopting a rule that is substantially more modest in scope, one that aligns compliance costs as much as practicable with the risk that reported transaction is one that requires a closer look.

Moreover, even if the Commission's estimate of the economic impact of the proposed rule was flawed, the Commission made improvements to the methodology it used to estimate the additional effort that will be required of filers to comply with the final rule. As discussed in section VIII, the Commission has accounted for the same costs in its own estimates, such as the time required from outside counsel, in-house counsel, and business personnel as well as costs associated with other services such as data vendors. The Commission believes that its estimates of the economic impact of the final rule are reliable and sufficient for it to determine that the final rule is a reasonable exercise of its rulemaking authority even if it imposes modest costs on overall dealmaking and in light of the benefits of the final rule for efficient and effective detection of illegal mergers via mandatory premerger review.

Much of the difference between the Commission's estimate and the one contained in the Kothari Report is attributable to the higher hourly rate applied to the required hours, which the Kothari Report suggests is more likely

[273] As further described in section VIII, the Commission estimates the range at 10 to 121 additional hours, or approximately an additional $5,830 to $70,500 per filing, with the highest costs borne by the acquiring person in a transaction with overlapping products or supply relationships in the target's industry.

[274] *See* ''Deal Analytics,'' Bloomberg L. (last viewed Apr. 3, 2024) (Prologis Inc.'s June 13, 2022 acquisition of Duke Realty Corp. (advisor fees over $135M); Thermo Fisher's Apr. 15, 2021 purchase of PPD Inc. (advisor fees over $70M); sale of Twitter Apr. 25, 2022 (advisor fees over $50M)). *See also* Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 20–21 & Fig. 3.

[275] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684.

[276] In conjunction with the passage of the Merger Modernization Act, the Congressional Budget Office estimated the budgetary impact of changing merger filing fees for transactions reported under the HSR Act. CBO estimated that the bill H.R. 3843 (which reflected fee levels that were eventually enacted) would increase HSR filing fees by $1.4 billion over the 2023–2027 period. Cong. Budget Office, Cost Estimate, H.R. 3843, Merger Filing Fee Modernization Act of 2021 3 (Sept. 27, 2022), *https://www.cbo.gov/publication/58527*. CBO estimated that the aggregate cost of the private-sector mandate would be about $325 million in each of the first five years. *Id.*

[277] Firmex, M&A Fee Guide 22/23 (N. Am. ed., 2022–23).

[278] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 21. Professor Kothari's report is attached as an annex to this comment. *See id.* at 54–85 (hereinafter ''Kothari Report'').

$936 per hour, and a category of ''other'' costs that is nearly one-third of the total projected costs. The Commission believes that its estimates of incremental costs associated with the final rule are more consistent with the range of filings and filers based on its experience receiving thousands of filings every year and the merger investigations conducted by the Agencies. See section VIII. The Commission has no basis to inflate the overall costs associated with the final rule beyond what was estimated by those with experience filling out HSR Forms for a variety of filers and transactions. As with prior rulemakings, if the Commission determines that certain requirements in the final rule are not generating a benefit to the Agencies' preliminary antitrust assessment in light of the associated costs, the Commission can consider adjusting those requirements in future rulemakings.

The Commission acknowledges that the incremental costs associated with this rulemaking are more material than its prior rulemakings, which frequently reduced the burdens associated with submitting an HSR Form. In fact, the current Form is very similar to the original 1978 version in its scope and content. But the cumulative effect of the economy-wide changes described in section I. have seriously undermined the Agencies' ability to engage in extensive fact-gathering to compensate for deficiencies in the HSR Form. The effort required by the Agencies to conduct premerger review in today's economy threatens to render the process ineffective for its specific purpose—detecting and preventing illegal mergers before they cause harm that cannot be undone. The status quo does not allow the Agencies to quickly identify which transactions may violate the antitrust laws, causing them to spend too much time on ones that likely do not while at the same time lacking sufficient information to identify ones that do. With this rulemaking, the Commission is updating the Agencies' tools for detecting illegal mergers during premerger review to match the size and complexity of reportable transactions, restoring rigor and efficiency to the task of premerger review.

The Commission disagrees with other assertions made in the Kothari Report or finds them unpersuasive and not entitled to significant weight. The report focuses on the small number of transactions that receive a Second Request and ignores the benefits to filers from the Agencies reviewing and dispensing with non-problematic transactions with greater efficiency and assurance than before. The Kothari Report also ignores the benefits to the public from the Agencies' ability to more effectively identify and investigate potentially problematic transactions based on the availability of better initial information about potential competitive harms. The Commission discusses these and other benefits of the final rule in section III.C.1.

b. Other Costs Not Attributable to the Final Rule

Commenters raised concerns that the proposed rule would lead to other costs for those seeking to engage in M&A activity. The Kothari Report predicted that the proposed rule would so increase the costs of M&A that it would reduce the number of mergers, including ones that would be beneficial for consumers, innovation, investors, and the economy. Other commenters similarly argued that the Commission's objective is to stop all mergers by making them too costly to pursue. The Commission disavows any intention to stop all mergers by imposing unreasonable costs on those that are subject to premerger review and disagrees that the final rule will have this effect. Moreover, the commenters provided only speculation that the proposed rule would deter or delay some deals merely by increasing the costs associated with making an HSR Filing as compared to other factors that more directly affect M&A activity, such as interest rates. In the absence of actual data from commenters, the Commission must make a predictive judgment based on the evidence available to it.[279] As noted in section III.C.1., the evidence available to the Commission indicates that the Agencies' antitrust enforcement saves consumers and other market participants billions of dollars a year, and in light of known information deficiencies outlined in section II.B., there are strong indications that closing known information gaps will allow the Agencies to better identify additional transactions that may also violate the antitrust laws if consummated. The final rule does not impose new incremental costs that could plausibly deter beneficial or competitively benign acquisitions, particularly after the additional revisions narrowing the requirements in the final rule are taken into account.

Relatedly, other commenters raised arguments about additional macro impacts of expanding information requirements for HSR Filings, such as concerns about the impact on institutional investors, including retail investors, by indirectly impacting the performance of investment portfolios. Some said they were concerned generally about the chilling effect on M&A. Others raised concerns that changing the status quo would create market uncertainty, citing increased market, labor, and operational volatility. Several of these commenters raised specific concerns that acquisitions in their particular sector were typically not challenged or even reviewed closely by the Agencies. Concerns about disproportionate impact for certain sectors or types of filers are addressed in section III.D. below.

The Kothari Report states that delays caused by the additional time that will be required to prepare a HSR filing could kill deals and lead parties to abandon transactions. It also stated that delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff, and that delay would lead to lost economic efficiencies that are realized through mergers. For these propositions, the Kothari Report cites an advisory committee report by the U.S. Department of Justice issued in 2000. While that committee report explains how delays can influence pending mergers, the cited portion is discussing international jurisdictions that do not impose strict timelines or which have prolonged agency investigations into mergers [280]—this rule does not contemplate either. In addition, as discussed above, the final rule will allow the Agencies to reduce the number of Second Requests or narrow their scope, significantly reducing delays in many instances.

Moreover, the Commission disagrees that any delays and incremental costs associated with an HSR Filing could have a significant impact on overall M&A activity. Deal volumes fluctuate, often substantially, from year to year, and these fluctuations are reflected in the number of HSR Filings received by the Agencies. But these fluctuations are attributable to many economic factors,

[279] *See, e.g., Huawei Techs. U.S., Inc.* v. *FCC,* 2 F.4th 421, 454 (5th Cir. 2021) (''Huawei does not object to specific cost calculations such as these but to the agency's failure to consider additional, difficult-to-measure costs about which the FCC lacked hard data, such as 'the broader economic costs of depriving Americans of access to Huawei's market-leading technology.' The agency's decision to base its analysis instead on the replacement cost estimates before it does not render its analysis unreasonable.''); *FCC* v. *Prometheus Radio Project,* 592 U.S. 414, 427 (2021) (''The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. . . . In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.'').

[280] Int'l Competition Pol'y Advisory Comm., Final Report to the Attorney General and Assistant Attorney General for Antitrust Ch. 3 (2000), *https://www.justice.gov/atr/final-report.*

including the cost of capital. Research relied on by one commenter provides evidence that a major driver of uncertainty in M&A activity generally is stock market volatility.[281] This is consistent with the Agencies' experience. Figure 1 reflects the volatility of HSR-reportable transactions, and the Commission believes that much of this volatility is attributable to changes in interest rates and other macro factors that drive M&A activity generally, unrelated to premerger review or the specific information collected in an HSR Filing.

The Kothari Report also asserted that M&A activity is beneficial to the economy, and that any potential delay or chilling of acquisitions due to the final rule would lead to significant loss of value creation. But the evidence cited to support these concerns is inapposite. For instance, a paper cited for support that acquired plants become more productive points to credit spreads and aggregate market valuation as being major drivers for merger activity.[282] Similarly, another source relied on a stylized, theoretical model of mergers that does not provide any empirical evidence about the benefits of M&A, applying the theoretical model to a situation where there is no M&A at all to calculate the benefits of M&A.[283] There is no reason to believe that the final rule will significantly chill M&A activity. Furthermore, in the model, the author finds that preventing a small fraction of deals over $1 billion has little effect on aggregate efficiency, and that due to the inefficiencies in the M&A market, a policy of blocking a fixed number of deals regardless of antitrust concerns can improve aggregate outcomes. Thus, the paper actually demonstrates that preventing some deals can improve economic performance. The paper does not provide a basis for the Commission to conclude that changes of the magnitude contained in the final rule threaten economic efficiencies gained through M&A activity generally.

Another paper cited in the Kothari Report, which purports to support the proposition that any discouragement of pending mergers results in significant value loss, is not on point.[284] First, this final rule is not intended to and should not discourage mergers—the final rule merely requires companies who are already submitting HSR Filings to submit more information with their filings. In the paper's survey of past empirical assessments of mergers, it highlights evidence that mergers that create market power yield no better performance, and sometimes worse. That assessment is wholly consistent with the Commission's efforts in this final rule: to collect information that better allows Agency staff to identify potentially anticompetitive mergers. The Kothari Report mischaracterizes this study as supporting the value of all mergers. In fact, the author concludes that mergers are not universally accretive in value, stating: ''[T]he buyer in M&A transactions must prepare to be disappointed. It is also true that most transactions are associated with results that are hardly consistent with optimistic expectations. Synergies, efficiencies, and value-creating growth seem hard to obtain. It is in this sense that deal doers' reach exceeds their grasp.'' [285] Last, it should be noted the study is dated 2002, and the latest mergers it analyzes are from 1999, whereas the Commission crafted this final rule to address changes it has observed in more recent transactions that reflect current dealmaking dynamics discussed in section II.B.

Indeed, one goal of this rulemaking is to ensure that any benefits from M&A are realized as quickly as possible and that the costs of anticompetitive mergers do not materialize. The Commission acknowledges that there are benefits generated from M&A activity generally, and that those benefits flow broadly throughout the economy. But the Agencies are not tasked with determining whether an acquisition is ''beneficial'' in any sense. The challenge given to the Agencies by Congress is to distinguish which acquisitions, among the many thousands they review each year, may violate U.S. antitrust law. For this task, they need certain facts that would reveal potential antitrust risks. For instance, event studies may indicate that M&A can result in significant value creation, but these outcomes may be the result of genuine synergies or they can also occur due to the anticompetitive creation of market power.[286] This highlights the very purpose of mandatory premerger review: to subject a certain number of larger acquisitions to a quick and thorough antitrust review prior to consummation solely for the purpose of identifying the few that need in-depth investigations. Throughout the history of the HSR Act, the Agencies have investigated just a small fraction of deals through the issuance of Second Requests. The Commission believes that the final rule will render premerger review more effective and efficient in identifying those mergers that may lead to anticompetitive harm, and that the small incremental costs and delays associated with the final rule are necessary and appropriate and consistent with the scheme established by Congress.

Moreover, to the extent these concerns arise from a belief that disclosure of additional relevant information to the Agencies will mean that a reported transaction is more likely to be challenged or investigated, that outcome fulfills the purpose of premerger review. As discussed above, to the extent that the HSR Act itself requires reporting for a large number of transactions that may never violate the antitrust laws, that has always been a feature of HSR premerger notification. Congress recently reaffirmed that particular tradeoff by imposing new disclosure requirements for foreign subsidies on all filers while not adjusting existing filing obligations.

In light of these considerations, the Commission does not believe that the final rule will have an undue effect on dealmaking, including by discouraging transactions that have little or no antitrust risk. The expected costs of this final rule are very small relative to the overall value of reportable transactions, the level of M&A activity in the United States, and the size of the overall economy. The benefits of the final rule are expected to be proportional to reductions in the errors in detection of illegal mergers that this final rule addresses.

Each year, the Agencies review reported transactions with an aggregate dollar value of nearly $2 trillion, on average.[287] Yet this is just a fraction of the level of M&A activity in the United States: as reflected in Table 1, over 80 percent of mergers completed in the United States are not reported to the Agencies. The costs associated with the

[281] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 (Kothari Report ¶ 57 n.46, citing Vineet Bhagwat et al., ''The Real Effects of Uncertainty on Merger Activity,'' 29 Rev. Fin. Studies 3000–34 (2016)).

[282] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 (Kothari Report at 24 n.47, citing Vojislav Maksimovic et al., ''Private and Public Merger Waves,'' 68 J. Fin. 2177–2217 (2013).

[283] *Id.* (Kothari Report at 25 n.49, citing Joel M. David, ''The Aggregate Implications of Mergers and Acquisition,'' 88 Rev. Econ. Studies 1796–18 (2021)).

[284] *Id.* (Kothari Report at 26 n.52, citing Robert F. Bruner, ''Does M&A Pay? A Survey of Evidence for the Decision-Maker,'' J. Applied Fin. 48–68 (Spring/Summer 2002)).

[285] *See* Bruner, *supra* note 284, at 65.

[286] W. Kip Viscusi et al., Economics of Regulation and Antitrust 217–18 (5th ed. 2018) (horizonal mergers raise the possibility of creating market power and the possibility of achieving socially beneficial cost savings).

[287] *See* HSR Annual Reports for FY 2014 through 2023, available at Fed. Trade Comm'n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 56.

final rule are very small in comparison to the U.S. economy, which was valued at nearly $28 trillion in 4Q 2023.[288] Any improvement in the Agencies' ability to detect illegal mergers prior to consummation will lead to benefits that will help reduce antitrust harm from illegal mergers and improve the efficiency and effectiveness of premerger review. The greater the improvement in detection and in avoiding the costs and burdens of acquiring information from sources other than the parties, the greater the benefits. The Commission expects that the costs from the final rule will be so small in relation to the total value of reported transactions, to the level of U.S. M&A activity in general, or to the U.S. economy that there will be negligible indirect effects, if any, on dealmaking, innovation, investments, and growth.

Nonetheless, the Commission has narrowed its proposals so that the final rule limits the incremental costs for filers as much as practicable while still generating additional information that is critical for the initial antitrust assessment in light of changes in market realities and information gaps outlined in section II.B. The need to modernize premerger review to adjust to market changes is compelling, and the Commission is acting within its statutory mandate to determine what information is required to conduct premerger screening that is appropriate in the modern economy.

The Kothari Report also commented that there is additional uncertainty for potential filers arising from the Agencies turning away from the decades of practice under the current rules. Any change brings with it some level of uncertainty and will require adjustment by all those involved. As with other adjustments to the HSR rules in the past, the Commission's PNO staff will be providing guidance and assistance to filers who have questions about the final rule. But the Commission believes that the uncertainty related to the new rule is a short-term issue that will be resolved after the final rule goes into effect. The commenters are overstating the effect of uncertainty on the economy. Not only are these concerns temporary; they ignore the greater benefits of a more efficient premerger review process that may result in a *faster* resolution of some deals, including by reducing the number of Second Requests and narrowing others. The goal of this rulemaking is to provide sufficient information so that the Agencies can quickly and confidently distinguish those transactions that present little or no risk that they may violate the antitrust laws, and identify those transactions that require a more searching investigation. As discussed above, the Commission believes that the final rule will reduce the delays that are attributable to information deficiencies.

Moreover, the Commission disagrees that the final rule will lead to greater uncertainty about the outcome of the Agencies' premerger review. This rulemaking does not (and cannot) affect the ultimate determination of whether a transaction violates the antitrust laws. A Federal court will make that determination for any transaction that the Agencies or others seek to block prior to consummation under prevailing legal standards.[289] Any ''uncertainty'' about the eventual outcome of premerger review is directly related to whether the merger violates the antitrust laws and whether the Agencies are able to detect that risk when conducting a premerger assessment. Premerger review is simply the tool Congress gave to the Agencies to detect those mergers that may violate the law so that the Agencies can take steps to prevent their consummation. On the margin, the Commission believes that the final rule will reduce uncertainty about the outcome by providing more transparency to the parties (and the public) about the information the Agencies rely on to make their assessment that a transaction may violate the antitrust laws. To the extent that the commenters are concerned that disclosing more information reveals a risk to competition that the current rules do not, that additional ''uncertainty'' is a benefit of the final rule as a result of improved detection and possibly greater deterrence achieved through more effective premerger review.

It is not feasible to design premerger review requirements to only apply to those mergers that will be found to violate the antitrust laws, because there are too many variables that weigh in that outcome. Establishing that a merger may substantially lessen competition or tend to create a monopoly is highly fact-dependent exercise. The final rule represents a reasonable reflection of the Congressional policy to screen those mergers in advance to discover the few that may cause lasting harm throughout the economy and that should be blocked prior to consummation. The Commission has determined that the current HSR reporting requirements are not sufficient for the critical task of premerger review in light of changes in the economy and in M&A activity.[290]

Some commenters argued that the proposed rule's expansion of reporting requirements would negatively impact investments in biotech innovation, or deny startups or other innovative companies an exit strategy. Others asserted that the acquisition of a small company by a larger one can create efficiencies by bringing together two entities that specialize in activities in which they have a comparative advantage or provide assistance necessary to bring discoveries to market. One study cited by a commenter estimates that it costs approximately $2.6 billion to develop and bring a new drug to market.[291] Another commenter noted that startups operate on tight budgets and that exits, most often facilitated by an acquisition, provide liquidity, enable capital flows through the startup ecosystem, and give startups incentives to innovate. The Commission recognizes these possible benefits and does not seek to deny them to small companies or others, nor does it believe that the HSR reporting requirements in this final rule will have any of these negative effects on the opportunities for small or startup companies to exit via lawful acquisitions. As noted in section II.B.4., many acquisitions of startups and small innovator firms are not reportable. For those acquisitions that Congress has determined are large enough to be reportable, the long-term benefits, both monetary and non-monetary, well outweigh the incremental costs associated with the final rule. Not surprisingly, acquisitions of this type (and others) declined in 2023 due to higher interest rates. Nonetheless, the Commission does not believe that small companies are so short-sighted that they will forgo benefits of a negotiated exit acquisition where the expected benefits dwarf HSR filing costs.

Moreover, the Commission cannot ignore that certain acquisitions may also reduce innovation and harm

[288] U.S. Bureau Econ. Analysis, Gross Domestic Product (updated Aug. 29, 2024) (Q2 2024 $28,652,337,000,000) (retrieved from FRED, Fed. Reserve Bank of St. Louis), *https://fred.stlouisfed.org/series/GDP*.

[289] In the Agencies' experience, when faced with an imminent or pending legal challenge to the legality of the transaction, many parties chose to abandon their merger plans rather than incur the additional legal costs associated with defending an injunction action in Federal court. This decision is solely in the discretion of the parties and reflects their assessment of litigation risks.

[290] As discussed in section III.E., other countries have adopted other procedures to review proposed and consummated mergers.

[291] Comment of Biotech. Innovation Org., Doc. No. FTC–2023–0040–0706 at 7 n.16 (citing Joanna Shepherd, ''Consolidation and Innovation in the Pharmaceutical Industry: The Role of Mergers and Acquisitions in the Current Innovation Ecosystem,'' 21 J. Health Care L. & Pol'y 1, 16 (2018)).

competition in violation of the antitrust laws, particularly when dominant firms use acquisitions to acquire nascent threats. One commenter acknowledged that an environment where a few large companies dominate is undesirable, and another noted that smaller companies have flexibility, the ability to pivot in response to new evidence, and a willingness to accept risk that is rare in larger firms. While acquisitions of small firms by large firms can be beneficial, when they substantially lessen competition or tend to create a monopoly, they can be detrimental to innovation and growth. For these reasons, and as discussed in section II.A., Congress tasked the Agencies with carrying out premerger review. The Agencies would be remiss if they did not fulfill that task by ensuring that the HSR reporting requirements are attuned to the risk that large firms are buying up smaller firms in order to eliminate nascent and potential threats. For any negotiated exit acquisition that must be reported under the HSR Act, the incremental costs imposed by the final rule are justified by the benefit to the Agencies and the public of assessing the risk that the acquisition may violate the antitrust laws.

To be clear, not all exit partners are denied to small firms due to antitrust scrutiny; it is only those whose acquisition would violate the antitrust laws. For instance, when a large incumbent seeks to acquire a smaller company that constitutes a nascent threat or an actual or potential competitor, the Agencies may challenge that merger. But in the Agencies' experience, a startup firm deemed valuable by a dominant incumbent also enjoys other exit options. For example, the Commission recently challenged the proposed acquisition of a license to an innovative, early-phase candidate drug treatment for Pompe disease by the company with the only FDA-approved treatments for the disease.[292] The parties abandoned the transaction after the Commission authorized a lawsuit to block the deal; within five months the innovator company had found an alternative partner, negotiated a new agreement, completed antitrust review, and closed the deal. Moreover, the terms of the new deal appear largely equivalent to what the innovator had negotiated with the incumbent.[293] In other words, if the acquisition of a startup by a dominant incumbent carries a risk that the Agencies may determine that the transaction is one that may violate the antitrust laws, it is likely that there are other buyers that do not create those risks and any of those buyers present a viable exit strategy via acquisition.

The Commission disagrees with the suggestion that incremental changes in the information requirements for HSR Filings could have a chilling effect in sectors that are especially acquisitive. One commenter stated that in 2022 alone, 16,464 U.S.-based VC-backed companies received $240.9 billion in funding, yet when these transactions were reportable they were rarely investigated. Unless the new information requirements in the final rule reveal that a reported transaction may violate the antitrust laws, the Commission expects M&A activity in these sectors to continue to be subject to other economic forces that will determine their viability or profitability.[294] Similarly, claims that an industry or sector is ''unconcentrated'' are unavailing. The Agencies must conduct a fact-specific, case-by-case assessment of market dynamics to determine whether any particular relevant market affected by the merger is concentrated, and that assessment is typically left to an in-depth investigation after the issuance of Second Requests. Although the Agencies routinely decline to investigate transactions where there are many remaining competitors post-merger, this is a decision made after assessing relevant facts about the transaction including those contained in the HSR Filing, and is not based on an advance determination that certain sectors are ''unconcentrated.''

The Commission has taken into account the additional costs imposed on small and innovative companies, as well as those that operate in sectors where the Agencies have historically not engaged in merger enforcement. As discussed in section II.B.5., the emergence of strategic buyers engaged in serial acquisition strategies raises the possibility that some sectors that were not concentrated in the past are becoming more concentrated, especially through transactions that are not subject to premerger review. Thus, the Agencies should not rely on assumptions about historical levels of concentration when conducting premerger review of a reportable transaction in those sectors. By requiring information about prior acquisitions of both the buyer and target, the Agencies are given better information about the current competitive landscape so that they can make more accurate assessments about the potential effect of the filed-for transaction.

To the extent possible, the Commission has imposed as few additional requirements as is practicable in light of the benefits derived from more effective premerger review. If, based on experience of collecting new information, the Commission finds that some requirements generate less-than-expected benefits to the Agencies, it can eliminate those requirements in future rulemakings. In many prior rulemakings, the Commission adjusted its rules to reduce the burden on filers after experience revealed that the information did not provide the hoped-for benefit to the Agencies sufficient to justify the costs to filers of providing the information.[295]

3. Adjustments Made to the Final Rule To Align Costs With Antitrust Risk

Since establishing a premerger notification program pursuant to the HSR Act, the Agencies have relied on information contained in HSR Filings to conduct their initial premerger review. However, in light of the information gaps identified in section II.B., the Commission has determined that the current requirements are not sufficient for that task and determined to reset the baseline requirements for all filers to fill these information gaps. As a result, the final rule eliminates some requirements that are contained in the current Form, and requires each filers to submit some

[292] *In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint alleging Sanofi's proposed acquisition of an exclusive license to Maze Therapeutics' pipeline Pompe therapy would have eliminated nascent threat to Sanofi's monopoly) (transaction abandoned).

[293] *Compare* Press Release, Maze Therapeutics, ''Maze Therapeutics Announces Exclusive Worldwide License Agreement with Sanofi for MZE001, an Oral Substrate Reduction Therapy for the Treatment of Pompe Disease'' 1–2 (May 1, 2023), *https://mazetx.com/wp-content/uploads/2023/04/Maze-Therapeutics-Press-release-MZE001-license-Final-.pdf* (proposed license included $150 million upfront cash and equity investment, the possibility of another $600 million in development, regulatory, and commercial milestone payments, plus further royalties), *with* Press Release, Shionogi & Co., ''Shionogi & Co., Ltd. and Maze Therapeutics, Inc. Announce Exclusive Worldwide License Agreement for MZE001, a Novel Therapeutic Candidate for the Treatment of Pompe Disease'' 1 (May 10, 2024), *https://mazetx.com/wp-content/uploads/2024/05/CONFIDENTIAL_Project-Magenta-Press-Release_Final-FINAL.pdf* ($150 million upfront fee, plus development, regulatory, and commercial milestones, plus further royalties).

[294] *See, e.g.,* Press Release, Nat'l Venture Cap. Ass'n, ''NVCA 2024 Yearbook: Charting the New Path Forward for Venture Capital'' (Apr. 9, 2024) (noting that the U.S. venture capital investment ecosystem is still the envy of the world.), *https://nvca.org/press_releases/nvca-2024-yearbook-charting-the-new-path-forward-for-venture-capital/.*

[295] *See, e.g.,* 76 FR 42741 (July 19, 2011) (elimination of requirement to provide Base Year in Item 5); 81 FR 60257 (Sept. 1, 2016) (elimination of requirement to explain valuation of the transaction).

information that is not currently required or certify that the request does not apply to its operations.

After careful consideration of the comments that identified aspects of the proposed rule that would be a source of significant costs for filers if adopted, the Commission made significant modifications to the final rule as compared to the proposed rule. In several instances, the Commission determined that the costs of a particular proposed requirement outweighed the benefits and chose not to adopt those provisions as part of the final rule. For other proposals and where possible, the Commission has tailored each information request contained in the final rule to reduce the cost of compliance for filers yet generate the information that is necessary and appropriate for the Agencies to conduct a premerger assessment of the transaction. See sections IV to VI. Overall, the final rule balances the cost of collecting additional information in the HSR Filing in light of the benefits of obtaining additional information that is relevant to the Agencies' premerger antitrust risk assessment, and aligns those costs in proportion to the antitrust risk associated with the transaction under review. As a result, the final rule is a reasonable exercise of the Commission's authority to require information that is necessary and appropriate to determine whether an acquisition may, if consummated, violate the antitrust laws. The additional information required by the final rule will close information gaps described in section II.B. and address information asymmetries by shifting the burden of collecting necessary information about the transaction and the business of the filers from the Agencies and third parties to filers.

To make these modifications to align costs and benefits, the Commission relied on the following tools and approaches it has used when exercising its HSR rulemaking authority over the last forty-six years and consistent with the statutory scheme. In addition to the features of the HSR Act described in section III.A. above that treat different filers differently (*e.g.,* requiring notification from acquirers but not the acquired person for cash tender offers in order to start the waiting period and exempting certain types of acquisitions entirely), the Commission has administered HSR reporting requirements over the years in a flexible way to minimize the burden on each filer and each type of transaction as much as practicable. Thus, contrary to the assertions of several commenters, the reporting requirements of the HSR Act have never been a ''one-size-fits-all'' reporting scheme because different filers face different burdens for complying with applicable reporting requirements. Rather, the HSR Form and Instructions have relied and will continue to rely on an IF/THEN format that excuses certain filers from information requirements based on answers provided to other requirements. For instance, several current information requirements need only be answered if the filer reports that it generates revenues in the same NAICS [296] code as the other party to the transaction. The final rule expands the existing IF/THEN format as the primary means of mitigating the costs of reporting certain new information in a way that, as much as practicable, aligns the information with the antitrust risk associated with the transaction, resulting in higher costs for those transactions most likely to require close scrutiny by the Agencies to determine if they may violate the antitrust laws.

As summarized above in section I. and explained in further detail in section VI., the Commission has also eliminated several information and document requirements and reduced the scope of many others as compared to the proposed rule to align the cost of reporting to the antitrust risk associated with each transaction. First, the Commission has eliminated in toto the proposals that would have imposed significant costs as compared to the benefits, such as those requiring filers to provide employee information, geolocation information, the identity of other interest holders or board observers, or draft versions of submitted documents. Second, the Commission created a new category of filings, select 801.30 transactions, for which the costs of complying with the final rule will be minimal as compared to current requirements. Next, the final rule imposes relatively fewer new reporting requirements on acquired persons, reducing their costs as compared to the acquiring person, which is the party pursuing the transaction that requires HSR reporting, and will operate the acquired interests post-consummation. The Commission has also reduced the burden on filers by limiting the lookback periods for several categories of information and created de minimis exclusions where appropriate. Finally, the Commission will continue to allow filers to rely on good faith estimates or answer in the negative to confirm that certain information does not exist. For instance, for a transaction in which there are no existing overlaps or supply relationships responsive to the final rule, filers can indicate that there are no such overlaps or relationships, although there may be costs for the filer associated with verifying that response.

The Commission also relies on definitions and clarifications to reduce or eliminate filing obligations or to reduce uncertainty regarding compliance. For instance, the Act applies to a wide variety of acquisitions; as a result, the Commission has provided definitions and guidance over the years to maximize compliance. Sometimes this results in certain transactions not being reported or reducing reporting requirements for certain types of transactions. The final rule contains several new definitions that are intended to reduce uncertainty and costs, and improve compliance.

Select 801.30 Transactions

As part of the Commission's effort to reduce the cost of the final rule, the Commission has created a new category of transactions, defined as ''select 801.30 transactions,'' that will have minimal reporting requirements, including a few of the new information requirements required by the final rule. Where the Commission has not excused requirements, it believes that the burden of compliance will be low because parties to select 801.30 transactions generally have less complex internal structures, do not hold significant stakes in similar companies, and have not generated the types of documentation the Form and Instructions generally require. As a result, the Commission expects that responses to the remaining requirements for these types of transactions will generally be short, and may just confirm that the parties do not have responsive material. However, for those transactions in which select 801.30 filers incur additional costs from complying with the final rule, there will be a benefit to the Agencies in learning about potential competitive issues that are not revealed by the current information requirements, especially the new information related to other entities between the UPE and acquiring or acquired person.

For select 801.30 transactions, filers are excused from the following information requirements:

i. Transaction Rationale
ii. Transaction Diagram
iii. Plans and Reports
iv. Transaction Agreements
v. Overlap Description

[296] The North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. *See* U.S. Census Bureau, North American Industry Classification System (rev. Sept. 10, 2024), *https://www.census.gov/naics/.*

vi. Supply Relationships Description
vii. Defense and Intelligence Contracts

Additionally, even where select 801.30 transactions are not expressly excused from responding, there are many items for which the Commission believes the response will be ''none'' because of the nature of the transaction or of the parties.

Less Information From the Acquired Person

The final rule also seeks to reduce costs by tailoring information requests to each party's role in the transaction. Because the buyer (the acquiring person) will have a larger stake in or control of the target (the acquired entity or assets), and often will be operating the assets or business acquired post-consummation, more information is needed from acquiring persons than acquired persons. The acquiring person is more likely to have certain types of information relevant to the Agencies' enforcement analysis, such as the transaction's structure, information about other minority holders who might have managerial control or influence, and overlapping officers and directors who could affect competitive decision-making after consummation. This approach reflects the more limited time the seller has had to consider the implications of the planned transaction, and to a lesser extent, the seller's less-honed strategic assessments of competitive opportunities. In addition, for certain information, such as a transaction diagram, the Agencies only need one response, and it is appropriate to place the cost of providing this information on the acquiring person and not require the acquired person to provide duplicative information.

Consistent with these considerations, the final rule excuses the acquired person from certain additional information requirements that apply to acquiring persons. In the final rule, acquired persons are excused from the following requirements:

i. Minority Shareholders, other than those that will roll over to the acquiring person
ii. Ownership Structure Description and Chart
iii. Reporting of Officers and Directors
iv. Identification of International Antitrust Notification
v. Transaction Diagram
vi. Identification of Other Agreements Between the Parties

Balanced against these reductions in burden, the final rule does require the acquired person to report prior acquisitions for the first time, for the reasons explained in sections II.B.5. and VI.J.4.

IF/THEN Format

Certain information requirements of the final rule are only applicable to filers who provide a positive response to other information requirements. That is, the final rule reflects an IF/THEN format by requiring some information only if filers have provided other information first. For example, many information requirements do not require a response if the filer indicates that there is no reported overlap or supply relationship between the merging parties. This is a main feature of the current HSR Form, and the Commission expands that approach in the final rule to closely align the information requirements with the risk of a law violation the transaction presents, resulting in an IF/THEN format that adjusts the cost of complying based on the existing competitive relationship of the parties to the transaction.

Importantly, information that is critical to identifying competitive overlaps or areas of premerger competition justifies a higher cost of collection and reporting.[297] Examples include reporting revenues for identified overlaps by geographic location so that the Agencies have some basis to screen overlapping products for local market impacts.[298] Even if there is some additional cost associated with collecting this information, a notification form that does not contain such information would be unreliable for detecting the risk that the transaction would cause harm to competition at the State or local level. Limiting the requirement to provide certain information only if both parties generate revenues in the same or similar business lines (as reflected in overlapping NAICS code reporting or the descriptive responses) or only if the parties operate in the same areas of the country is a powerful limitation aimed at generating information that bears directly on the question whether the transaction involves direct competitors. For any transaction that does not have these overlaps, there is no burden associated with answering questions that depend on the reporting of such overlaps other than certifying that such overlaps do not exist. In the final rule, the following information requirements are dependent on the identification of an existing overlap or a supply relationship:

i. Overlap Description
ii. Supply Relationships Description
iii. Officers and Directors (acquiring person only)
iv. Plans and Reports
v. Prior Acquisitions
vi. State and Street-Level Reporting of Geographic Market Information
vii. Author information for submitted documents
viii. Defense and Intelligence Contracts

Limited Lookback Periods

The Commission also relies on limited lookback periods to collect the most recent and reliable information and data related to the risk of a law violation. For example, filers are only required to submit the most recent annual reports and annual audit reports. This type of limitation is intended to focus on more recent economic activity and reduce the cost associated with collecting potentially less probative or out-of-date historical data. As discussed below in section VI., the Commission has reduced the lookback periods for some information requirements as compared to the proposed rule to reduce compliance costs and focus the information requirements on the most recent and probative data needed for premerger screening. In other places, the Commission has identified a fixed reporting period to limit the information filers must gather to prepare the HSR Filing and provide certainty for filers about what is required. For example, as compared to the proposed rule, the final rule contains shortened lookback periods for the following information:

i. Overlap Description
ii. Supply Relationships Description
iii. Officers and Directors
iv. Transaction Rationale
v. Minority Shareholders
vi. Prior Acquisitions

[297] In the initial rulemaking implementing the HSR premerger program, the Commission proposed to require the reporting of revenues by Standard Industry Classifications (SIC) codes. Many commenters complained about the costs associated with providing this information. But the Agencies needed to establish some system for reporting overlaps. This provides an early example of the Commission determining that, where the information is essential to enforcement of the antitrust laws, the costs associated with collecting and reporting that information is justified by the benefits in light of other available options.

[298] The Agencies rely on analytical tools to identify an area of effective competition, often by defining a relevant antitrust market. A relevant antitrust market comprises both product (or service) and geographic elements. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines 4.3 (2023) (describing the information and analysis used by the Agencies to define markets for the purpose of antitrust analysis). For screening purposes, the Agencies may conclude that the parties to the transaction do not serve the same set(s) of local customers if there is reliable information in the HSR Filing that indicates that they generate revenues in different locales even if they supply the same product or service.

De Minimis Exclusions

The Commission also relies on de minimis exclusions to excuse the reporting of otherwise relevant information that might be costly to collect. De minimis exclusions can sometimes require extra effort by filers, because filers must evaluate whether the information is above or below the de minimis threshold. In the Commission's experience, it can sometimes take less time for filers to collect and report all responsive information than to report less information after conducting the assessment required to eliminate de minimis amounts. In deciding whether to add de minimis exclusions, the Commission carefully weighed the additional costs for filers to determine what information falls below the de minimis thresholds and can therefore be excluded, as compared to the costs of collecting all responsive information. The final rule contains new de minimis exclusions for certain information in the following requirements:

i. Supply Relationships Description
ii. Prior Acquisitions
iii. Defense and Intelligence Contracts

Voluntary Information

Finally, one new information request is not strictly required by the final rule, but filers may provide it on a voluntary basis. As part of the HSR Form, filers may agree to waive the confidentiality protections of the HSR Act to permit the Agencies to share HSR materials with other enforcers in order to facilitate cooperation during any investigation of the transaction. Such a waiver would be beneficial for the Agencies, and the filer may want to provide it as a way to limit the need to produce multiple or duplicative data sets and documents to other enforcers that are investigating the transaction, thereby reducing its overall regulatory compliance costs. Filers may view this as a benefit and therefore may grant a waiver even though their HSR Filing would be compliant with the final rule without it.

Non-Compliance Statement

In addition to these limits, the Act allows for incomplete answers with a statement of the reasons for non-compliance, and the Commission has the discretion to permit filers to rely on good faith estimates or no answer at all. If the filer is unable to answer any question fully, it must provide the information that is available and provide a statement of reasons for non-compliance as required by § 803.3, which is intended to reduce disagreements between filers and PNO staff.[299] Where exact answers cannot be given, filers are allowed to enter best estimates, while indicating the source or basis of the estimate, and marking the information with the notation ''est'' to any item where data are estimated. Finally, filers already routinely indicate under the current rules that certain required information is not applicable given the type of transaction being reported, and filers will continue to be able to do so under the final rule.

Summary of Requirements Based on Transaction Type

In the final rule, the Commission has employed all of these techniques to align the cost of complying with the final rule in light of the benefit to the Agencies, filers, and the public of the Agencies having the information on the first day of the statutory review period to conduct their preliminary antitrust assessment. The chart below summarizes the different information requirements of the final rule for the acquiring person and the acquired person for three distinct types of transactions: (1) select 801.30 transactions, (2) those transactions that will have no NAICS or described overlaps or supply relationships; and (3) transactions that report a NAICS or a described overlap, or a supply relationship, which includes transactions with significant pre-merger competitive interaction between the filers (for example a company acquiring one of its principal competitors or suppliers).[300] The chart indicates which type of filer will not provide this information because it is not required by the final rule. As depicted in this chart, the final rule creates different information requirements for different types of filers and different types of transactions, resulting in a range of costs associated with filing that are directly proportional to the complexity of the deal, corporate structure, and most importantly the risk of law violation.

[299] The submission of the statement of reasons for noncompliance is not intended to be a substitute for compliance with the notification obligation but it serves two salutary purposes: (1) reducing disagreement between the Agencies and the filer, and (2) providing a basis for any civil penalty proceeding that may be brought under 15 U.S.C. 18a(g)(1). *See* 122 Cong. Rec. 29342 (1976); *see also* 43 FR, 33450, 33508–09 (July 31, 1978).

[300] These three scenarios were used to calculate costs for the Paperwork Reduction Analysis, discussed below in section VIII.

Figure 3: Applicability of Significant Updated and New Information Requirements By Filer and Transaction Type

	Select 801.30		No Overlap / No Supply Relationship Transaction		Overlap / Supply Relationship Transaction	
	A-Side	B-Side	A-Side	B-Side	A-Side	B-Side
Translations						
Changes to Identification of Additional Minority Interest Holders						
Organization of Controlled Entities	■	■				
Description of Ownership Structure		■		■		■
Organizational Chart (if exists)		■		■		■
Identification of Certain Officers and Directors		■		■		■
Description of Business of the Acquiring Person		■		■		■
Transactions Subject to International Antitrust Notification		■		■		■
Transaction Rationale	■	■				
Transaction Diagram (if one exists)	■	■		■		■
Competition Documents from Supervisory Deal Team Lead		■				
Plans and Reports	■	■	■	■		
Transaction Agreements	■	■				
Other Agreements Between the Parties		■		■		■
Overlap Description	■	■				
Supply Relationships Description	■	■	■	■		
Geographic Market Information (new organization, street-level reporting, and reporting of francisees)			■	■		
Limiting Minority-Held Entity Identification to Overlaps			■	■		
Prior Acquisitions			■	■		
Subsidies from Foreign Entities or Governments of Concern						
Defense or Intelligence Contracts	■	■	■	■		

D. Disproportionate Impact on Certain Sectors

Here the Commission addresses arguments that the final rule would have a disproportionate impact on certain sectors as part of its consideration of how the benefits and costs associated with the final rule are distributed among various groups.[301]

Small Businesses

Several commenters are concerned about the additional costs associated with the final rule for small businesses who are parties to a reportable transaction, stating that the proposed rule would disproportionally affect small businesses because they would be less equipped than larger businesses to cover the additional costs. Commenters said that these additional costs would not only deprive small businesses of funds that are needed for operations or innovation, they might also slow or deter dealmaking involving small businesses altogether. On the other hand, an individual commenter explained that the proposed rule would help small businesses who have been affected by mergers.

The Commission addresses concerns about undue costs throughout this final rule, making many adjustments to limit the costs of complying for those filers who do not have complex corporate structures or extensive business lines, including small businesses. In section IX., the Commission certifies that the final rule will not have a significant economic impact on a substantial number of small entities as that term is defined by the Small Business Administration (''SBA''). HSR reporting requirements apply to very few small businesses. Congress adjusted the statute in 2000 to require annual indexing of reporting thresholds so as to minimize the effect of inflation that would otherwise require more reporting for small businesses and small transactions, and nothing in the final rule changes which acquisitions are subject to premerger review. See section III.A.1.

In fact, the Commission believes that many small entities will benefit from the final rule. As noted by one commenter, the goal of antitrust enforcement is to strike the right balance: too little enforcement could allow some companies to gain an unfair advantage, while too much enforcement risks driving up compliance costs and undermining legitimate efforts to compete. The Supreme Court has explained that Congress designed section 7 of the Clayton Act to ''prevent economic concentration in the American economy by keeping a large number of small competitors in business,'' [302] and to retain '' 'local control' over industry and the protection of small businesses.'' [303] As a result, a merger of two small companies that allows the combined entity to compete more effectively with larger rivals may be unlikely to violate the antitrust laws. In contrast, the legislative history of the Clayton Act reveals Congress was very much concerned with, and sought to prevent, acquisitions involving large companies buying smaller or up-and-coming rivals that would otherwise cease to be independent businesses.[304] By making possible more effective and efficient premerger review of HSR-reportable transactions, the final rule will facilitate effective enforcement of the antitrust laws, which in turn will preserve opportunities for small businesses to thrive in markets that are not dominated by much larger competitors.

In passing the HSR Act, Congress made plain that it was not interested in burdening mergers between two small companies with premerger review, since small businesses generally do not present the same risks of anticompetitive effects as do larger businesses. To that end, the HSR Act specifically exempts certain smaller companies from its reach. But it is not possible to say that all transactions involving small businesses carry little or no antitrust risk, whether they are

[301] *See generally* Boardman et al, *supra* note 256, at 506; Executive Order 12866 directs agencies when designing regulation to ''consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.'' E.O. 12866 Sec. 1(b)(5) (1993).

[302] *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275–76 (1966) (also noting that undue concentration drives small businesses out of the market).

[303] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 316 (1962).

[304] *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 281 (1964).

reported or not. When they are required to be reported, the Agencies are obligated to conduct a premerger assessment. Therefore, it is appropriate for the Agencies to receive information from even small businesses that are a party to a reportable transaction to determine whether those transactions may violate the antitrust laws.

Based on the Commission's experience, deals of any size can present significant antitrust risk. The American Antitrust Institute analyzed historical data about HSR filings from 1985 to 2020 and prepared a chart that reflects the percentage of Second Request investigations to transactions by deal value.[305] This data shows that while transactions valued at under $100 million rarely receive Second Requests, a not insignificant number of transactions in the $100 to $150 million range do. This confirms the Agencies' experience that although many deals that are subject to an in-depth investigation involve large companies, especially on the buyer side, it is not possible to ignore that some transactions that involve small businesses also violate the antitrust laws.[306] And of course, the Agencies are also attentive to small-value acquisitions that cause harm even if they were not subject to premerger review and seek to unwind them as resources and precedents allow.[307]

As modified, however, the final rule imposes lower costs on transactions involving independent small businesses, as they typically involve fewer business lines and less complex corporate structures. Typically, the larger the company, the more extensive and complex its business lines. Many of the changes in the final rule are designed to allow the Agencies to quickly understand complicated entities and the businesses that they have connections to. These changes generally will not impact small business. Further, where possible, the final rule imposes less burden on sellers (the acquired person), which tend to be smaller in size than buyers.[308] In effect, the final rule imposes costs on filers that are commensurate with the antitrust risk presented by the transaction: those with low risks (*e.g.,* simple corporate structures, few lines of business or no preexisting commercial relationship with the other party) have the lowest costs. Wherever practicable, the Commission took into account the burden across smaller businesses who may engage in competitively benign transactions and has adjusted the final rule in several significant ways to mitigate this burden. For example, the Commission has excluded select 801.30 transactions from certain requirements, eliminated other proposed requirements, and modified other proposed requirements as described throughout this final rule. The Commission believes that this approach, which is focused on antitrust risk and not necessarily business size, nonetheless minimizes the costs for small businesses involved in transactions subject to mandatory premerger review consistent with the statutory scheme.

Startups

A number of commenters expressed the view that the requirements of the proposed rule would deter innovation by denying startup firms an exit path; they observed that many startups plan for eventual acquisition, and this strategy drives investment that allows the firm to grow. Commenters stated that any change to the status quo will upset this balance. Others observed that acquisitions by large, established firms play a crucial role as an exit strategy for startups securing venture capital, which is an important source of funding in many sectors, including tech. Some of the same commenters, however, acknowledged the valuable role startups play by challenging established incumbents. Various commenters made nonspecific objections to increased burdens imposed upon startups by the proposals in the proposed rule.

Startup companies are not unique to particular industries but represent an important business model throughout the U.S. economy. For any transaction that does not present facts indicating it may violate the antitrust laws—including those involving startups—the minimal additional burden of disclosing more information is justified by the Agencies' need to conduct a thorough review in light of the information gaps discussed in section II.B. Where those facts are absent, there should be no additional delay or additional risk of detection for those transactions. Given the small incremental costs associated with the final rule relative to other M&A costs and the potential magnitude of returns from an exit sale of a successful startup, HSR compliance costs would not plausibly factor into the *ex ante* investment decision. To the extent that the final rule requires additional disclosures regarding the business lines of startups, that burden is not different from those imposed on established businesses in the same sector. Moreover, the Commission has no basis to excuse startup companies from complying with the final rule; it is not the case that they always or mostly present no antitrust risk. See sections II.B.4. and III.C.2.

Private Equity and Other Types of Investments

The Commission received several comments from groups representing investors raising concerns about the burden of gathering the information for the proposed rule as well as the burden of having to disclose the new information. One commenter asserted that certain proposed requirements would be particularly onerous for transactions involving private equity and venture capital, such as the expanded lookback period, information regarding limited partnerships, more information about prior acquisitions, the identities of past and present members of boards of directors, and disclosure of the buyer's prior acquisitions. Another commenter said that the burden of the information requirements would affect the efficiency of transactions and introduce more uncertainty and risk into the deal process, which would adversely impact returns for investors. Another noted that the burden of the proposed information requirements would, among other effects, make capital markets less efficient, resulting in a significant impact on its members and the thousands of pensioned workers, retirees, universities, and other investors who rely upon them. The Commission discusses these concerns elsewhere and has concluded that the incremental costs associated with the

[305] *See* Diana L. Moss, Am. Antitrust Inst., ''What Does the Billion-Dollar Deal Mean for Stronger Merger Enforcement?'' 3 Fig. 2 (Sept. 20, 2022), *https://www.antitrustinstitute.org/wp-content/uploads/2022/09/AAI_Billion-Dollar-Mergers_9.20.22.pdf.*

[306] *See, e.g., United States* v. *Neenah Enterprises, Inc.,* No. 1:21–cv–02701 (D.D.C. Oct. 14, 2021) (complaint) ($110 million asset purchase); *In re Global Partners LP,* No. C–4755 (F.T.C. Mar. 2, 2022) (decision and final order) ($151 million acquisition); *In re ANI Pharmaceuticals, Inc.,* No. C–4754 (F.T.C. Jan. 12, 2022) (decision and final order) ($210 million acquisition); *United States* v. *Grupo Verzatec S.A. de C.V.,* No. 1:22–cv–01401 (N.D. Ill. Mar. 17, 2022) (complaint) ($360 million acquisition). Note that the value of the transaction is considered by some filers to be confidential information and is not always disclosed in public filings. *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23-civ-06188 (S.D.N.Y. Dec. 29, 2023); *In re Lifespan Corp.,* No. C–9406 (F.T.C. Feb. 17, 2022) (complaint).

1 *See, e.g., In re The Golub Corp.,* No. C–4753 (F.T.C. Jan. 20, 2022) (decision and final order) (divestiture of 12 supermarkets); *United States* v. *B.S.A. S.A.,* No. 1:21–cv–02976 (D.D.C. Mar. 15, 2022) (divesture of two business lines).

[307] *See, e.g., Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012); *In re Otto Bock HealthCare N. Am., Inc.,* No. 9378 (F.T.C. Dec. 1, 2020).

[308] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2022, Tables VI through IX (FY 2022).

final rule are small relative to the value of the transaction and the costs of other merger-related fees. As noted throughout this final rule, the Commission has taken many steps to reduce the burden on all types of filers as compared to the proposed rule, including investors.

The same commenter who mentioned the effect on capital markets also noted that the HSR-reportable transactions in which its members engage often do not pose competitive risk. These are transactions in which the acquiring persons are investment groups, trusts, or other financial vehicles or are providing securities, commodities contracts, and other financial investments or related advice. According to this commenter, its members rarely, if ever, have horizontal or even vertical relationships with the issuers whose securities they acquire. Rather, the kinds of HSR-reportable transactions in which its members engage are not mergers or acquisitions but the acquisition of minority positions, for instance, when concentrated funds make large purchases due to sizeable investor inflows, when benchmark-relative funds make large purchases due to index rebalancing, or when managers shift portfolios into highly liquid names in anticipation of redemptions or in connection with wind-downs.

This and other comments generally reflect three different types of concerns: potential burdens for investors that must make HSR filings, potential burdens for minority investors in entities that have to make HSR filings (but have no HSR filing obligation themselves), and potential burdens related not to filing out the Form, but to potential enforcement actions to block the transaction that may arise from the Agencies having more complete information. The Commission addresses each below.

As a starting point, the Commission emphasizes that the final rule does not change who must file [309] and the HSR Act and Rules exempt passive investments of 10% or less,[310] or 15% or less for institutional investors.[311] The final rule does not alter the analysis regarding passive investments and therefore the final rule has no impact on investors who hold passive investments [312] unless these investors acquire more of a company than these significant ''investment only'' exemptions permit and are, as a result, required to report their investments for premerger review. As a result, many of the types of investors discussed in the comments will not have HSR filing obligations for their transactions, and thus would not be required to fill out the Form that is the subject of the final rule.

Some investors will have filing obligations either because they will hold a stake that provides them with the ability to direct or influence the management of the company in which they are investing (*i.e.,* above the 10% and 15% exemptions), or because they do not intend to be merely passive investors. In these instances, the Act treats them as any other acquiring person and the Agencies use the Form to screen for potential competitive effects. Until now, though, the Agencies have received less information about transactions where private equity and other types of investors are involved because the current Form does not require sufficient information to explain the often complex structures and relationships between different entities that are within the acquiring or acquired person. The final rule intends to close these information gaps and focuses on information that should be within the records of the acquiring or acquired person.

Further, the Commission acknowledges that investors can have different motivations in making acquisitions. Some do not seek to control or influence the companies in which they invest, but rather only seek a desired rate of return. In contrast, others seek positions with significant management rights or stakes that result in control of or influence in the target business. The Commission has sought to tailor the requirements of the final rule to illuminate those factors that could give rise to competitive concerns while minimizing additional costs for those investors that do not seek to participate in or influence decision-making of entities related to the acquiring entity or other entities within the buyer that are in the same industry as the target. As a result, the Commission has made significant changes as compared to the proposed rule, declining to adopt many of the proposed changes and significantly tailoring others. The Commission has also introduced the concept of select 801.30 transactions, which it anticipates will capture the transactions of many investors that do not seek to influence, direct, or manage the companies in which they invest. *See* section VI.A.1.f. The Commission has relieved such transactions from many of the new requirements, which it anticipates will mitigate the potential burden of providing information for many investors who do have to file.

As to investors that do not have HSR filing obligations but hold minority interests in entities that do, the final rule does require additional information about some minority investors if those investments are in entities controlled by the acquiring person that are either related to the transaction or operate in the same industry as the target. However, as described in section VI.D.2.a., the burden of providing this information rests on the acquiring person, not on those minority investors. Their presence as an investor should be known to the filer because the filer controls the entity, and when revealed in the HSR Filing, will provide information that will assist the Agencies in determining whether those investors also hold interests or have relationships with entities related to the target.

Additionally, the Commission modified the proposed rule to scale back requirements that would have broadly required disclosure of the limited partners of certain entities. As discussed below, the Commission has limited the final rule to require identification of only those limited partners that have certain rights related to the board of directors or a similar body. When required, this information is limited to providing the legal and business name of the minority investor, its address, and the percentage the investor holds in the entity controlled by the acquiring person. In most instances, the Commission believes this information should be available in the records of the acquiring person. When it is not, the Commission has explained that the acquiring person can note that the information is not available and why. The final rule does not create an obligation for the acquiring person to request this information from its minority investors. Therefore, the final rule imposes no burden on such minority investors in filling out the revised Form. Investors that do not have HSR Act filing obligations, but hold minority interests in entities that do, will not have any new obligations to either make filings or provide information for the filings of entities in which they have minority holdings.

Several commenters raised concerns that the additional information requirements for funds, especially those managed by activist investors, would

[309] One commenter suggests that the proposed rule would result in an increase in filings among investors. Comment of TIAA, Doc. No. FTC–2023–0040–0691 at 3. The Commission disagrees.

[310] 15 U.S.C. 18a(c)(9); 16 CFR 802.9.

[311] 15 U.S.C. 18a(c)(11); 16 CFR 802.64.

[312] Some commenters discussed shareholder engagement encouraged by the SEC. *See, e.g.,* Comment of Managed Funds Ass'n, Doc. No. FTC–2023–0040–0651 at 8. The Commission notes that the SEC is a different agency with a different law enforcement mission.

have a detrimental impact on these investors as a result of the disclosure of the information itself. They pointed to the disclosure of the interests and rights of limited partners as creating disincentives for shareholder engagement or as undue interference in the market for corporate control. Another commenter stated that disclosure requirements may deter investments in private equity firms, potentially reducing the flow of capital to small- and medium-sized businesses.

The final rule does not target information specific to any type of investor. But if an investor holds a small but significant stake (five percent or more) or plays a role in the acquiring person's decision-making, the Commission believes that disclosure of these interests is justified by the Agencies' need to know about such investments to conduct premerger screening. As discussed in section II.B.1. and section VI.D.1.d.ii, there have been significant changes in the number and breadth of investment companies managing portfolios that include investments in companies with competitively significant relationships. Due to these changes and others, the Commission has determined that the Agencies need more information about minority holders between the UPE and the acquiring person, as well as information about those who serve as officers and directors and who will be involved in decision-making after the transaction is consummated. Many commenters specifically objected to providing any information about limited partners, noting that the existence of significant management rights such as board seats or board approval rights, is ''atypical.'' The final rule has been modified to require disclosure only of these types of limited partner situations, which should mitigate these concerns.

Another commenter said that having to disclose the required information would deter investment in in certain types of investment vehicles because of the exposure of proprietary contractual information and Personally Identifiable Information (PII) about every facet of the M&A process. This commenter noted, for instance, that the requirement to provide a term sheet or draft agreement reflecting sufficient detail about the proposed transaction when filing on the basis of a Preliminary Agreement would expose details about transactions that could undermine competition in the industry and harm returns to LPs. In addition, this commenter stated that the requirement for PE firms to submit a narrative describing the justification for certain transactions would impinge on the proprietary information that PE firms exchange with target companies and their consultants.

As noted above and elsewhere, the Commission has made significant changes as compared to the proposed rule, and the changes in this final rule should address many of this commenter's concerns. That said, the Commission believes the commenter has overread the Commission's intent. The purpose of the final rule is to provide the Agencies with more information on those factors that could give rise to competitive concerns, not to expose every facet of the M&A process or investor strategy. The required information does not require social security numbers, addresses or other sensitive PII. Moreover, the final rule requires the disclosure of additional information to the Agencies, not to the public or third parties, and the confidentiality of the information provided to the Agencies as part of the HSR filings process is protected by statute, specifically 15 U.S.C. 18a(h).

Finally, as described in section VI, the final rule will provide the Agencies with more transparency into what the acquiring person holds and whether any person or entity that has influence over the acquiring person is also involved in the business of the target. Specifically, the Commission has not limited the information required about the acquiring person even in the case of select 801.30 transactions. As stated in the NPRM and throughout this final rule, the Commission believes this information is critical to the Agencies' initial review and the benefit for robust premerger screening justifies the burden of disclosing the information because it may identify an existing business relationship between the acquiring person and target (via common investors or shared managers) that are otherwise not revealed in the HSR Filing.

The Commission disagrees with comments that identify increased transparency about the filed-for transaction itself (and not the specific burden of collecting and providing the information) as a cognizable burden associated with the final rule. The purpose of the final rule is to require information that allows the Agencies to accomplish the task assigned to them by Congress: to determine whether the acquisition subject to the Act, if consummated, may violate the antitrust laws. Suggestions that increased transparency would endanger certain filed-for transactions implicitly indicate that the current Rules have led to under-enforcement of the antitrust laws. Any burden related to deal uncertainty that might arise from increased transparency is not a burden related to compliance with the HSR Act and the final rule, but rather is tied to whether the transaction itself may violate the antitrust laws.

Biopharmaceuticals

Two commenters from the biopharmaceutical sector suggested that several requirements of the proposed rule would disproportionately burden biopharmaceutical firms and transactions. They pointed to the burden of identifying information related to products in early stages of clinical development, and stated that, because the Commission's 2013 rule specific to pharmaceutical license agreements increased the universe of reportable transactions, any expansion of the Form disproportionately burdens the pharmaceutical sector. One additionally objected to providing information about employees, and the other asserted disproportionate impact from providing information regarding additional prior acquisitions because of the number of acquisitions in this sector, and from disclosing officers and directors due to biotech firms' dependence ''on a small cadre of qualified directors and officers.'' Both commenters claimed the changes to the HSR Form and Instructions will prolong the time required for HSR filing preparation and agency review, resulting in delayed transactions.

The final rule does not target any information that is unique to biopharmaceutical companies, and the Commission disagrees that the additional information that would be sought from these companies is not relevant. Where the final rule requires additional information from biopharmaceutical companies, the cost of supplying that information is justified by the benefit to the Agencies in having a more complete understanding of the companies' existing business operations and their business strategy, including prior acquisitions involving the same business lines. For instance, many biotech and pharmaceutical companies invest in extensive R&D pipelines, and the Agencies need information about products in development to determine if the companies are current competitors for innovation in a particular space to meet a particular need, or if one or both merging parties are potential competitors for any existing products.[313] As the commenters

[313] *See In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint alleging Sanofi's proposed acquisition of an exclusive license to Maze Therapeutics' pipeline Pompe therapy would have eliminated nascent threat to Sanofi's monopoly) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120

Continued

acknowledged, mergers, acquisitions, and exclusive licenses are particularly prevalent in the pharmaceutical sector, where the business model for new drug development centers around such transactions. Similarly, the comparatively higher number of transactions occurring in this sector can be expected to trigger a higher number of HSR Filings and could require filers to disclose a greater number of prior acquisitions. Even if biopharmaceutical companies have to report more prior acquisitions, this disclosure is also justified because it is relevant to determining whether there is a pattern of serial acquisitions. The fact that sharing of officers and directors is more common among companies in this sector means there is a greater need for the Agencies to screen for related competitive problems.[314]

On the other hand, other information requirements have been modified to reduce the costs for all types of filers, including those in the biopharmaceutical sectors. For instance, the Commission declined to adopt new information requirements related to employees, which commenters asserted could impose significant costs on those in the biopharmaceutical as well as other sectors. Overall, the impact of the final rule is proportional to the number and characteristics of transactions that occur in any given sector of the economy (including biopharmaceuticals). To the extent that the revised Rules will result in delayed transaction closings, the potential impact of incremental delay is outweighed by the Agencies' statutory mandate to examine each transaction for the potential for that it may violate the antitrust laws. In other instances, the additional information may actually reduce delay by permitting the Agencies to avoid issuing a Second Request or issuing Second Requests that are more tailored to the potential for competitive harm than would have been issued under the existing reporting requirements.

In sum, the Commission has determined that the burden imposed on this sector by the final rule is proportionate to the market realities and complexities of these companies and the likelihood that any transaction may require more in-depth antitrust review.

Hospitals

A national organization representing hospitals and several State hospital associations stated that the proposed rule would have a negative and wholly unnecessary impact on hospitals and health systems. They asserted that the additional information required by the proposed rule would not generate actionable information with respect to hospital mergers. They objected to specific requirements, stating that reporting prior acquisitions has no relevance in the context of hospital mergers, or that it is inconceivable that a hospital-related merger could plausibly harm competition in any labor market without also presenting at least some competitive risk in a downstream market.

The Commission responds that the final rule does not target any information that is unique to hospitals and health systems, and disagrees that the additional information, when sought from hospitals, is not relevant. For example, the commenters' suggestion that the Agencies not screen for hospital labor competition issues is inconsistent with growing empirical evidence of competitive harm to labor markets from consolidation generally and from hospital mergers in particular.[315] Moreover, as discussed above, an empirical assessment of the price effects of consummated hospital mergers reveals that there are meaningful information gaps in the current requirements that led the Commission to grant early termination of the waiting period for hospital mergers that caused significant price increases.[316]

As discussed, the final rule will exclude non-profit entities organized for religious or political purposes from the specific requirement to produce information disclosing officers, directors, and members. This carve-out will likely encompass some healthcare organizations, including certain religious-affiliated hospitals or other provider groups. While these entities will not be required to provide such information as a matter of course in the HSR Filing, it can nonetheless be relevant in any in-depth investigation of the transaction and may be sought from the parties at a later date.

Given the Commission's significant expertise and interest in preventing hospital mergers that may violate the antitrust laws, the final rule is appropriately focused on transactions that are most likely to present antitrust risk. The Agencies have determined the information sought by the final rule will close the information gaps that now exist with regard to hospital and other healthcare acquisitions. Moreover, because many hospital mergers are not reportable under the HSR Act, several States have enacted premerger notification laws for certain healthcare acquisitions, including those involving hospitals, to prevent consolidation that may affect their citizens directly. In light of all this evidence of a need for robust screening in this critical sector, there is no basis to excuse hospitals or health systems from any of the new requirements of the final rule beyond the modifications that reduce costs on filers overall, including on hospitals.

E. Regulatory Alternatives Considered

In addition to considering the costs and benefits of the final rule as compared to the status quo, the Commission considered other alternatives suggested by commenters.[317] The first alternative is to not finalize any modification to the current HSR Form and Instructions and to issue more Second Requests when the HSR Filing is insufficient to determine whether the proposed acquisition may violate the antitrust laws. Relatedly, commenters suggested that the Commission maintain current reporting requirements and make more extensive use of voluntary submissions from the parties post-filing. These alternatives are discussed above in section III.A.3. Another alternative suggested by commenters is for the Commission to create two separate sets of information requirements, one for acquisitions that present a low risk of a law violation and therefore require less reporting (a ''short form'') that would continue to report the information required by current HSR rules and a second form for acquisitions that cannot be considered low risk and that would contain all of the new information requirements in the final

(D.D.C. Jan. 25, 2017) (complaint alleging Questcor's acquisition of rights to pipeline competing drug eliminated nascent threat and protected its monopoly ACTH drug H.P. Acthar Gel) (consent decree ordered license and $100 million equitable monetary relief); *In re Thoratec Corp.,* No. 9339 (F.T.C. July 28, 2009) (complaint alleging Thoratec's proposed acquisition of HeartWare eliminated pipeline threat to Thoratec's left ventricular assist device monopoly) (transaction abandoned).

[314] Mark A. Lemley et al., ''Analysis of Over 2,200 Life Science Companies Reveals a Network of Potentially Illegal Interlocked Boards'' (Stan. L. & Econ. Olin Working Paper No. 578, 2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4253144.*

[315] Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan, *supra* note 70, at 2 n.1; *In re Lifespan Corp.,* No. 9406 (F.T.C. Feb. 17, 2022) (complaint).

[316] *See supra* note 24 and related text.

[317] Executive Order 12866 requires an assessment of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulations and an explanation of why the planned regulatory action is preferable to the potential alternatives. E.O. 12866 sec. 6(a)(3)(C) (1993). As an independent agency, the Commission is not subject to the requirements of this executive order but nonetheless used the principles outlined there to explain why the Agencies' chosen regulatory action is preferable to potential alternatives.

rule. Here the Commission discusses the relative merits of adopting this alternative over the final rule.

Several commenters suggested that the Commission consider creating two separate sets of information requirements for notification, stating that this approach is used by other jurisdictions to alleviate some costs and delays associated with merger notification under their laws. They asserted that it would be suitable for effective and efficient premerger review under U.S. law.

As discussed above, the HSR Form is not ''one size fits all'' and the costs of making an HSR Filing are unique for each transaction. In this rulemaking, the Commission is publishing, for the first time, separate Forms for the acquiring person and the acquired person. The final rule has materially different requirements for each filing person, and providing separate Forms allows for clearer instructions (avoiding terminology in the proposed rule such as ''the acquired person or acquired entity (as applicable)''). The Commission expects that having two separate forms for each side of the transaction will improve compliance and reduce errors for filers.

Moreover, while not styled as a ''short'' or ''long'' form, the final rule reflects the Commission's consideration of each requirement and makes clear where there is a need for the information for each type of transaction. In particular, the IF/THEN structure of the information requirements results in some filers responding to only a few information requirements. As a result, in practice, there are ''shorter'' and ''longer'' versions of the forms depending on the type of filer and the type of transaction under review. The Commission determined that this approach better reflected the varying information requirements the Agencies need in order to effectively and efficiently analyze the broad spectrum of filers and transactions.

Most importantly, in its review of past filings, the Commission found no set of objective criteria that would appropriately sort transactions into one or more discrete categories for the development of a single short form. Rather, the final rule adopts new information requirements but imposes them differently to reflect each filer's role in the transaction (acquirer versus acquired) and the relative antitrust risk associated with the proposed transaction. Filers with the highest information and document requirements are acquirers pursuing the acquisition of a firm with whom they have extensive existing business relationships or offer products or services in the same industries that must be assessed prior to consummation.

For one category of transactions, select 801.30 transactions (described in section VI.A.1.f.), the Commission has determined that the Agencies need minimal additional information such that the final rule should impose fewer new requirements. The Commission believes that the few new information requirements for select 801.30 transaction are justified in order to ensure that the Agencies conduct a premerger assessment to determine that even these transactions do not present risk of a law violation. Similarly, the Commission determined that other characteristics justify a different and lighter burden, such as whether the filing person is the buyer or the seller in the transaction. Finally, many requirements are tied to the acquiring and acquired person operating in the same industry or having a business relationship. These questions would be inapplicable to many filers, particularly activist, institutional, and retail investors, which typically do not have controlling stakes in operating companies or do not focus on a particular industry. As a result, the costs of complying with the final rule are tailored to the risk of a law violation associated with each transaction in a way that is similar to, but more flexible than, the ''short form'' alternative. The size and complexity of each party to the transaction, as well as the size and scope of their respective business, vary widely across filings. As discussed in section II.B., there are specific risks to competition that the current information requirements do not disclose, making the final rule a better alternative to achieve robust premerger screening even for select 801.30 transactions as compared to a short form alternative.

In addition, the short form alternative is likely to create uncertainty for filers that do not qualify for short form treatment but whose deals would suddenly be viewed as ''not low risk.'' Having a bifurcated system that targets some transactions as ''low risk'' is not consistent with the statutory premerger scheme Congress created when it determined that reporting would be required based on deal value regardless of the risk of a law violation, with additional authority for the Commission to exempt transactions that it has determined to present little to no antitrust risk. At this time, the Commission does not have a basis to conclude that the existing requirements continue to be sufficient for any category of transactions.

The Commission believes that broadening the use of the HSR Form's existing IF/THEN format so that the final rule aligns the cost of complying with the associated antitrust risks of the transaction is the most appropriate way to implement the premerger notification scheme established by Congress. Congress has determined which transactions are subject to premerger review, relying on deal value to determine reportability. This criterion provides administrative clarity and predictability for businesses. Some jurisdictions use market share or revenue (''turnover'') thresholds to determine reporting or eligibility for short form treatment. But in doing so, these regimes also typically depend on the competition authorities to provide extensive guidance to business, often prior to formal notification, regarding the proper definition of markets. This may require an in-depth analysis of the potential markets at issue and can delay formal notification.[318] Congress has chosen to rely on an objective and administrable system of reportability based on deal value and revenues for filers. Adopting a different standard for determining eligibility for short form treatment would require the Commission to engage in a separate and challenging rulemaking to seek public comment on what types of thresholds should be adopted that would be consistent with the premerger scheme Congress adopted in the HSR Act. At this time, the Commission has determined that one category of filings, select 801.30 transactions, will have minimal additional information requirements as compared to the current HSR Form and has made other modifications in the final rule to reduce the costs for other types of filers and transactions as well.

Although the short form alternative would save some filers additional direct costs associated with making an HSR, the Commission chose to adopt the final rule with modifications designed to reduce the cost of filing as much as possible for all types of filings, including those transactions that might be eligible for short form treatment. The Commission believes that this approach reflects, to the extent practicable, the antitrust risks associated with a variety

[318] Relying on market share thresholds presents many challenges, and several jurisdictions have replaced them with thresholds that are easier to administer. In the early 2000s, approximately half of the jurisdictions with merger control had subjective notification thresholds such as market share but by 2010 more than forty percent of these jurisdictions had replaced their subjective thresholds with objective, sales- or assets-based thresholds.

of filings, not just ones that could be eligible for short form treatment. A final rule that reasonably balances the benefits to Agencies' premerger review with the costs imposed on filers and others is a reasonable exercise of the Commission's rulemaking authority under the HSR Act and is consistent with the overall mandatory premerger review scheme established by Congress. The Commission believes that the final rule, with its tailored modifications based on the Agencies' experience in reviewing thousands of transactions, will result in minimal additional costs for certain filers and is preferable to adopting and maintaining a short form.

Final Instructions and Changes From the Proposed Rule

IV. Part 801

A. Sections 801.1(d)(2): Ministerial Changes To Reflect Reorganization of Form and Instructions

While the Commission will continue to use the same mechanism for electronic filing, it has re-organized the Form and Instructions, as discussed below in section VI. As a result, several ministerial changes must be made to § 801.1(d)(2). This section, which defines ''Associate'' and provides examples, currently refers to item numbers used in the current Form and Instructions. The Commission adopts revisions that align with the Form and Instructions as adopted in this final rule.

Specifically, the definition of ''Associate'' and the related examples refer to Items 6(c)(i), 6(c)(2), and 7. This information is now required by the Minority-Held Entity Overlaps and Controlled Entity Geographic Overlaps sections, which replace the previous item numbers. The Commission, accordingly, modifies the Rule to reflect these changes.

B. Section 801.1(r): Definitions of ''Foreign Entity or Government of Concern'' and ''Subsidy''

On December 29, 2022, the President signed into law the Consolidated Appropriations Act, 2023, which included amendments to the HSR Act in the Merger Modernization Act. 15 U.S.C. 18b. The Merger Modernization Act required the Commission, with concurrence of the Assistant Attorney General, and in consultation with Chairperson of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the Chair of the United States International Trade Commission, the United States Trade Representative, and heads of other appropriate agencies (''Relevant Agencies''), to promulgate a rule to require persons making an HSR Filing to disclose subsidies received from countries or entities that are strategic or economic threats to the United States.

After conducting its own internal diligence to draft a rule and in consultation with the Relevant Agencies on this topic, the Commission proposed amending § 801.1 to add proposed paragraphs (r)(1) and (2), which define ''foreign entity or government of concern'' and ''subsidy,'' respectively.

The Commission received no objections to the proposed definitions and received input that they appear to be a reasonable implementation of the Merger Modernization Act. As such, the Commission adopts these definitions as proposed.

V. Part 803

A. Sections 803.2, 803.5, and 803.10: Adoption of Electronic Filing

The Commission proposed amending §§ 803.2(e) and (f); 803.5(a)(1) [319] and (3) and (b); and 803.10(c)(1)(i) and (ii) to eliminate references to paper and DVD filings and delivery to physical offices. The Commission has been successfully accepting filings electronically since March 17, 2020, as a result of the COVID–19 pandemic and resulting closures of Federal office buildings during the COVID emergency. The Commission received only one comment on this proposed change: One commenter noted that electronic filing is generally preferable and less burdensome to filing by paper or DVD. The Commission received no negative comments on the elimination of paper and DVD filings. The Commission adopts this change as proposed, though, as explained below, § 803.2(e) and (f) have been redesignated as (d) and (e), respectively.

Separately, the Commission noted in the NPRM that the Agencies were developing a new e-filing platform that would eventually replace the current mechanism for electronic filing. The same commenter stated that before seeking to impose an e-filing requirement on all parties, the FTC should provide further details regarding the proposed user interface; the ability for users to collaborate on a single filing; the ability of users to save, review, and edit; and how filing persons will receive complete copies of filings as submitted. At this time, no change has been made to the method for accepting filings. While the Form and Instructions have been updated, filers will continue to use the platform that has been in use since March 2020. The Commission continues to develop a new interface for electronic filing and will, at the appropriate time, issue a rulemaking that provides instructions and access to the new e-filing platform in advance of its effective date.

B. Sections 803.2(b), (c), and (e); 803.9(c); and 803.12(c): Ministerial Changes To Reflect Reorganization of Form and Instructions and Clarification of Time Zone

As discussed above in section IV.B., several ministerial changes must be made to the Rules to reflect the new organization of the Form and Instructions. Existing §§ 803.2(b), (c), and (e), and 803.9(c) all currently refer to item numbers used in the current Form and Instructions. The Commission adopts revisions that align the references in the Rules with the headings in the Form and Instructions as adopted in this final rule.

Additionally, existing § 803.2(b) of the Rules currently explains what information needs to be provided by the acquiring and acquired person for Items 5–8 of the current Form. As described below, the Commission adopts separate instructions for the acquiring and acquired person, making existing § 803.2(b) unnecessary. For this reason, existing § 803.2(b) is being removed, and existing § 803.2(c)–(f) are being redesignated as § 803.2(b)–(e), respectively. Further, existing § 803.2(c) and (e) have references to the current Form numbering and are being updated.[320] Similar ministerial changes are being made to §§ 803.9(c) and 803.12(c). Finally the references to time in, redesignated § 803.2(d) have been updated to specify Eastern Time, consistent with other provisions of the Rules and with longstanding practice.

C. Section 803.2: Requiring Separate Forms for Acquiring and Acquired Persons

The Commission proposed amending § 803.2(a) and deleting § 803.2(b)(1)(v) so that filing persons that are both the acquiring and acquired person are

[319] In making this change, the Commission also takes the opportunity to correct the capitalization of ''act'' to lower case to be consistent with the definitions and other usage of the term in the Rules.

[320] For purposes of consistency and clarity, the Commission is also making a ministerial change to § 803.2 to explain that documents must be provided by 5 p.m. Eastern Time. Because electronic filing permits parties to submit documents from different time zones, they will need clarity as to which time zone the Commission is referencing in the rules. The Commission notes that § 803.10 already specifies that Eastern Time should be used when determining the expiration of the waiting period as well as the date of receipt of filings and it has long been the practice of the Commission to use Eastern Time in applying this rule.

required to submit separate Forms in each capacity. The Commission proposed this change because, in its experience, filers that opt to combine the information on a single Form often do not include everything that is required and would be reported if they filed on separate Forms. Such combined filings are also very confusing for the Agencies to review. In contrast, when filers choose to submit two separate Forms for such transactions, the filings provide all the required information and in a much clearer format that allows the Agencies to quickly understand how the transaction might change the operation of the acquiring person post-acquisition.

The Commission received only one comment on this proposal, which expressed support and noted that it will enhance the understanding of the entire transaction. The Commission adopts the change as proposed but replaces the word ''should'' with ''shall.''

D. Section 803.5(b): Requiring Detailed Letters of Intent, Draft Agreements, or Term Sheets

The Commission proposed amending § 803.5(b) to require filers who have not executed a definitive transaction agreement to submit a draft agreement or term sheet describing the transaction that is the subject of the HSR Filing with sufficient detail to permit accurate analysis.[321] The Commission received numerous comments on this proposal focused on the increased burden and delay for filing parties. The Commission has adopted the proposal in the final rule with modifications that respond to these concerns.

Although filers can currently file on the basis of preliminary agreements, such as an indication of interest, letter of intent, or agreement in principle (''Preliminary Agreements''), in the Commission's experience, a small but significant minority (approximately 10%) of filings made on the basis of Preliminary Agreements do not contain enough information to permit the Agencies to conduct an accurate determination of whether the contemplated acquisition may violate the antitrust laws if consummated.[322] In addition, such filings may be made prior to significant negotiations or due diligence and can be so lacking in specifics that they could force the Agencies to expend resources on transactions too uncertain to merit review.

As discussed below, the Commission has determined that it is necessary to assure that filings are not made prematurely—before the scope of the transaction has been sufficiently determined and before the parties have engaged in enough diligence such that consummation is not merely hypothetical—and in contravention to the purpose of requiring an affidavit stating that there is a good faith intent to consummate the transaction. However, the final rule will not specifically require term sheets or draft agreements for all transactions where a definitive agreement has not been executed. Rather, the Commission will continue to require filers to submit an executed agreement but, if that agreement does not describe with specificity the scope of the transaction that the parties intend to consummate, filers must also submit an additional dated document, such as a term sheet or draft definitive agreement, that does contain sufficient details about the transaction that the parties intend to consummate. This dated document can also take other forms; the title of the document is not determinative.

One commenter sought clarity on what level of information would constitute sufficient detail as required by the proposed rule, including what types of terms that may still be subject to negotiations would render a term sheet as an insufficient basis to submit an HSR filing. The Commission agrees that the additional clarity suggested by the commenter would be helpful in reducing uncertainty. The Commission revises the Instructions accordingly, as noted in section VI.H.1., to describe what would be sufficient. The Instructions state that the transaction agreement or supplemental document should contain some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms. The Commission notes that these examples are meant to be illustrative and not exhaustive. In contrast, indications of interest or other agreements that merely indicate that the parties will commence negotiations or begin diligence will not be sufficient.[323]

Using the criteria adopted in the final rule, the Commission analyzed all filings that contained Preliminary Agreements submitted in FY 2021 to determine how many transactions would be impacted by the final rule.[324] Of the transactions that were submitted on the basis of a letter of intent, term sheet, or similar document that was not a definitive agreement, less than 10% did not provide the Commission with a sufficient level of detail to assess the transaction. From this data, the Commission believes that filing parties typically reach agreement on key terms prior to filing, and there would be no additional cost to them to comply with the final rule. Of those that do not reach such agreement prior to filing, the Commission believes that antitrust review is not warranted until such time as the parties have resolved key aspects of the transaction, such as those described above, because the transaction may never be consummated, or key terms may change in ways that would affect the Agencies' initial review.

The Commission believes the transaction agreement requirements of the final rule represents a middle ground between a merely conceptual deal and a ''ready to close'' deal. The Agencies need to know the key terms of the transaction to determine whether it may violate the antitrust laws if consummated. Given the short period of time given to the Agencies to make that determination, it is necessary for the transaction to be one that is likely to close. The Commission acknowledges that even with this modification, the final rule may not permit some parties to make an HSR Filing as early in their deal process as is currently permitted. However, parties will be able to file after they have agreed to material terms of the transaction even if a final agreement has

[321] NPRM at 42182.

[322] Some commenters assert that documents such as letters of intent and preliminary agreements give the agencies enough information to identify those transactions that require further scrutiny. Based on its experience over forty-five years of reviewing merger filings that include these Preliminary Agreements, the Commission disagrees that they always provide sufficient information, especially when filings are made prematurely, prior to any significant due diligence.

[323] Here is an example of the type of terms contained in agreements that have been filed with an HSR Form and conformed to existing requirements, but will no longer be accepted without filing an additional document that provides the key terms of the agreement once the final rule is effective: This letter agreement confirms the good faith intention of Alpha (''Purchaser''), to consummate the acquisition of Target, a corporation, from Beta (''Seller''), for in excess of $119.5 million and less than $235 million, subject to the terms of a definitive agreement to be negotiated and executed by them with respect to such acquisition and the satisfaction of conditions to be set forth therein. This letter agreement is non-binding and subject to satisfactory completion of due diligence, mutually acceptable definitive documentation to be negotiated between Purchaser and Seller. Purchaser will pay all filing fees in connection with all filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder.

[324] The Commission reviewed transactions filed during FY 2021 due to the large number of filings received by the Agencies during that fiscal year, which made for a robust data sample. *See supra* note 260.

not been executed. The Commission notes that for many filings that do not contain an executed agreement today, the parties continue to negotiate final terms. The Commission expects that after the final rule, parties that have come to an agreement on key terms but have not yet signed a definitive agreement will continue to work to an executed agreement while the Agencies are conducting their antitrust review.

The transaction agreement requirements of the final rule are necessary to address a real shortcoming of allowing notification on Preliminary Agreements. As noted above, currently, some parties submit a ''letter of intent'' that substantively only states that the two parties have the good faith intent to consummate a transaction. Some documents are labeled an ''expression of interest'' in a future transaction that is similarly not specific. In the Agencies' experience, such filings are often made prior to any significant due diligence has begun and do not demonstrate that the parties have considered or agreed to key terms that would be required for consummation. Such filings require staff to dedicate time to collect facts and make an initial determination of potential illegality for a transaction that may never occur or without a sufficient basis to know the full scope of what the parties may agree to in the future. As noted in the original Statement of Basis and Purpose from 1978, because of the time and resource constraints upon the agency staff, the Agencies should not expend resources to review transactions so lacking in specifics that they could be considered merely hypothetical.[325]

The Commission has considered the additional effort required to review transactions that are filed with Preliminary Agreements and has determined that permitting filings on barebones agreements lacking sufficient details about key terms is contrary to the overall intent of the HSR Act. When a filing is made, triggering the initial waiting period, staff must start their review of the transaction and decide whether to issue Second Requests within the applicable statutory waiting period (15 or 30 days). If key terms of the transaction have not yet been established, staff may not have sufficient information to determine the potential antitrust risks. Further, if the parties have not yet begun robust negotiations or due diligence, the filing will not contain documents that provide business assessments of the transaction because such assessments have not been made. If the parties have not yet analyzed the impact of the transaction, it is not appropriate for the Agencies to begin such an assessment. This is particularly true if such assessments or negotiations lead the parties to abandon the transaction. In those cases, the Agencies will have needlessly spent scarce resources and may have burdened third parties investigating the transaction. Even if the parties do not abandon their transaction and the reviewing agency issues Second Requests, these investigations are often unnecessarily slowed down by the uncertainty surrounding the deal terms. The Commission understands that filers are anxious to get their HSR review completed so that it does not delay consummation of the transaction. But putting the burden on the Agencies to conduct antitrust assessments prematurely based on Preliminary Agreements that lack specificity undermines the purposes of the HSR Act. In addition, allowing notifications on mere expressions of interest in a future transaction creates opportunities to file as early as possible knowing that early filings put the Agencies at a disadvantage in conducting a thorough review.

Commenters raised concerns that the delay associated with negotiating additional deal terms would cause filers not to pursue beneficial transactions. One commenter claimed that as time is often of the essence in mergers, the result would be a significant chill on mergers. Another commenter contended that the proposal would deter investment in private equity and would increase costs that would likely be passed down to limited partners. Another commenter claimed that the Agencies failed to consider additional costs resulting from the additional delays in the transaction timeline.

The Commission disagrees that requiring more detail about transactions filed on Preliminary Agreements will chill M&A activity generally or for any particular type of investment. First, based on the Commission's review of filings detailed above, most reported transactions already meet the requirements adopted in the final rule. For those that do not, the Commission has identified a specific need for more detail to ensure that the reported transaction is likely to occur so that it is ripe for antitrust review. In addition, Congress identified those transactions where time is of the essence—namely, those that will be accomplished through a cash tender offer—and provided for a very short 15-day initial waiting period. For these transactions, the acquiring person does not need to file any agreement; it merely attests that its intention to make the tender offer has been publicly announced.[326] For other transactions, the Agencies need some basis to know that the reported transaction is one that is likely to occur so that they do not begin an antitrust assessment before fully understanding how the transaction will likely change the premerger market dynamics. In the Commission's experience, when parties cannot reach agreement on a few key terms within their desired timeline to consummate the transaction, that is an indication that the deal is one that is not likely to close or is likely to close on terms that are very different from the ones in the Preliminary Agreements. Finally, while the parties have an interest in starting the 30-day review period as soon as possible so that it does not unnecessarily delay their deal, the Commission has an obligation to review the transaction to determine whether it may violate the antitrust laws, and cannot effectively do so prematurely. The Commission believes that any delay associated with filers complying with the transaction agreement requirements of the final rule is necessary and justified by the benefits to the Agencies and the public in avoiding premature review of reported transactions.

Separate from the concerns about delay, one commenter expressed concerns that, as drafted in the NPRM, the Instruction arguably requires the production of the most recent draft agreement, even if a term sheet was also provided. The final rule requires filers to analyze the executed agreement to determine whether it provides sufficient detail about the transaction. If that document does not, then filers must provide one additional dated document that does sufficiently describe the transaction. The same commenter also questioned the value to the Agencies of receiving the most recent draft agreement, which they state is often slanted to reflect the views of the most recent party to circulate a draft and thus is not necessarily representative of what the definitive agreement will ultimately become. If the most recent draft agreement does not reflect the key terms of the transaction, then some other document, such as a term sheet, should be submitted. Otherwise, as described above, the filing may be premature. Further, the Commission acknowledges that certain provisions of a draft agreement that are not strictly necessary to understanding the antitrust implications of a transaction may change, sometimes substantially, and that the final definitive agreement is the most probative. However, the Commission believes that not permitting

[325] 43 FR 33450, 33511 (July 31, 1978).

[326] 16 CFR 803.5(a)(2).

filing until a definitive agreement has been reached is not necessary and could impose too great a cost due to the associated delays. The Agencies have extensive experience with reviewing draft agreements and find that even they can be probative. So long as the draft agreement and the associated executed agreement comply with the transaction agreement requirements of the final rule, the Commission will accept a supplemental document that is in draft form.

The same commenter suggested revising proposed § 803.5 to change ''will be consummated'' to ''the parties intend to consummate.'' The Commission agrees that this change in wording better captures the requirement for the parties to attest to their good faith intention to proceed with the transaction based on the submitted document and will add the phrase ''the parties intend to consummate'' to § 803.5. The Commission notes, however, that in order to satisfy the Act, parties must file and observe the waiting period for the transaction that will be consummated. Therefore, if there are material changes to the transaction after filing, the parties must continue to notify the Agencies so that they can determine whether an amended or new filing may be required. The Commission thus adopts the proposed requirement to submit a draft agreement or term sheet with the clarifications noted above.

In sum, the Commission has determined that changes to § 803.5 contained in the final rule are necessary and appropriate to prevent the Agencies from reviewing transactions for which the merging parties have not yet reached agreement on key terms. For premerger review to be timely and effective, the Agencies need some assurance that the transaction is likely to occur and that the scope of the transaction is revealed in the transaction documents submitted with the HSR Filing. The Commission has modified the final rule as compared to the proposal for this requirement to reduce the cost and delay for filers as much as practicable.

E. Section 803.8: Translation of Documents

The Commission proposed amending § 803.8 to require submission of English-language translations for all foreign-language documents submitted with the notification. Under § 803.8(a), filers currently do not need to translate these materials for the initial filing, and English-language outlines, summaries, extracts, or verbatim translations need only be provided if they already exist. Section 803.8(b), in contrast, requires that all foreign-language documents responsive to a Second Request be provided with English translations. The Commission proposed combining § 803.8(a) and (b) so that proposed § 803.8 would therefore be one paragraph requiring that verbatim English translations be provided with all foreign-language materials submitted as part of an HSR Filing or in response to a Second Request. The Commission adopts this proposed change with a revision to reduce potential confusion.

As explained in the proposed rule, when the Agencies receive key documents, such as the transaction agreements, relevant financial analyses or transaction-related assessments required by Item 4(c) with no translation at all or with unhelpful English-language outlines, summaries, or extracts, the Agencies are at a significant disadvantage during the very short period provided for initial review. The Commission received several comments on this proposal, principally regarding the burden and overall need for the proposed translation requirement. One commenter supported the proposed change, noting that with the help of modern software the cost of producing English translations should not be burdensome. The Commission agrees. As stated in the proposed rule, the Commission believes that translation tools available to the parties have become more abundant and these tools provide many options for translation that should significantly reduce the cost of providing translations. Moreover, it is important that the parties themselves provide translations because they created the documents at issue. The parties should ensure that translations are faithful to the original documents, a task that the Agencies are unable to complete, as they do not have the context or background to the transaction or companies that would be necessary to identify material errors. The Commission wants to avoid disputes over translations of these complex business documents that the parties have not reviewed.

The Commission notes that not requiring English-language translations from all entities, including foreign entities, under the current rule puts the Agencies at a disadvantage when reviewing HSR Filings with only foreign-language documents. This also creates an advantage for non-U.S. firms (whose materials are most likely to be in a foreign language). If key documents are not translated, the Agencies cannot give the transaction the same level of rigorous review and scrutiny as they do for transactions where all of the documents can be reviewed starting on the first day of the waiting period. Translation requires time that should not be taken from the short period available to the Agencies for the initial review. Time spent translating documents reduces the time available for more critical tasks, such as assessing the antitrust risk of filed transactions.

To understand the potential costs associated with requiring submitted documents to be translated, the Commission examined all HSR filings submitted in FY 2021.[327] Of the 7,002 HSR Filings that year, only 40 contained documents submitted in a language other than English and did not provide a translation. This represents fewer than 0.6 percent of filings that year. While the cost of providing translations may increase the cost of making an HSR Filing for these particular filers, the overall impact of this requirement is limited.

Beyond the issue of increased cost, some comments questioned the need to include translations with HSR Filings, especially for transactions that do not raise competitive concerns. The Commission disagrees that translations of submitted documents are not necessary for the Agencies to complete their analysis or that they are useless to the Agencies. The foreign-language versions of the documents are required by the Rules because they are responsive to specific information requests. As stated in the NPRM, the Agencies receive HSR Filings that contain only foreign-language versions of key materials, such as the transaction agreements submitted in response to current Item 3(b) of the Form, the relevant financials submitted in response to current Item 4(b), and the documents submitted in response to current Items 4(c) and 4(d) of the Form. These are the very documents that allow the Agencies to conduct a preliminary review of HSR Filings for compliance with filing requirements and to determine whether the transaction may violate the antitrust laws. Other filers submit these same types of documents in a form that staff can quickly review. Not being able to review these key materials on the first day of the waiting period puts the Agencies at a material disadvantage during their initial review.

After carefully considering the objections in the comments, the Commission continues to believe requiring translations of foreign-

[327] As noted above in footnote 260, the Agencies selected FY 2021 for this effort because of the large number of reportable transactions that year, 3,520, which provided for a robust data set. For these transactions, there were 7,002 filings, roughly two per transaction. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 appendix B (FY 2021).

language documents with HSR Filings is necessary and appropriate for the Agencies' premerger assessment, and notes that such translations may be especially important for those transactions that report foreign subsidies.[328] Despite the cost to filing parties, translations permit staff to review transactions and determine whether they require further investigation on the basis of the materials contained in the HSR Filing. With this cost in mind, the Commission invited commenters to suggest other alternatives that might achieve the Commission's goal of being able to understand and assess foreign-language documents while lessening the cost for filing parties and received a range of potential modifications to the proposal. One commented suggested that the requirement to provide verbatim translations should be limited to only final documents, not draft versions. As noted in section VI.G.1.b., the Commission has not adopted the proposal to require drafts, so no translations will be required for such documents in connection with the submission of the Form.

Commenters also proposed requiring only general summaries in English in lieu of verbatim translations, or permitting a filing party to produce a better-quality translation within a reasonable time period if the Agencies request them. The Commission acknowledges these suggestions but does not believe either presents a viable alternative to the version of § 803.8 contained in the final rule. General summaries do not provide the Agencies with a complete, detailed picture of the transaction. The Agencies' preliminary analysis of transactions often relies upon a nuanced and thorough reading of documentary attachments, and general summaries may not include facts or descriptions that the Agencies find relevant. The ability to require a better-quality translation within a reasonable time period after the submission of the HSR Filing will mean the Agencies must depend on filing parties to respond; this would likely delay Agency review within the already time-constrained initial waiting period. The time saved by the parties in preparing a summary in lieu of a translation is outweighed by the benefit to the Agencies of having a version of the underlying document available at the beginning of the waiting period.

Given the importance of having translations of key documents, the Commission adopts the proposed changes to § 803.8 but deletes the reference to ''understandable.'' The Commission believes this word is superfluous when used in conjunction with ''accurate and complete'' and may introduce confusion. Section 803.8 does not require any particular method of translation but specifies that, whatever translation method the parties choose, all verbatim translations must be readily understood, materially accurate, and complete. One commenter suggested revising the instructions to state explicitly that the submission of machine translations is acceptable. The Commission declines to state this explicitly and notes that in complying with the requirement to provide translations, parties must certify that translations are materially accurate even if they do not identify how they were created.

In sum, the Commission has determined that the translation requirement contained in the final rule is necessary and appropriate to enable the Agencies to quickly review submitted documents with English translations that have been certified as accurate.

F. Section 803.10: Commencement of Waiting Periods

The Commission proposed amending § 803.10(c)(1)(i) to clarify that filings made electronically are to be credited as received by the Agencies on the date filed if: (i) the electronic submission is complete by 5 p.m. Eastern Time; and (ii) such date is not a Saturday, Sunday, legal public holiday (as defined in 5 U.S.C. 6103(a)), or the observed date of such legal public holiday. This change codifies the current policy, and no comments were received. The Commission adopts this change as proposed.

G. Section 803.12: Information To Be Updated With Refiling

The Commission proposed amending § 803.12(c) to specify what updates would be required to the acquiring person's filing if the acquiring person chose to withdraw its HSR Filing and refile it. This procedure for voluntary withdrawal and refiling permits the acquiring person to restart the initial waiting period, providing the Agencies an additional 15 or 30 days (depending on the transaction type) to review the transaction without issuing a Second Request, as long as certain conditions are met. Currently, the rules require updates to Items 4(a), 4(b), 4(c), and 4(d). The NPRM proposed changes to § 803.12(c) including: eliminating the requirement to provide updated financials, currently required by Items 4(a) and (b); requiring updated Transaction-Related Documents with the updated HSR Filing; requiring updated transaction agreements; and requiring updated information about subsidies from Foreign Entities of Concern. The Commission adopts the proposed change with modifications to reflect ministerial changes to the names of sections of the Form.

The Commission received one comment on this proposal that noted that the proposal would impose a significant additional burden on the merging parties by requiring them to conduct a new search for Transaction-Related Documents with an expanded set of custodians. According to this commenter, it would also discourage the parties' use of pulling and refiling, and divert agency resources away from the review of other reported transactions.

Parties who withdraw and refile under § 803.12(c) must already search for new documents responsive to current Items 4(c) and 4(d). The basic requirement to search for new Transaction-Related Documents remains largely the same with the addition of only a single new custodian (the supervisory deal team lead, as defined) and a clarification that versions sent to any member of the board of directors (or similar body for non-corporate entities) are responsive and should not be treated as draft documents. The search required is a limited one, reaching back at most to the 15 or 30 days since the original filing was made. The Commission notes that these newly created documents and updated agreements are material to the Agencies' evaluation of the transaction and the determination of whether to issue a Second Request. Additionally, a change in information about subsidies may also be material and, until the Agencies have more experience with receiving this information, as required by Congress, parties must also provide updates to this item. The Commission therefore adopts the proposal with changes made to the names of the sections in the Form and Instructions.

VI. Part 803 Appendix A and Appendix B

Below, the Commission describes the changes to the appendices to Part 803, the Form and the Instructions. As discussed in section V.A., the Commission will continue to use the same electronic filing mechanism that has been in place since March 2020. Therefore, the Commission now provides a Form which will be available on the FTC's website in Microsoft Word format to collect the information required by the Instructions. Additionally, as discussed in section V.B., separate forms will be required for

[328] NPRM at 42182–83.

parties that are filing both as acquiring and acquired persons for related transactions. As a result, and to aid parties in understanding which provisions are applicable to acquiring persons and which are applicable to acquired persons, the Commission has now provided separate Instructions and Forms for acquiring and acquired persons. This change has also allowed the Commission to simplify the language of some of the instructions, such as by defining ''target'' to include all acquired entities or assets and eliminating use of phrases such as ''acquiring person or acquired entity as appropriate'' that were included in the draft instructions. Other ministerial changes to aid readability of the Instructions are also noted below.

For ease of reference, the Commission includes the following materials regarding the adopted Instructions and Form:

- An outline of the organization of the Form and Instructions,
- A chart that identifies proposed new locations of the current Items of the Form and Instructions, including whether substantive changes are adopted, and
- A chart of the new categories of required information.

These materials appear immediately below.

Instructions Outline

- General Instructions and Information
- Fee Information
- General Information
- Ultimate Parent Entity Information
  - UPE Details
  - Acquiring Person or Acquired Entity Structure
  - Additional Acquiring Person Information (Acquiring Person Only)
- Transaction Information
  - Parties
  - Transaction Details
  - Transaction Description
  - Additional Transaction Information
  - Joint Ventures (Acquiring Person Only)
  - Business Documents
  - Agreements (Acquiring Person Only)
- Competition Descriptions
  - Overlap Description
  - Supply Relationships Description
- Revenues and Overlaps
  - NAICS Codes
  - Controlled Entity Geographic Overlaps
  - Minority-Held Entity Overlaps
  - Prior Acquisitions
- Additional Information
  - Subsidies from Foreign Entities or Governments of Concern
  - Defense or Intelligence Contracts
  - Voluntary Waivers
- Certification
- Affidavits

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Cross Reference Between Current Form and Final Rule:

Current Form Item	New Location	Substantive Changes?
Fee Information	Fee Information	No
Corrective Filing	General Information	No
Cash Tender Offer	General Information	No
Bankruptcy	General Information	No
Early Termination	General Information	No
Foreign Jurisdictions	Transaction Information/Transactions Subject to International Antitrust Notification	Yes
Item 1(a)	Ultimate Parent Entity Information/UPE Details	No
Item 1(b)	Separate Forms will Identify Acquiring and Acquired Person, No Combined Form	No
Item 1(c)	Ultimate Parent Entity Information/UPE Details	No
Item 1(d)	Ultimate Parent Entity Information/UPE Details	No
Item 1(e)	Ultimate Parent Entity Information/UPE Details	No
Item 1(f)	Transaction Information/Parties	No
Item 1(g)	Ultimate Parent Entity Information/UPE Details	No
Item 1(h)	Ultimate Parent Entity Information/UPE Details	Yes
Item 2(a)	Transaction Information/Parties, Transaction Description	No
Item 2(b)	Transaction Information/Transaction Details	No
Item 2(c)	Transaction Information/Transaction Details (Acquiring Person Only)	No
Item 2(d)	Transaction Information/Transaction Details	No
Item 3(a) (Entities)	Transaction Information/Parties	No
Item 3(a) (Description)	Transaction Information/Transaction Description	Yes
Item 3(b)	Transaction Information/Agreements	Yes
Item 4(a)	Ultimate Parent Entity Information/UPE Details, Acquiring Person or Acquired Entity Structure	Yes (Natural Persons)
Item 4(b)	Ultimate Parent Entity Information/UPE Details, Acquiring Person or Acquired Entity Structure	Yes (Natural Persons)
Item 4(c)	Transaction Information/Business Documents	Yes
Item 4(d)	Transaction Information/Business Documents	No
Item 5(a)	Revenue and Overlaps/NAICS Codes	Yes
Item 5(b)	Transaction Information/Joint Ventures (Acquiring Person Only)	Yes
Item 6(a)	Ultimate Parent Entity Information/Acquiring Person or Acquired Entity Structure	Yes
Item 6(b)	Ultimate Parent Entity Information/UPE Details	Yes
Item 6(c)(i)	Revenue and Overlaps/Minority-Held Entity Overlaps	Yes
Item 6(c)(ii)	Revenue and Overlaps/Minority-Held Entity Overlaps (Acquiring Person Only)	Yes
Item 7(a)-(d)	Revenue and Overlaps/Controlled Entity Geographic Overlaps	Yes
Item 8(a)	Revenue and Overlaps/Prior Acquisitions	Yes

New Requirements and Categories of Information:

New Sections	Location
New Definitions	General Instructions and Information
Translations	General Instructions and Information
Identification of Additional Minority Interest Holders	Ultimate Parent Entity Information/UPE Details
Organization of Controlled Entities	Ultimate Parent Entity Information/Acquiring Person or Acquired Entity Structure
Identification of d/b/a	Passim
Description of Ownership Structure of the Acquiring Entities	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Organizational Chart for Funds and Master Limited Partnerships (If One Exists)	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Identification of Certain Officers and Directors	Ultimate Parent Entity Information/Additional Acquiring Person Information (Acquiring Person Only)
Description of the Business of the Acquiring Person	Transaction Information/Transaction Description (Acquiring Person Only)
Identification of Related Transactions	Transaction Information/Transaction Description
Mandatory Disclosure of International Antitrust Notification	Transaction Information/Transaction Description (Acquiring Person Only)
Transaction Rationale	Transaction Information/Additional Transaction Information
Diagram of the Transaction (If One Exists)	Transaction Information/Additional Transaction Information (Acquiring Person Only)
Production of Certain Documents of the Supervisory Deal Team Lead	Transaction Information/Business Documents
Production of Certain Plans and Reports	Transaction Information/Business Documents
Expansion of Transaction Agreements to be Produced	Transaction Information/Agreements
Identification of Other Agreements Between the Parties	Transaction Information/Agreements (Acquiring Person Only)
Description of Overlaps	Competition Descriptions/Overlap Description
Description of Supply Relationships	Competition Descriptions/Supply Relationship Description
Identification of Franchisees with Revenue Overlaps	Revenue and Overlaps/Controlled Entity Geographic Overlaps
Identification of Additional Prior Acquisitions	Revenue and Overlaps/Prior Acquisitions
Disclosure of Subsidies from Foreign Entities or Governments of Concern	Additional Information
Identification of Certain Defense or Intelligence Contracts	Additional Information
Voluntary Waivers for International Competition Authorities	Additional Information
Voluntary Waivers for State Attorneys General	Additional Information
Statement of Penalties for False Statements	Certification

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A. General Instructions and Information

The Commission proposed creating a General Instructions and Information section within the proposed Instructions that largely parallels the General section of the current Instructions but is significantly reorganized and includes a ministerial change to clarify what information is found on the PNO website. Within the proposed General Instructions and Information section, the Commission proposed substantive changes to the following sections: Definitions, Identification of the Filing Person, Responses, and Translations. As discussed below, the Commission adopts some of the changes as proposed, adopts others with modification, and does not adopt others. In addition, in order to effectuate separate, tailored Forms and Instructions for the acquiring and acquired person, and to enhance clarity, the Commission adopts certain ministerial changes discussed below.

1. Definitions and Explanation of Terms

a. Economic Research Service's Commuting Zones

The Commission proposed adding a definition for Economic Research Service's Commuting Zones to facilitate responses to proposed requirements related to labor markets. The Commission received several comments on the Economic Research Service's Commuting Zones, and all cited the burden of this proposal. Many noted that the U.S. Department of Agriculture

has not updated these metrics since 2012, which makes them unreliable as a basis for determining the geographic scope of labor markets. As the Commission is not adopting the information requirements for employees in the final rule (see section VI.I.3.), the Commission does not adopt this definition.

b. Fee Information

The Commission adopts a ministerial change related to this item. As a result of the new fee structure mandated by Congress in the Merger Modernization Act, the fee information description now refers to the adjusted fees and fee tiers.

c. North American Product Classification System Data

The Commission proposed eliminating the reporting of 10-digit North American Product Classification System (''NAPCS'') based codes, and, as a result, proposed deleting the NAPCS definition from the proposed Instructions. The Commission received one comment on the elimination of the NAPCS definition; the comment supported the proposed streamlining of manufacturing revenue reporting. The Commission adopts this change as proposed. See section VI.J.1. for further discussion on the elimination of NAPCS-based codes.

d. Notification Thresholds

The Commission adopts a ministerial change related to this item. Currently, the section entitled ''Thresholds'' discusses filing fee and notification thresholds as a single item. With the fee changes that were enacted in the Merger Modernization Act, these are now separate thresholds. As discussed in section VI.A.1.b., ''Fee Information'' discusses the fee tiers. The definition of ''Notification Thresholds'' now discusses only the notification thresholds that are defined in § 801.1(h).

e. Standard Occupational Classification

The Commission proposed adding a definition for Standard Occupational Classification (''SOC'') codes to facilitate responses to proposed requirements related to labor markets. As the Commission is not adopting information requirements for employees in the final rule that would require reporting on this basis (see section VI.I.3.), the Instructions do not contain a definition for SOC codes.

f. Select 801.30 Transactions

As discussed in section III.C., the Commission received many comments that objected to the burden of the new requirements as proposed. Among the objections were claims that the proposed requirements reached transactions that typically were not investigated by the Agencies, that the burden of the new requirements could slow the pace of some transactions and deter others, and that the burden would fall not just on acquiring persons but on target companies that did not initiate or consent to the transaction. One commenter urged the Commission to exempt from HSR reporting requirements certain transactions that the Agencies rarely challenge, including acquisitions of voting securities that do not transfer control of the target company. The Commission acknowledges these comments, and while it disagrees that there is any category of transaction for which all of the adopted proposals should not apply, it does agree that exempting certain transactions from some of the new requirements will not inhibit the Agencies' ability to understand the transaction and determine that it warrants further investigation. To that end, the Commission limits the amount of information required for the notification of certain transactions subject to § 801.30 that also meet specific conditions.

Section 801.30(a), first promulgated by the Commission in the original rules, defines certain types of transactions in which the consent of the acquired person may not be required.[329] These transactions include acquisitions made on the open market, via tender offers, through the exercise of warrants or options, or through the conversion of non-voting securities. The involvement of the acquired person varies across these transactions. In some instances, such as an investor acquiring voting securities on the open market, the acquired person does not have to agree to the transaction and may not even have knowledge of it. In others, the acquiring and acquired person both assent to the deal. For example, some transactions are effectuated by a tender offer or the acquisition of purchases on the open market or from third parties—making § 801.30 applicable—but are also subject to an agreement between the acquiring and acquired person.

When the agreement of the acquired person is not required in a transaction, the Commission believes that certain requirements of the final rule are unlikely to provide information necessary to determine whether that transaction may violate the antitrust laws. Several commenters agreed that in such transactions the target in particular would not be able to provide the new information required in the final rule in the short time they have to make their filing. Further, in such transactions, the acquired person may not know that it has a filing obligation until the acquiring person has filed and will have limited time to prepare its filing. For this select set of transactions, the Commission has determined that it is not necessary to collect certain information, particularly in light of the costs that would be imposed on these types of filings which often carry low antitrust risk. Therefore, the Commission, adapting suggestions from the comments, introduces and defines the term ''select 801.30 transactions.'' Select 801.30 transactions are those transactions that do not result in the acquisition of control to which § 801.30 applies and where there is no agreement or contemplated agreement between any entity within the acquiring and acquired person. An example of a select 801.30 transaction includes an acquisition of voting securities on the open market via a national exchange by an investor that has no other ties to the issuer and which acquisition does not result in the acquisition of control. Additionally, select 801.30 transactions include acquisitions resulting from a traditional executive compensation arrangement where the executive exercises contractual benefits pursuant to a compensation package to acquire voting securities and nothing more.

In addition to excluding transactions in which there is an agreement between the acquiring and acquired person, the definition of ''select 801.30 transactions'' excludes transactions that would result in the acquiring person obtaining control, as defined by the Rules, of the acquired entity or where the acquiring person has obtained or will obtain certain rights related to the board of directors, general partner, or management company of an entity within the acquired person. These excluded transactions are likely to require a more thorough review for potential antitrust risk, and therefore it is necessary and appropriate for the Agencies to receive some additional information related to them as contemplated in this rulemaking. The Commission uses the term ''select 801.30 transaction'' throughout the discussion below, and transactions that meet the definition will not be required to respond to certain items as part of the Commission's efforts to limit costs to filing parties in response to the comments. See Figure 3.

[329] 16 CFR 801.30(a); *see also* 43 FR 33450, 33483 (July 31, 1978).

g. Supervisory Deal Team Lead

As discussed in section VI.G.1, the Commission proposed that, in addition to requiring documents prepared by or for officers and directors in response to current Item 4(c), filing persons must also submit transaction-related documents prepared by or for supervisory deal team lead(s). This proposal targeted documents authored by or for the person who functionally led the deal team even if not an officer or director. In the Agencies' experience with Second Request responses, these documents often include information that would have been highly relevant to the Agencies' analysis of the transaction during the initial waiting period to determine whether Second Requests should issue and what additional information they should seek. The Commission adopts this definition to limit the proposal to a single individual and provide clarity regarding identification of the appropriate individual.

The proposed rule noted that the identification of any supervisory deal team lead would not be based upon title alone and that this addition would require the filing person to determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. A supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, who have the authority to authorize the transaction. In the proposal, any such individual(s) might be the leader(s) of an investment committee, tasked with heading the analysis of mergers and acquisitions, or otherwise given supervisory capacity over the flow of information and documents related to transaction.

The Commission received many comments on its proposal to require current 4(c) documents from the supervisory deal team lead(s). Several comments noted that the proposed Instructions do not offer a definition of supervisory deal team lead(s) and that the proposed rule's description of the term was vague, ambiguous, and subjective, leaving filers uncertain which individuals must be searched in addition to officers and directors. One comment stated that the term was neither defined nor self-explanatory, and the proposal's descriptions of what constitutes a supervisory deal team lead(s) offers two separate standards. Yet another comment noted that the description could potentially describe a company's entire corporate development team.

Concerns about the meaning of the term ''supervisory deal team lead'' led a number of commenters to propose a definition. One commenter suggested limiting supervisory deal team lead to the senior most member of the corporate development deal team responsible for driving the strategic vision and assessment of the deal, who would not otherwise qualify as an officer or director. Another commenter suggested it should be the most senior member of a filing party's deal team responsible for the company's strategic vision and who otherwise would not qualify as a director or officer. Also, another commenter offered that supervisory deal team lead(s) should be expressly defined to mean the individual with primary responsibility for supervising the assessment of the transaction, and that it should only be one person.

The Commission acknowledges that a definition of supervisory deal team lead in the Instructions would help filers accurately identify the appropriate individual to be searched for responsive materials. The Commission notes that many of the comments' proposed definitions provided useful contours to help define the term. As discussed above, certain commenters suggested a definition that the relevant individual have responsibility for business strategy associated with the transaction under review. The Commission agrees that centering the definition on the ''primary responsibility'' for the strategic assessment of the deal will help identify the correct individual.

The Commission also agrees that the definition should focus on one supervisory deal team lead to mitigate any confusion or uncertainty raised in the comments about having two or three supervisory deal team leads. As discussed in section VI.G.1., several commenters also raised concerns with the burden associated with collecting documents from additional custodians, particularly if multiple individuals fulfilled that role.

The Commission therefore adopts a new definition for ''supervisory deal team lead'' as the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer. This definition focuses on the one person who oversees the strategic assessment of the transaction and it should mitigate the concerns of some commenters that the term is so vague that it might introduce uncertainty as to when the initial HSR waiting period begins. These commenters explained their concern that Agency staff may become aware of another employee who would better constitute a supervisory deal team lead than the individual selected by the filer and reject the filing. In response to comments that requiring filers to select a supervisory deal team lead will allow the Commission to reject filings, the Agencies will continue to rely on filers to certify to their good faith belief in completing and certifying to the accuracy of the filing, and the Agencies will continue to rely on that good faith. In the situation where the only individuals supervising the strategic assessment of the deal are already either an officer or director, filers can state that this is the case and identify an officer or director as the supervisory deal team lead.

h. Target

For additional clarity in the instructions, the Commission introduces and defines the term ''Target'' as a ministerial change. The target includes all entities and assets to be acquired by the acquiring person from the acquired person and eliminates the need to use the inadvertently confusing phrase ''the acquired entity(s) or assets'' throughout the Instructions. The Commission notes, however, that the Instructions do continue to use ''acquired entity(s)'' in certain instances where a question may not be relevant to the acquisition of assets.

i. Year

As part of the Commission's effort to add more clarity to the Instructions, the Commission makes a ministerial change to the definition of ''most recent year'' found in the definition of ''year'' to make clear that the ''most recent year'' is the most recently completed calendar or fiscal year. This is the current intent of the definition and consistent with the guidance that has been given informally and with how filing persons complete the form and provide information.

2. Filing as an Acquiring and Acquired Person

As discussed in section V.C., the Commission adopts the proposed changes to § 803.2 such that filing persons will be required to submit separate forms when filing as an acquiring and acquired person. Additionally, the Commission has created separate, tailored Forms and Instructions for the Acquiring and Acquired Person. Since filers will choose the appropriate Form for the filing, the Commission adopts the ministerial change to eliminate the question, currently Item 1(c), asking the

filing person to identify whether the filing is being made as an acquiring or acquired person.

3. Responses

In the new Responses section, the Commission proposed setting out the specifics of how filers would provide the information responsive to the proposed new questions. The revisions included eliminating instructions regarding filings made on paper or DVD, see above at section IV.A; the Commission adopts these changes as proposed. The proposed responses section also described the information that filing persons would need to provide in a log of responsive documents and descriptive responses to be submitted with an HSR Filing. This information would have generally been the same as the information currently required for documents submitted in response to Items 4(c) and 4(d) of the current Form, with two proposed expansions. The first would have required the filing person to identify the request(s) to which the document would be responsive. The second would have required the identification of the individual within the acquiring or acquired person who supervised the preparation of documents prepared by third parties, or for whom the document was prepared. The Commission adopts the proposal with modifications to reflect the layout of the Form and to reduce the burden for transactions that do not have either a NAICS overlap, see section VI.J., or overlap or supply relationship identified in the Competition Descriptions, see section VI. I.

The Commission received two comments regarding the new Responses section, both of which focused on the proposed requirement for filing persons to provide the name, title, and company of the individuals within the filing person who supervised the preparation of third-party documents or for whom the documents were prepared. One commenter expressed concern that the proposal could put certain fund employees at risk of violating their nondisclosure agreements with target companies. Another commenter noted that there is minimal if any value to the Agencies having this information for every single reportable transaction, but collecting and filing a comprehensive list of all the people who may have supervised the creation of these documents will require many hours of work.

The Commission acknowledges the cost but disagrees that this information is not valuable or informative. In the Agencies' experience, knowing the authors of documents assists in the evaluation of the documents as well as any subsequent investigation by providing context regarding who was involved in the preparation of the document. Currently, the Agencies do not receive this context for documents prepared by third parties. Therefore, for documents prepared by third parties, such as consultants or bankers, the Commission adopts the proposal for the filing person to identify the individual or individuals who supervised the production of such documents, or for whom the document was prepared. This information will not be required for documents that were provided to the parties without solicitation, or for documents provided to the acquiring or acquired person by the other party.

As part of the Commission's overall effort to reduce the burden on filing parties, the Commission has revised the proposal to only require authors (or the individuals that supervise the creation of documents) for filings in which there are NAICS overlaps, or overlaps or supply relationships identified in the Competition Descriptions. For those transactions where such an overlap or supply relationship has been identified, filers will be required to provide the same author information as is currently required for documents responsive to Items 4(c) and 4(d), as well as the individuals within the filing person who supervised the preparation of third-party documents or for whom the documents were prepared. The Commission notes that these third-party documents are already required. The additional information is related to the identification of the individuals within the acquiring or acquired person, so no new non-disclosure risks should result from the requirement. Finally, because the Form requires identification of the file name for each document submitted, the ''Responses'' section does not require a document log. A privilege log will still be required.

4. Translations

As noted in section V.E., the Commission amends § 803.8 to require the filing person to submit English translations of all foreign-language documents. The Instructions also reflect this change.

5. Non-Compliance

While the Commission does not make any changes to the explanation of ''non-compliance,'' it does emphasize that if the filer is unable to answer any question fully, it is required to provide the information that is available and provide a statement of reasons for non-compliance consistent with § 803.3 and as permitted by the HSR Act.[330] Further, where exact answers cannot be given, filers are allowed to enter best estimates, while indicating the source or basis of the estimate and marking the information with the notation ''est'' for any item where data are estimated. The Commission routinely accepts filings and commences waiting periods for filings that avail themselves of this procedure. For example, publicly traded filers are often unable to identify with certainty their minority shareholders, and instead provide information that has been filed with the SEC. The Commission did not propose any changes to this Instruction and does not change it now.

B. Fee Information

Although the Commission proposed moving the filing fee information to the Transaction Information section of the proposed Instructions, in the final Form and Instructions, filing fee information will instead be collected in its own section. The Form also includes new areas for filing persons to indicate whether the fee is being paid by more than one entity, and if so, how much each entity will pay. Additionally, the Commission adopts a ministerial change to eliminate the need to provide Taxpayer Identification or Social Security Numbers and the name of the institution, such as the bank, from which the fee will be paid. The Commission has determined that it no longer needs this information to identify filing fees, and parties therefore no longer need to provide it.

C. General Information

The General Information section of the Form and Instructions requires filing persons to indicate whether the transaction is a post-consummation filing, cash tender offer, or bankruptcy, and whether early termination of the transaction is requested—information that is currently collected on the first page of the Form. The Commission did not propose and does not adopt any material changes to these items.

D. Ultimate Parent Entity Information

1. UPE Details

The UPE Details section of the Form and Instructions requires information about the UPE of the acquiring or acquired person, including contact information, financial documents, and information about certain minority shareholders or interest holders. Much of this information is currently required by Items 1, 4(a) and (b), and 6(b). The Commission proposed (1) requiring

[330] 15 U.S.C. 18a(b)(1)(A)(ii).

contact information for the individual to whom Second Requests should be sent; (2) clarifying the instructions related to the provision of financial documents for natural person UPEs; (3) requiring filers to stipulate that the appropriate size of person threshold is met, if applicable; (4) identifying additional minority holders of entities within the acquiring person; and (5) reducing the types of minority holders of the acquired entity that must be reported. As discussed below, the Commission adopts some of these proposals without change and some with modification.

a. Contact Information

The Commission proposed that all filers, not just foreign filers, must identify the individual to whom Second Requests should be addressed. The Commission received no comments on this change and adopts it as proposed.

b. Annual Report and Audit Reports of the UPEs

This section requires information currently required by Items 4(a) and 4(b) as it pertains to the UPE of the acquiring or acquired person. Annual and audit reports of other entities within the acquiring and acquired person are required by the Acquiring and Acquired Person Structure section, as discussed in section VI.D.2.b. The Commission proposed clarifying the current instructions regarding which annual reports and audit reports are required from natural person UPEs. The Commission makes no change to the instruction that natural person UPEs should not produce any personal balance sheets or tax returns. Since natural persons should not provide personal financial information, no information should be provided in the UPE section. The Commission did not propose and does not make any change to the annual or audit reports required of the UPE of the acquiring or acquired person.

The Commission did propose clarifications regarding what other annual and audit reports entities within the same person as natural person UPEs must provide. This proposed clarification is discussed in section VI.D.2.b.

c. Size of Person Stipulation

The Commission proposed adding an item on the Form that would allow filers to stipulate that the size of person test is met (at the appropriate dollar amount) or indicate that the size of person test is not applicable. The Commission received no comments on this change and adopts it as proposed.

d. Minority Shareholders or Interest Holders

The Commission proposed a Minority Shareholders or Interest Holders section to require identification of minority interest holders of certain entities within the acquiring person and the acquired entities. Currently, Item 6(b) requires acquiring persons to identify minority holders of 5% or more but less than 50% of the acquiring entity and the UPE of the acquiring person (or, for natural person UPEs, the highest-level entities they control). Acquired persons are required to report such minority holders of the acquired entity. For UPEs of the acquiring person, acquiring entities, and acquired entities that are limited partnerships, only disclosure of the general partner is currently required.

The Commission proposed several changes to require additional information about the identity of minority holders, as well as identification of additional minority interest holders by the acquiring person, but potentially fewer by the acquired person. First, the Commission proposed requiring disclosure of the ''doing business as'' or ''street name'' of minority investors that are related to a master limited partnership, fund, investment group, or similar entity. Second, the Commission proposed to expand the entities for which the acquiring person must identify certain minority interest holders to include entities related to the acquiring entity. Third, the Commission proposed requiring the identification of certain minority holders of limited partnerships, rather than just the general partner. Finally, the Commission proposed limiting the minority interest holders that acquired persons would need to identify. The Commission adopts the first two proposals without change but modifies the limited partners that need to be identified, as discussed below.

(i) Provision of ''Doing Business As'' or ''Street Names''

First, the Commission proposed that the acquiring person provide the doing business as or ''street name'' of minority investors that are related to master limited partnerships, funds, or investment groups. The Commission did not receive comments on this specific proposal but did receive comments to similar proposed requirements in other areas of the Instructions. Objections in these other sections generally focused on the lookback period and the burden of searching for all names that were potentially used by a business. In this section, the Commission did not propose a lookback period, but instead proposed requiring only the current name of the related master limited partnership, fund, investment group, or similar entity.

The Commission continues to believe that this information should not be costly for filers. In many cases, communication between the acquiring person and the investor will include this information. For example, though the minority investor may be RANDOMNAME, LLC, the acquiring person regularly communicates with INVESTMENT GROUP and sends information related to the investment in care of that business. However, if this information is not known to the acquiring person, it can so note in a statement of non-compliance.

The task of screening transactions for potential competitive effects is stymied when filers provide only legal names, which are often unrelated to the name by which the public knows the business. Knowing the d/b/a or street name of the entities involved in the transaction allows staff to use public resources to gather additional information, for example through internet searches or look-ups using commercial services relied on by the Agencies to provide industry data. Because of the value to the screening process, the Commission adopts this requirement as proposed.

(ii) Identification of Additional Minority Investors in the Acquiring Person

The Commission next proposed two changes that could increase the number of minority investors the acquiring person would need to identify: First, it proposed that the acquiring person be required to report holders of 5% or more but less than 50% of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. Second, it proposed that filing persons report holders of 5% or more but less than 50% of limited partnerships, in addition to the general partner.[331]

Comments on these two proposed changes were similar and often intertwined. One commenter urged the Agencies to collect the proposed new information and stated that the ownership structure resulting from the

[331] This change also relieved natural person UPEs from the obligation to identify minority shareholders of all top-level entities, instead only requiring identification for entities related to the transaction.

transaction may change the parties' incentives to compete, enhance the acquirer's ability to influence decision making through changes in voting interests or governance rights, or facilitate the sharing of competitively sensitive information between rivals. Two others also supported the proposal, with each noting the various potential anticompetitive impacts of minority interests. Specifically, one commenter stated that these new requirements would address complex corporate structures, which may obscure potentially significant relationships. The other commenter also supported providing more information about shareholders, particularly since the current Form and Instructions can treat portfolio companies of private equity funds as independent from each other and their management companies.

Broadly, critics of these proposed changes expressed concerns about the burden of collecting the requested information. Additional criticisms included objections to the five percent threshold for identification, with commenters stating that the interests of such minority investors may be wholly unrelated to the notified transaction, or less likely to result in a substantial lessening of competition. Concerns were also raised about confidentiality and disclosure, noting the Commission's prior consideration of the fact that the identity and investment level of limited partners is often highly confidential when it decided in 2011 not to require disclosure of limited partners. Commenters further speculated that requirements to disclose the identity of additional minority investors could create a chilling effect on fundraising and deals. Finally, commenters stated that such a decrease in fundraising and deal volume could affect smaller businesses, pension plans, endowments, charitable foundations, and activist investors, among others. Each of these objections is discussed below.

(a) Identification of Minority Holders of Additional Entities

Regarding the first proposal to expand the entities for which minority holders must be identified, the Commission notes that until 2011 acquiring persons were required to report minority holders of 5% or more for all corporate entities within the acquiring person that had assets of $10 million or greater. As part of the 2011 rulemaking, the Commission determined that this broad requirement, which could reach entities within the acquiring person that had no nexus to the reported transaction, was not essential to an initial review of the transaction.[332] Through this change, the Commission expanded the requirement to include identification of minority holders of non-corporate entities, but it limited the obligation for the acquiring person to the identification of minority holders of only the acquiring UPE and the acquiring entity. As a result, the Agencies receive information about what entities have a ''seat at the table'' in the case of very simple corporate structures where the acquiring person UPE directly controls the acquiring entity without any intermediary entities, or where intermediary entities are wholly owned by the acquiring person, without the acquiring person providing information about entities unrelated to the transaction.

Since 2011, however, the Commission has learned through experience that many acquiring persons have more complex structures that include many entities between the UPE and acquiring entity that are not wholly owned but that are related to the acquiring entity. For example, ''A'' plans to acquire a target and will bring in ''B'' as a co-investor. The UPE of ''A'' creates (or already has) a number of intermediary entities within its person to effectuate the transaction. ''B'' does not invest in either the UPE of ''A'' or the entity that will make the acquisition, but rather in one of these intermediary entities. Currently, as illustrated in Figures 4 and 5a, when ''A'' makes its filing, it is not required to disclose the co-investment of ''B'' so long as the investment is below 50%. The current focus on just the UPE and the acquiring entity deprives the Agencies of key information about individuals and entities that may have influence, or even management or operational oversight, over entities related to the transaction and could make or influence competitively important decisions post-acquisition.

[332] 75 FR 57110, 57118 (Sept. 17, 2010); 76 FR 42471, 42472 (July 19, 2011).

Figure 4: Current Rules Only Requires Disclosure of Minority Holders (or General Partner) of A

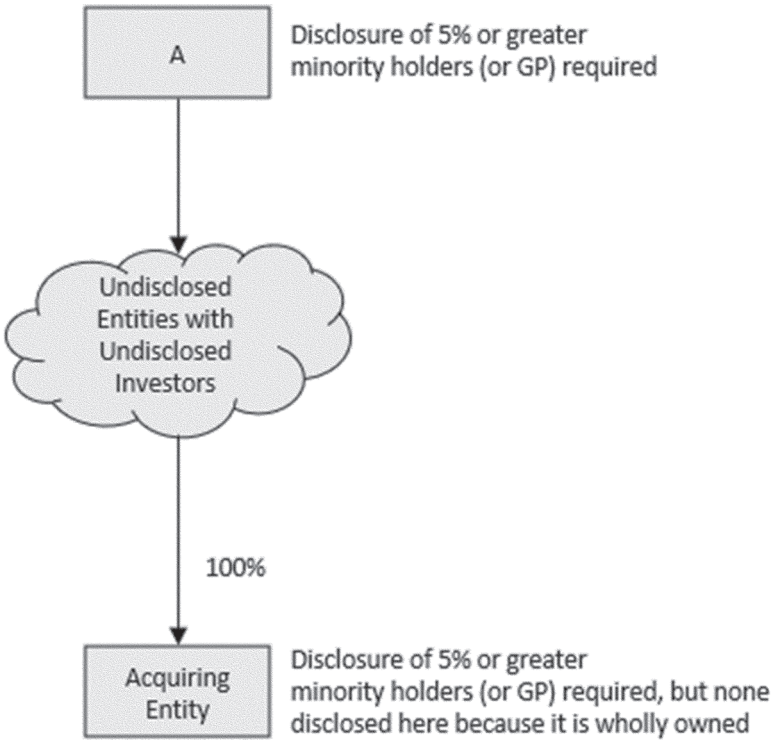
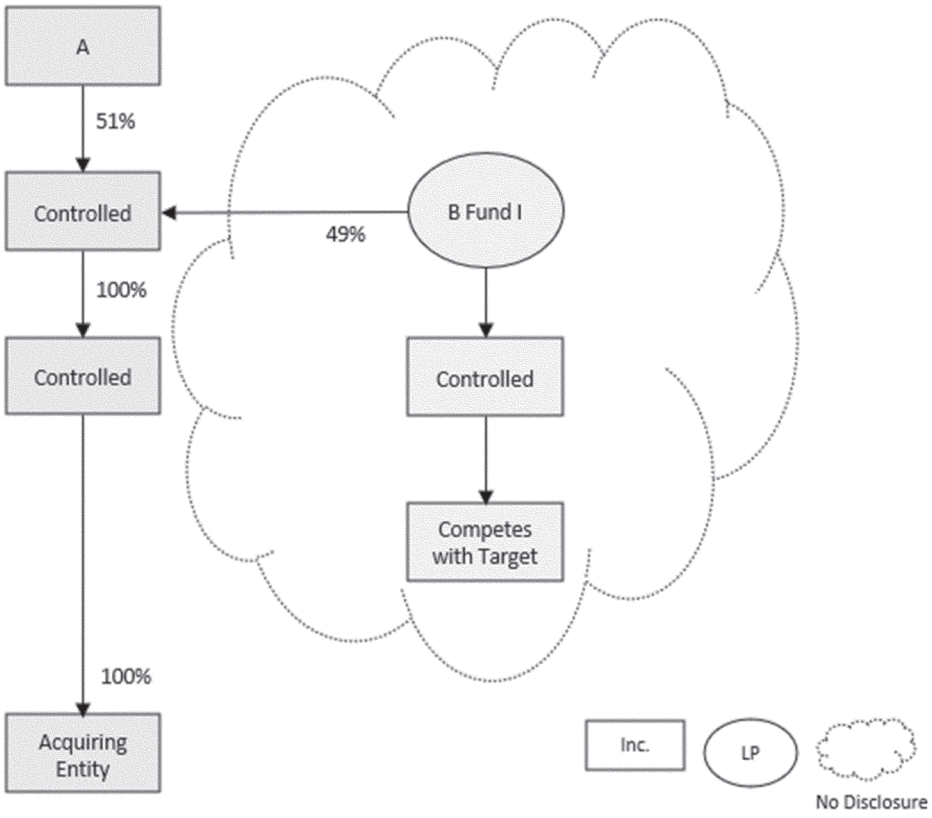
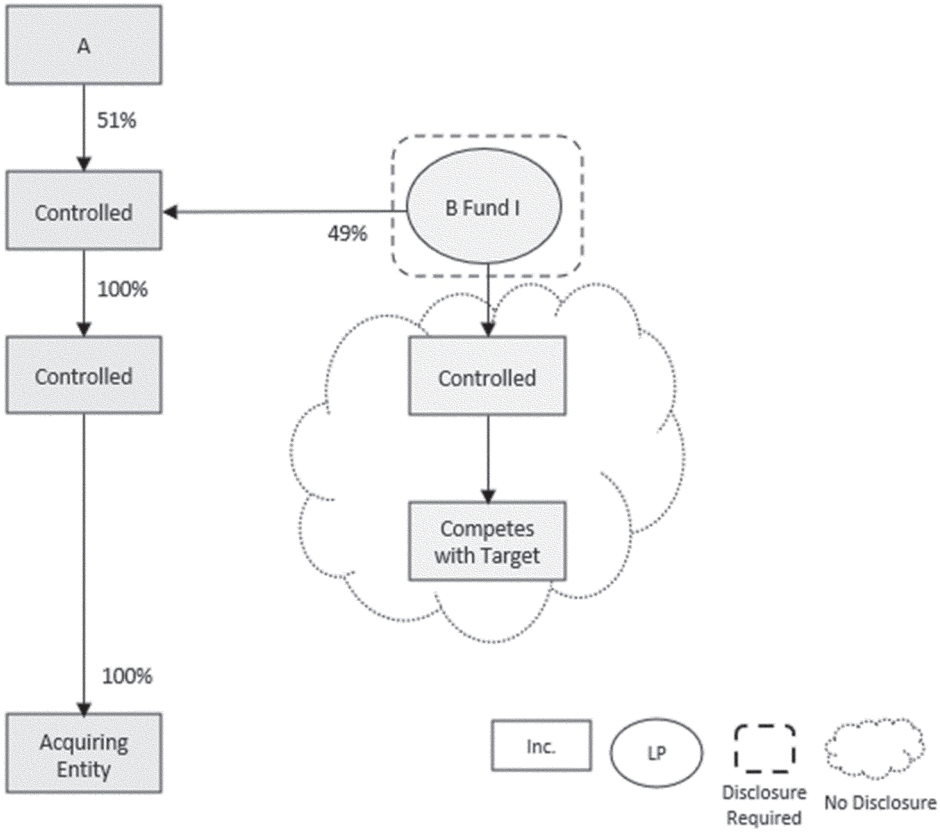


Figure 5a: Current Rules Do Not Require Disclosure of B Fund as a Co-Investor in the Acquisition; No Ability for Agencies to Know to Research B Fund's Other Holdings



As discussed in section II.B.1., and illustrated in Figure 5a, individuals or entities that have significant rights or holdings in entities related to the acquiring entity may also take active positions in or exert control over competitively significant businesses, including competitors, and the disclosure of these relationships could surface antitrust risks that require the Agencies' attention during the initial antitrust review. Because information that reveals whether there are existing investment relationships between the acquiring person and the target is necessary and appropriate for the Agencies' initial antitrust review, the Commission adopts this change as proposed. As a result, as shown in Figure 5b, the Agencies will receive the information necessary to determine whether the acquisition of the target by the acquiring entity may violate the antitrust laws.

Figure 5b: Final Rules Require Disclosure of B Fund; Agencies Know to Research B Fund's Other Holdings



In objecting to these proposals, commenters stated that identification of these additional minority holders would be burdensome. The Commission notes that, rather than merely reviving an expansive requirement to disclose all the minority investors of entities within the acquiring person, it proposed a more tailored instruction to require disclosure only of the entities related to the transaction. Given this limitation and the information gaps caused by vast changes to the M&A landscape discussed in section II.B.1., the Commission believes that the identification of the minority holders of the entities that are related to the transaction is necessary and appropriate and should be contained in an HSR Filing. Further, if the acquiring person does not have knowledge of the identity of the minority investors, it can so indicate and explain, just as acquiring persons currently do when the minority investors of the UPE or acquiring entity are unknown.[333] For example, acquiring persons that have publicly traded UPEs routinely note that they do not have information about minority holders beyond what is reported to the SEC.

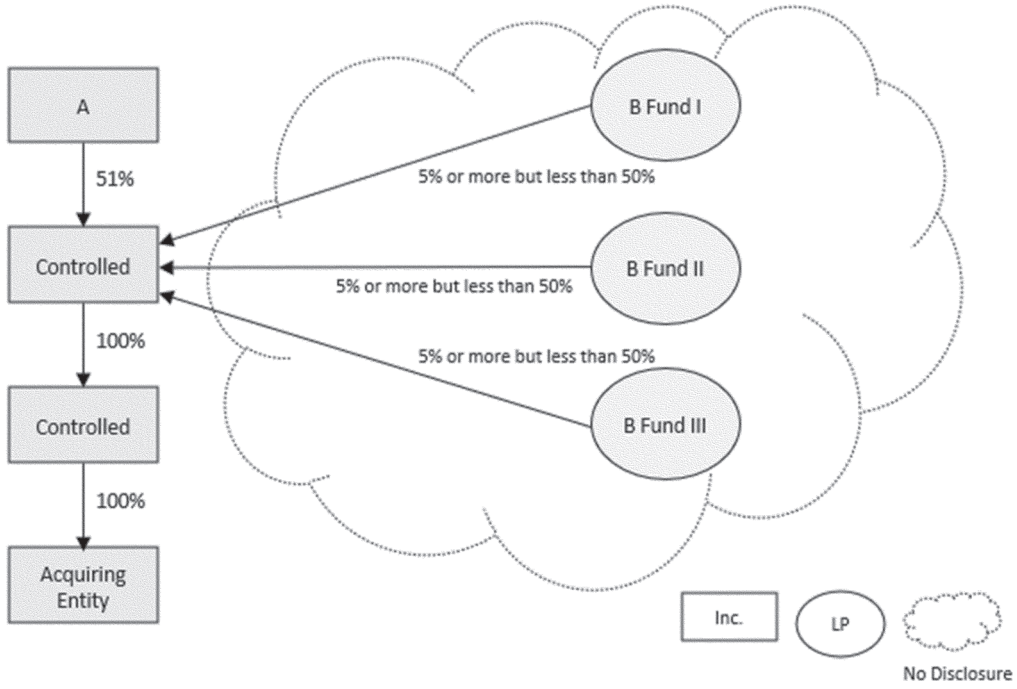
One commentor stated that the ''direct or indirect'' and ''control or controlled by'' language was broad and would require substantial time and resources to navigate. The Commission disagrees and notes that this requirement does not require a broad analysis of various theories of control but rather requires a determination of ''control'' as defined by § 801.1(b). The proposed instruction stated that the controlling relationship can be either direct or indirect to make clear that the requirement was not limited to entities just one level above or below the acquiring entity. For example, in a common scenario involving multiple shell entities, the acquiring UPE controls an intermediary entity that controls an intermediary entity that controls the acquiring entity, as shown in Figure 6a below. The Instructions contained in the final rule require disclosure of minority holders of five percent or more of each of those intermediary entities, subject to the limitations on disclosure of limited partners discussed below in section VI.D.1d.ii., as shown in Figure 6b. Control is a long-standing concept in the Rules, and the determination of control in this context is consistent with control determinations that filers need to make for a variety of items currently included in the Form and Instructions.

The Commission received suggestions to change the existing five percent threshold but declines to adopt this change. Because of the complexity of investment structures, minority investors with even low equity stakes can have formal rights to direct or influence the strategic decisions of the company, informal channels to exert influence, or the right to obtain sensitive business information about the entity in which they are invested. Further, as illustrated in Figures 6a and 6b, investment groups may be broken up

[333] See also the discussion of non-compliance in section VI.A.5.

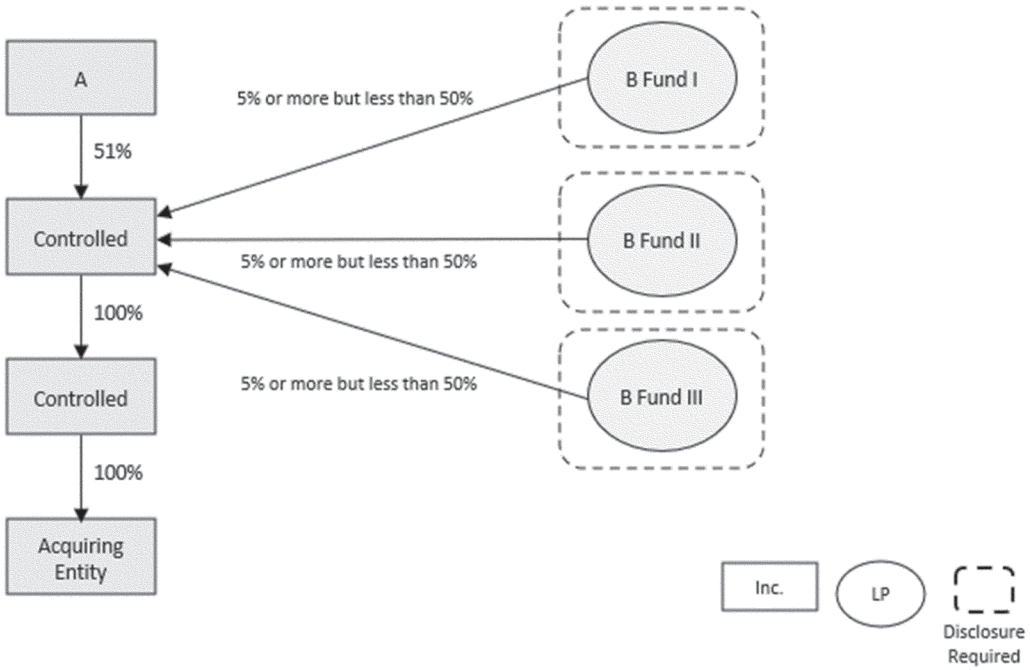
across multiple entities that are, for HSR purposes, separate persons.[334] These types of organizations can take active positions in multiple companies in the same or related industry, a trend that the Commission and commenters have observed. As a result, the Agencies need to know who these investors are in order to determine whether the acquiring person has connections to the target's business that could have competitive effects.

Figure 6a: A Single Investment Group May Divide Its Investment; Current Rules Do Not Require Disclosure if Investments Are Not Made in A or Acquiring Entity



[334] In 2020, the Commission proposed changing the HSR Rules to require aggregation of such interests when determining whether a filing must be made. 85 FR 77053 (Dec. 1, 2020). The Commission has not adopted any of those proposals. This more modest proposal to identify minority shareholders does not create any new obligations to file but does provide the Agencies with the identity of funds and other investors that hold, or will hold, interests in entities related to the acquiring entity through multiple HSR persons, allowing for further investigation as warranted.

Figure 6b: Final Rules Require Disclosure Regardless of the Entity In Which B Fund Invests



The Commission disagrees with the commenters' assertions that this information is not necessary to assess the competitive effects of the filed for transaction and is beyond the authority of the Commission. As discussed in section II.B.1., that analysis requires the Agencies to understand the scope of the acquiring person's involvement in the business of the target. Minority holders of entities within the acquiring person that are related to the acquiring entity may have the ability to influence decision-making of the acquiring entity and target post-acquisition. Therefore, they are functionally ''in the deal'' and their existing business relationships are relevant to a thorough antitrust analysis of the transaction. The increasing complexity of corporate structures and investment vehicles has increased the number of transactions with these types of minority interest holders, and the Commission has determined that the Agencies need to update the information requirements to keep pace with these changes.

The Commission finds the additional critiques of the proposal unpersuasive as well. The Commission addresses arguments about chilling deal volume and investment levels in section III.C.2. above. As to commenters opposing this particular change to the Instructions, the Commission is unaware of any evidence that fundraising or deal volume was negatively affected during the period prior to 2011 when HSR rules required broader disclosure of minority investors, nor that such activity increased when the requirement was dropped. Given the many other factors that influence the level of investment and M&A activity generally, the Commission believes it is unlikely that the disclosure of minority holdings in parties involved in reportable transactions has any measurable effect on dealmaking or investment levels.

Further, commenters objecting to the Agencies' need for identification of additional minority interest holders also offered contradictory critiques, with some stating that the Commission did not identify transactions where the minority interest holders were relevant to the competition analysis, and others stating the fact that the Commission offered two examples demonstrated that the current Form and Instructions provided the Agencies with sufficient information. First, cases cited in the NPRM provide examples of enforcement actions brought by the Agencies on various legal theories and fact patterns and do not necessarily reflect cases that were discovered through the HSR process. Second, the need for this information is obvious and its relevance plain: the Agencies need to know who will be making decisions for the combined entity post-acquisition. For example, the hypotheticals discussed above demonstrate that existing information gaps in the current Form leave the Agencies without enough information to even know to ask additional questions about additional individuals and entities within ''A.'' In the hypotheticals above, ''B'' could hold up to a 49.9% stake in an entity related to the transaction and functionally jointly control the acquiring entity along with ''A.'' Or ''B'' could hold only 5% but have ancillary rights or outsized influence over the operations of the acquiring entity (and thus the target after consummation). Or ''B'' could be its own person for HSR purposes, but one of several related entities that each has a minority interest that, when aggregated, account for a significant, or even majority, stake in the acquiring entity. In any of these scenarios, as well as many others, the identity of the minority interest holder would be critical to understanding the competitive implications of the transaction. Though the filing requirement falls on ''A,'' ''B'' has a seat at the table, and the Agencies must be able to investigate whether ''B'' has ties

to the business of the target. If the Agencies are not alerted to the existence of ''B'' on the Form, there is no ability to screen for potential issues that arise from ''B's'' involvement in both the acquiring entity and, upon consummation, the target.

Regarding concerns about privacy, the Commission notes that the contents of HSR filings are confidential.[335] Unlike requirements for disclosure made by private parties or government rules promulgated to require public disclosure, information included in HSR filings is protected by statute. Additionally, disclosure of minority investors, other than limited partners, which are discussed below, is already required by the current Form. The proposal to require identification of additional minority investors, including some limited partners, is an incremental expansion of what is currently required (and for corporate entities, less than what was required under the HSR Rules from 1978 to 2011). Additionally, the Agencies often require disclosure of an even broader group of minority investors, including limited partners, in response to a Second Request, as discussed in more detail below. The proposed requirements, therefore, did not introduce any new privacy concerns, and commenters did not offer any evidence that the current disclosure rules have created any substantive issues related to privacy.

The Commission further notes that the proposed requirements do not require the acquiring person to ask the minority investors for any information. Therefore, completion of the Form itself should impose no burden on the minority investors themselves. Only if the identity of the minority investor reveals a competitively relevant connection and an investigation is opened would the investor potentially have any cost. These costs are not imposed by the information requirements of Form and Instructions but rather by a potential investigation or enforcement action for a violation of the antitrust laws. Disclosure of an existing business or financial relationship in an entity that is engaging in an HSR-reportable transaction is not an improper burden and allows the Agencies to fulfill their statutory mandate to scrutinize every filing to determine whether it may violate the antitrust laws.

(b) Identification of Limited Partners

In addition to increasing the number of entities for which minority shareholders would need to be identified, the Commission also proposed requiring the identification of minority investors of limited partnerships that held 5% or more, in addition to the general partner. Filing persons are currently only required to identify the general partners of limited partnerships, but not limited partners, regardless of the percentage held. After considering the comments received regarding this proposal, the Commission adopts a modified requirement to identify only the general partner and limited partners that have certain rights related to the board of directors (or similar bodies) of entities related to the acquiring entity.

The current requirement to identify only the general partner of limited partnerships, and not its minority investors, was based on the understanding that limited partners had no control over the operations of the fund or portfolio companies.[336] As discussed above and in section II.B.1., the operations and investments of limited partnerships and limited partners cannot be easily generalized. Though some argue that limited partners may have limited influence over investment or operational decisions, this is not universally true. Limited partnerships often file for acquisition of control of entities. Investment groups, which utilize limited partnerships, often make investments in specific industries, leaving open the possibility that there is a competitive relationship between these investments and the target of the filed-for transaction.

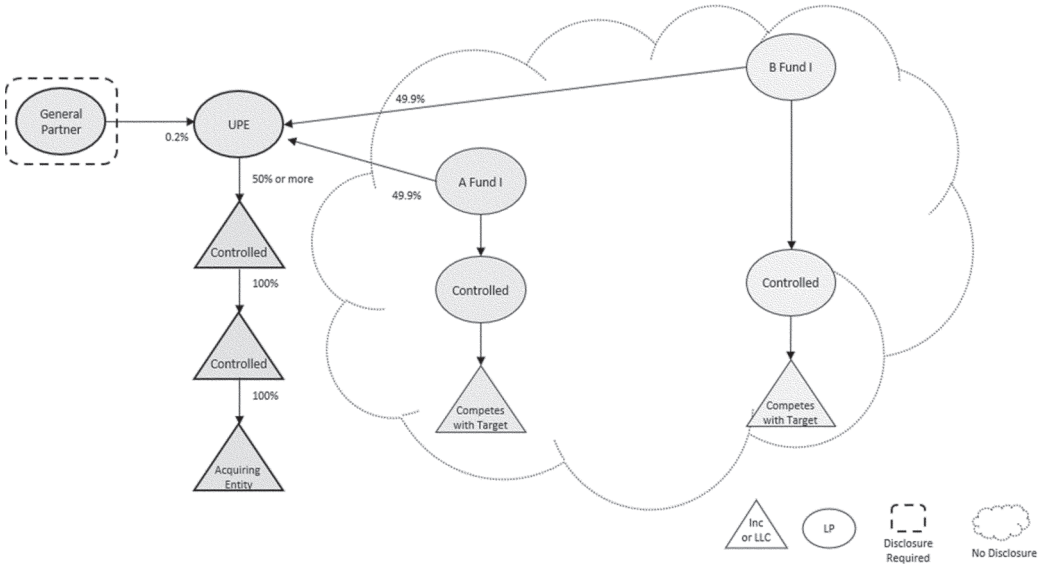
Further, the Commission has learned through its work that limited partnerships are not exclusively used as vehicles for diffuse groups of passive investors to invest their capital. Instead, some limited partnerships function as aggregation vehicles that allow private equity or other investor groups to direct the strategic business decisions of the portfolio companies in which they invest. The decision to organize as a limited partnership rather than an LLC or incorporated entity may be driven not by how the entity will function in the marketplace but by other factors, such as tax and liability.

The scenario in Figure 7a illustrates how the current Form and Instructions' lack of information about limited partnerships can affect a preliminary antitrust assessment. ''A'' and ''B'' form a new limited partnership that will be an acquiring person. ''A'' and ''B'' will each hold 49.9% of this entity and will have rights related to the board (or similar bodies) of entities related to the transaction. The remaining 0.2% will be held by the general partner. Pursuant to the current Instructions, this newly formed acquiring person would not be required to provide any information other than the name and address of its general partner when making a filing for a reportable transaction.

[335] 15 U.S.C. 18a(h).

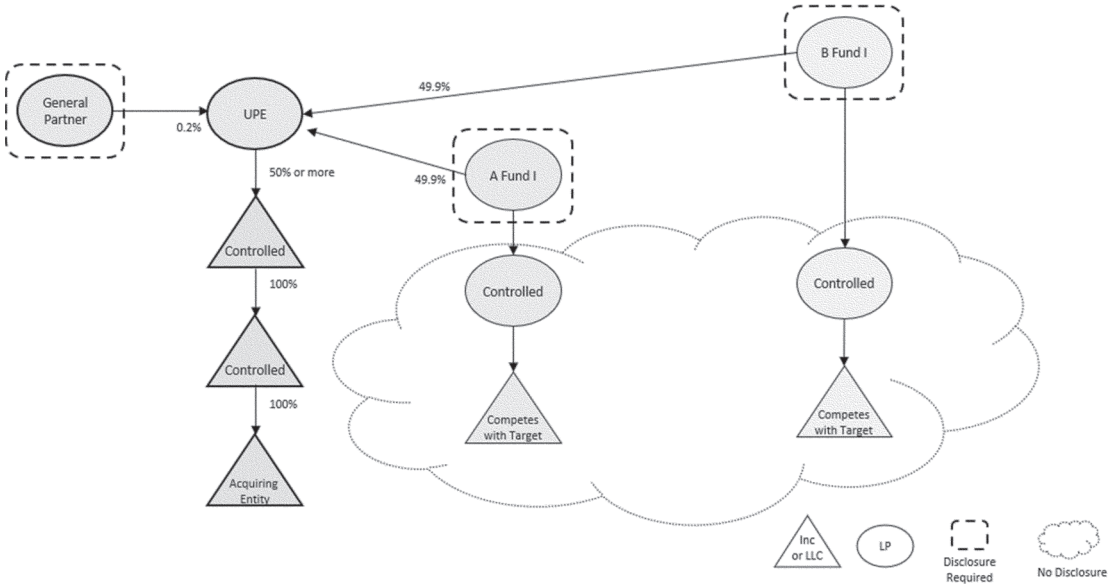
[336] 75 FR 57110, 57118 (Sept. 17, 2010) (proposed rule), *adopted* 76 FR 42471 (July 19, 2011).

Figure 7a: Current Rules Only Require UPE to Disclose Name and Address of Its General Partner; No Disclosure that A and B are Functional Buyers of Target



Compounding the difficulty in understanding the scope of the acquiring person's relationships, A Investment Group and B Investment Group may have used a code name for the transaction, such as ''Project Alpha,'' and also used that code name to name the newly created entity. In this scenario, the Agencies could receive a filing from Alpha Fund, L.P., that only discloses that it has a general partner, Alpha GP, L.P. There is no requirement that Alpha Fund, L.P. disclose that A Investment Group and B Investment Group each hold nearly 50% and will effectively co-own and manage the target after consummation. A Fund I or B Fund I could be head-to-head competitors of the target (or control competitors of the target) or have some other competitively significant relationship with the target. But the current Form would not make the Agencies aware of their significant stake in Alpha Fund, L.P. As shown in Figure 7b, the final rules address this by requiring the identification of A Fund I and B Fund I (and their affiliations with A Investment Group and B Investment Group, if known to UPE), allowing the Agencies to research whether the transaction may violate the antitrust laws.

Figure 7b: Final Rules Require UPE to Disclose Name and Address of Its General Partner and the Investment of A Fund I and B Fund I; Agencies Know to Research Holdings of A and B

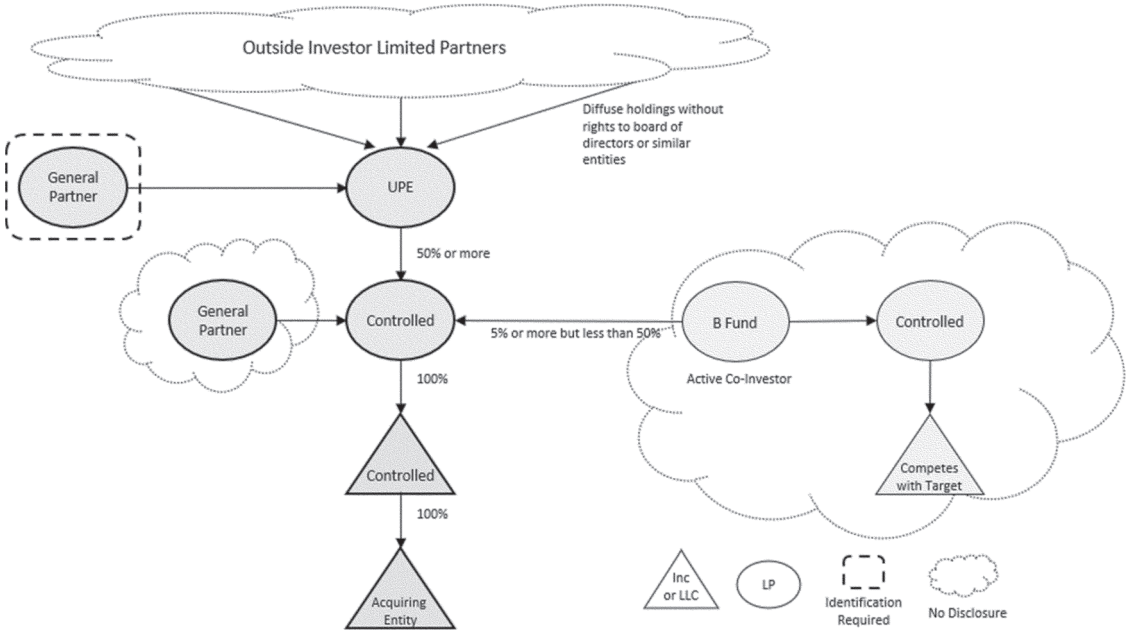


The Commission notes, as did one commenter, that in some instances the Agencies may receive some disclosure through the reporting of associate overlaps in current Items 6(c)(ii) or 7(b)(ii) and 7(d). However, many

investment groups are set up such that the associate definition, which focuses on entities, does not apply, even though the same individuals may be managing multiple funds. The Commission considered changing the definition of associates but determined that, at this time, it would be less complex and less burdensome on filers to merely require the identification of certain limited partners, which the Commission believes will allow the Agencies to use other sources to conduct a preliminary assessment of the competitive implication of these minority holders. If this proves to be insufficient, the Commission may revisit the requirements in future rulemakings.

Despite the need for identification of some limited partners, the Commission understands that there are still many limited partners who are essentially ''silent'' investors that do not participate in management decisions. They hold only financial interests for the purpose of earning a return on their investment and do not hold additional rights or participate in the governance or business operations of the limited partnership or the investments of the limited partnership. Therefore, the Commission adopts an incremental change for the identification of limited partners, implementing in part the suggestion of one commenter to require only limited partners that have certain rights related to the board of directors or similar bodies of entities related to the acquiring entity.[337] The hypothetical in Figure 8a shows a structure where the UPE of the acquiring person is a limited partnership in which its limited partners do not have any rights related to the board of directors or similar bodies of any of the UPE, Acquiring Entity, or either of the two Controlled entities between them. Additionally, UPE controls a limited partnership in which B Fund, an active co-investor for the transaction, has made its investment. Currently, UPE is only required to disclose its general partner.

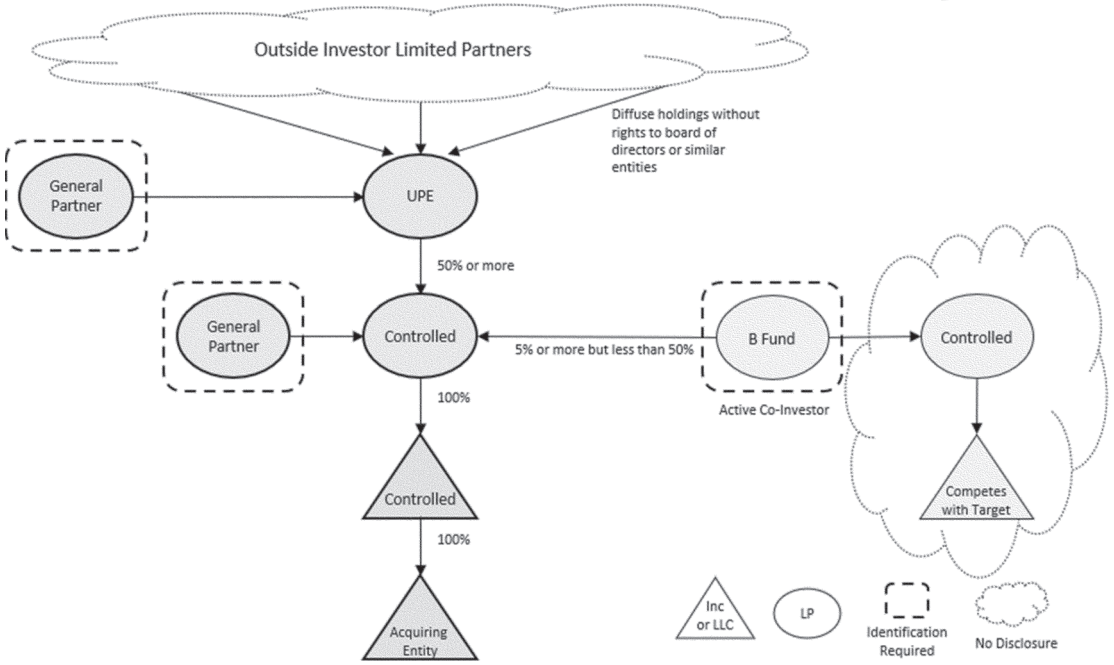
Figure 8a: Current Rules Only Require UPE to Disclose the Name and Address of Its General Partner



As shown in Figure 8b, the final rules would not require the disclosure of the ''Outside Investor Limited Partners'' because none has any rights to the board or similar body of an entity related to the acquiring entity. In contrast, UPE would need to disclose that B Fund is a limited partner of the Controlled entity as well as the general partners of UPE and Controlled LP.

[337] Comment of Dechert, Doc. No. FTC–2023–0040–0659 at 11 (commenting that it is not clear why a broad requirement to disclose all limited partners who hold interests of five percent or more is necessary to identify a potential competitive concern irrespective of such limited partners' ability or inability to participate in the management or control of the applicable fund, general partner, or acquired business).

Figure 8b: Final Rules Require UPE to Disclose General Partners and its Active Co-Investor (B Fund) But Not Passive Limited Partners or the Holdings of B Fund



In the Commission's experience, competitive concerns that arise from limited partners holding interests in the acquiring person most frequently stem from those limited partnerships that act as vehicles for investor groups to manage, direct, or influence the portfolio companies in which they invest. The Commission has determined that it is not necessary to know the names of limited partners that do not also have certain management rights and the final rule does not require disclosure of their minority interests.

The Commission expects that this modification will address concerns of commenters that disclosing limited partners would require investment firms to renegotiate agreements with limited partners. As discussed above, there is no restriction on the Agencies' ability to require disclosure of the identity of limited partners today during an in-depth investigation of the transaction. As a result, limited partners should be aware that their holdings may be relevant to an antitrust review of any transaction involving one of their investments. Indeed, the Commission has brought enforcement actions against acquisitions involving minority holdings of limited partners in competing businesses.[338] As the agencies charged with enforcing the antitrust laws, the Agencies have the authority to investigate the commercial dealings of limited partners for potential law violations regardless of any private agreements that promise non-disclosure. Therefore, any deficiency in agreements to permit disclosure to government agencies already exists. Further, if disclosure is the source of the Agencies' being made aware of a potential competitive concern with the transaction, any cost to the limited partner related to the completion and submission of the HSR Filing is justified because the information is necessary to determine whether the transaction may violate the antitrust laws. Nonetheless, the Commission has modified the requirement to reduce the type of limited partners that must be disclosed, focusing only on those with the ability to participate in management or control. On this basis, filers can exclude limited partners who serve as passive investors, who are essentially the customers of private investment firms, according to one commenter. To the extent that these limited partners do not participate in the management of the filing person, they need not be disclosed as a minority holder.

(iii) Limiting Requirements for Acquired Persons

Finally, the Commission proposed limiting the reporting requirements for the acquired person. Currently, the acquired person must identify the name and headquarters address of all holders of 5% or more but less than 50% of the acquired entity, along with the percentage held. If the acquired entity is a limited partnership, only identification of the general partner and its headquarters address is required. The Commission proposed limiting this requirement to minority holders of the acquired entity that would hold an interest after that consummation or would receive an interest in another entity within the acquiring person as a result of the transaction. However, the proposed requirements to identify certain limited partners also applied to the acquired person, if the minority investors will stay with the target post-acquisition. The Commission adopts this proposal with modification.

The proposed limitation to identify only minority interest holders of the target that will remain invested after consummation is intended to reduce the cost of complying with the final rule for the acquired person. The Commission has determined that the identity of any minority interest holder of the target that will cease to be involved with the target or acquiring person post consummation has limited relevance to understanding who could influence decision-making of the business post-

[338] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 3, 2017) (overlapping limited partnership holdings violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors).

acquisition. The Commission adopts this portion of the proposed rule. It modifies the proposed instruction to reflect the modification it adopts for the identification of limited partners, as described above. Thus, the final rule will require the acquired person to only identify minority holders of 5% or more if such holder will continue to be invested in the target or will acquire an interest in an entity within the acquiring person. If the target is a limited partnership, only limited partners (1) that hold 5% or more in the acquiring entity, (2) will continue to hold an interest in the acquired entity, or acquire an interest in the acquiring person, after the transaction is consummated, and (3) will have that have certain rights related to the board of directors or similar bodies of entities related to the acquiring entity will need to be identified. If the acquired person does not have this information, it can so note in an endnote.

The Commission also notes that one commenter focused on the requirement to identify roll-over investors, stating it would be a new burden that would discourage continued post-transaction investment. The Commission disagrees with this assessment. Currently, the acquired person already must identify all 5%–49.9% holders of the acquired entity, including roll-over investors. Further, the Commission once again notes that the amount of information required is limited; only the name of the minority interest holder (and the name of the master limited partnership, fund, or investment group, if applicable), its headquarters address, the name of the acquired entity it holds an interest in, and the percentage held must be disclosed.

2. Acquiring Person and Acquired Entity Structure

The Acquiring and Acquired Person Structure sections of the Form and Instructions require the reporting of information currently required by Items 1(f), 4(a) and (b), and Item 6(a). The Commission proposed that filing parties provide more information about the structure of the acquiring person and acquired entity, as well as the names under which they do business. The Commission also proposed a clarification regarding annual reports and audit reports of natural person UPEs. As discussed below, the Commission adopts some of these proposals without change and some with modification.

a. Entities Within the Acquiring Person and Acquired Entity

This section contains information currently required by Items 1(f) and 6(a) of the current Form. The Commission proposed requiring filing persons to organize the list of controlled entities by operating company or business, and, for each such operating company or business, the Commission proposed that filers identify the name(s) by which the company or business does business, as well as any name(s) by which it formerly did business within the three years prior to filing. The Commission adopts the proposal with modification.

The Commission received several comments opposed to this proposal. One commenter stated that the Agencies do not need to know the relationships between and among all related entities for its initial review of the HSR filing. The commenter asserted that the majority of covered entities will likely have no overlapping activities with the acquired company, and thus learning about them adds no value to the Agencies' initial screen. The Commission disagrees that the Agencies do not need this information and that it adds no value to the initial screen. This is the very information that allows the Agencies to understand what businesses are involved in the reported transaction.

The Commission does, however, make several modifications to these proposals that should reduce the cost of providing this information. The Commission adopts the proposal to require DBA names but does not adopt the proposal to adopt ''formerly known as'' (FKA) names. One commenter noted the difficulty of providing ''doing business as'' names for filing parties that do not maintain such records, but the Commission believes these DBA names will be of great value to the Agencies in the initial waiting period. Businesses create (or change) DBA names for a variety of reasons and may be required to register these names with State or local authorities. One commenter objected to the three-year period, and, as part of its overall efforts to reduce costs associated with an HSR Filing, the Commission eliminates this lookback so that filing parties must only provide this information as it stands at the time of filing.

Another commenter recommended that for executive compensation transactions the filing persons be permitted to dispense with the requirement to report ''doing business as'' names, assuming certain conditions are met. They stated that these transactions are unlikely to generate meaningful antitrust issues but that requiring prior business names will add materially to the burden on the acquired side without a corresponding benefit. The Commission agrees and as part of its overall effort to reduce cost, adopts the modification to allow both filing parties in select 801.30 transactions (which include those related to executive compensation) to provide this information as kept in the ordinary course without DBA names.

Finally, one commenter noted that the proposed rule appears to use the terms ''operating business,'' ''operating entity,'' and ''operating company'' interchangeably. The commenter requested clarification of the definitions or adoption of one term for consistency. The Commission agrees that using these three terms interchangeably is confusing and thus adopts ''operating business'' to capture entities that comprise distinct operations. Under this modification, filing parties need to organize their response by operating business(es) whether they are corporations, non-corporate entities, or assets that function as an operating business.

In sum, the Commission adopts modifications that require filing persons, except for those in select 801.30 transactions, to organize controlled entities at the time of filing by operating business and, for each such operating business, identify the name(s) by which the operating business does business. For example, a fund must organize its response by portfolio company(s), and a conglomerate must organize its response by business(es).

b. Annual Report and Audit Reports

Information for this section is currently required by Items 4(a) and (b). The Commission proposed clarifying the current instructions regarding which annual reports and audit reports are required from natural person UPEs. Currently, natural person UPEs, in lieu of personal financial documents, must produce financial documents for the highest-level entity(s) within their person. In addition, natural person UPEs must produce the same additional reports that non-natural person UPEs must produce: for acquiring persons, the reports of the acquiring entity(s) and any entity controlled by the acquiring person whose dollar revenues contribute to an NAICS overlap; and for acquired persons, the reports of the acquired entity(s). The Commission proposed new language to make this requirement clearer and the Commission adopts this change with modification.

The Commission received one comment that supported the proposal. Another commenter suggested two

revisions to the proposed Instructions. This commenter first suggested that for natural person UPEs who filed as acquired persons, the instructions should only require the most recent annual reports for the highest-level entity the Natural Person controls that includes the assets or entities being sold. Second, as a general matter, the commenter stated that persons filing notification should not be required to provide annual reports for entities that have less than $10 million in total assets, unless that entity's revenues contribute to a competitive overlap between the parties.

In considering the two suggested revisions in this comment, the Commission agrees that it is sufficient for the UPE of the acquired person to provide financial reports for only the highest-level entities that control the acquired entity, as appropriate, in lieu of providing personal financial documents. The Commission also has determined that this limitation is appropriate for acquiring persons with natural person UPEs as well. Therefore, the Commission adopts this suggestion, and natural persons, in lieu of providing personal financial statements, will need only provide financial reports for the highest-level entities that control the acquiring entity or acquired entity, as appropriate. The financial information for these highest-level entities should be provided in this section and not the UPE Details section, as discussed in section VI.D.1.

The Commission declines to adopt the suggestion that persons filing notification should not be required to provide annual reports for entities that have less than $10 million in total assets, unless that entity's revenues contribute to a NAICS overlap or any overlap identified in the Overlap Description. ''The person filing notification'' is a defined term for the purpose of the Instructions and is limited to the UPE. Therefore, other than for natural persons, the proposed Instructions only require reports from the UPE and, for the acquiring person, acquiring entity(s) and entities that contribute to a NAICS overlap, and for the acquired person, the acquired entity(s), which is consistent with the current requirement. The Commission finds these reports valuable, regardless of whether those entities have $10 million in assets.

3. Additional Acquiring Person Information

The Commission proposed requiring additional information about the acquiring and acquired person. These proposals included a description of the ownership structure of the acquiring person and acquiring entity as well as an organizational chart if the acquiring person UPE is a master limited partnership or fund, information about other types of interest holders that may exert influence over the acquiring person, and the identification of officers, directors, and board observers of the acquiring person and acquired entity. As discussed below, the Commission adopts some of the items as proposed, adopts some of the proposals as modified, and does not adopt others.

a. Ownership Structure

The Commission proposed that acquiring persons provide a description of the ownership structure of the acquiring entity and, for fund or master limited partnership UPEs, an organizational chart sufficient to identify and show the relationship of all the entities that are affiliates or associates. The Commission also proposed that acquired persons describe the ownership structure of the acquired entity.

The Commission did not receive any comments regarding the requirement to provide a description of the acquiring and acquired entities' ownership structure. The Commission believes that such descriptions will provide information and nuance about ownership structures that may not be clear from a simple list of minority holders. Moreover, descriptive responses allow filers to offer clarification about the structure, including whether the ownership structure is subject to change between filing and consummation of the transaction. As a result, the Commission adopts this item as proposed for the acquiring person. However, this information is less relevant from the acquired entity. As part of its efforts to reduce the cost related to filing where possible, the Commission does not adopt the proposal for the acquired person.

As for the proposed requirement for the acquiring person to provide organizational charts, commenters noted that organizational charts are not always kept in the ordinary course of business, and structures may be so complex that they cannot be synthesized into a chart. The Commission acknowledges that there may be some cost associated with creating organizational charts just for the purpose of making an HSR Filing and modifies this item to require charts that show the relationship of entities that are affiliates or associates if such charts exist, even if they were created for other purposes. The Commission declines to adopt the suggestion to limit this requirement to transactions where there is an identified NAICS or product or service overlap. These charts are necessary for staff to understand the totality of the transaction, including the role of key decision makers and their responsibilities relative to the business lines under review.

The complex structure of investment entities is not adequately captured by the current Form, and there is often no other source for Agencies to learn of these relationships. Information about the acquiring entity's ownership structure is therefore necessary and appropriate for the Agencies to evaluate the transaction at issue. The Commission has modified the proposal to limit the reporting costs by requiring only the acquiring person to provide a description of its ownership structure and to provide organizational charts only if they exist.

b. Other Types of Interest Holders That May Exert Influence

The Commission proposed an Other Types of Interest Holders that May Exert Influence section that would have required the acquiring person to identify certain individuals or entities, beyond those with the minority interests discussed above, that may have material influence on the acquiring entity and entities related to it. These included certain individuals or entities that (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. As discussed below, while understanding these relationships can be very important in assessing the competitive effects of certain transactions, the Commission has elected not to adopt proposals (i), (ii), and (iv) at this time. As discussed in section VI.D.3.c., the Commission adopts with modification the proposal to require identification of officers and directors, which incorporates some of proposal (iii).

The Commission received several comments in support of the proposed change to disclose other types of interest holders. One commenter stated that disclosure of these interest holders would be helpful to close a loophole when the filing parties may have influence or joint profit maximizing incentives with rivals. Another commenter noted that the information would also enable the Agencies to assess conflicts of interest or the potential for inappropriate sharing of competitively sensitive information. Other comments highlighted the

importance of identifying situations in which a single creditor to competing firms could have an incentive to facilitate their coordination or collusion as well as situations in which a private lender may assert control or an investor may have a dual role as private provider of leveraged loans to finance buyouts.

The Commission also received several comments opposed to these proposed changes. Critics noted that some of this information may not be available at the time of filing or would be burdensome to collect and report. Others questioned the utility of the information. Another commenter noted that it will not be readily apparent whether identified entities or individuals have overlaps, supply, or other relationships relevant to the target.

In regards to identifying certain creditors, commenters stated that in the vast majority of credit arrangements, the creditor's rights and financial incentives are distinctly different than those of equity holders and that many creditors are unable to control investment decisions. In addition, one commenter observed that these disclosure requirements could impede access to credit, which would seriously impact private equity as its deals frequently rely on third-party financing. Several commenters also expressed concern about the burden of identifying and describing complex credit arrangements, particularly for infrequent filers.

Regarding the proposed requirement related to non-voting securities, options, or warrants, one commenter questioned the necessity of the information to examine the anticompetitive effects of any proposed transaction, noting that, in exempting acquisitions of non-voting securities from filing, Congress must have concluded, based on the legislative history, that such acquisitions pose no anticompetitive threat. No specific comments were received with respect to the proposed requirement to identify individuals or entities that have agreements to manage entities related to the transaction.

The Commission disagrees with assertions that information about individuals or entities that can influence the acquiring person through mechanisms such as credit relationships, non-voting interests, or management contracts is not relevant to the assessment of the competitive effects of a reported transaction. Further, the Commission notes that the HSR Act specifically defines voting securities as securities which at present or upon conversion entitle the holder the right to vote for the board of directors.[339]

[339] 15 U.S.C. 18a(b)(3)(A).

Nevertheless, the Commission acknowledges that the mechanisms of influence or managerial control are often bespoke and vary from entity to entity. The proposed rule was intended to sweep broadly but in a manner that was straightforward and relatively uncomplicated for filers to navigate. The comments raised issues that warrant further consideration. Given the other proposals that the Commission does adopt, particularly identification of additional minority interest holders, information about officers and directors of entities related to the acquiring entity, and the collection of additional documents, the Commission has decided not to adopt the proposals related to credit relationships, non-voting securities, and management agreements at this time. If these additional requirements still leave significant gaps in information that impede the Agencies' ability to screen for transactions that warrant additional investigation, the Commission may revisit these proposals in future rulemakings.

c. Officers and Directors

The Commission proposed adding a section that would have required the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity. Further, the proposal required for those individuals, the identity of other entities for which those individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). After consideration of the comments and in light of the varied roles that religious or political non-profit organizations can play, the Commission has determined to narrow this requirement to (1) eliminate reporting related to board observers; (2) limit reporting to certain entities within the acquiring person (including officers and directors of the acquired entity who will continue to hold one of these positions post-consummation, if the acquiring person has filed for the acquisition of control); (3) only require identification of officers or directors that serve in those roles at the target or entities that are in the same industry as the target; and (4) exempt any non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce, as described below.

Several commenters wrote in support of the proposal, recognizing the value to the Agencies' understanding of the ownership and management structure of companies involved in the transaction. One commenter stated that common board members at intermediate levels of ownership can influence competition directly. Another commenter also noted that private equity minority investment interests can confer rights to appoint board members or allow board observers that create anticompetitive opportunities to exert coordinated market power. This comment further explained that some entities place the same person on several boards to coordinate business strategies across those entities even where they hold only minority positions. The Commission agrees that, due to the influential impact that officers and directors can have on competitive decision-making of entities within the acquiring person, this information is relevant to the Agencies' initial antitrust assessment of the acquiring person's acquisition of interests in the target. The same commenter recommended that the Commission require disclosure of board membership information for any prior acquisitions identified in the HSR Filing. Because this requirement has been designed to identify potential competitive concerns between acquiring person and target at the time of filing and going forward, the Commission declines to expand the final rule to require this historical information.

However, the majority of the comments related to this proposal suggested significant modifications, either by eliminating the requirement in its entirety or acknowledging the relevance of the information but urging revisions to more narrowly tailor the requirements to achieve the Agencies' objectives. Critics across both of these groups raised some common issues.

Some commenters questioned the Commission's authority to require information on common officers and directors in an HSR Filing to enforce section 8 of the Clayton Act, pointing to the absence of any reference to section 8 or interlocking directorates in the HSR Act or in the Commission's original Statement of Basis and Purpose issued with the final HSR rules in 1978. A law firm commenter stated that legislative statements support that Congress disavowed any intention that premerger notification be used to allow the accumulation of information on businesses for general enforcement purposes, and the commenter asserted that the HSR Act is concerned only with potential violations of section 7. Another commenter wrote that even if it was appropriate to enforce section 8 using the HSR Act process, the

proposed instructions went beyond the text of section 8 by requiring information about unincorporated entities as well as historical information.

Additionally, several commenters questioned the Commission's legal basis for the requirement to report officers and directors. For example, one commenter stated that this requirement had no bearing on the antitrust analysis of transactions under section 7 and that the NPRM does not provide evidence that the Agencies have missed anticompetitive interlocks due to lack of information in HSR Forms. One commenter stated that the NPRM does not identify any cases where a court stated that this information has relevance for review under section 7 of the Clayton Act.

The Commission disagrees that the identity of officers and directors is immaterial to an analysis of whether an acquisition may violate section 7. As described in sections II.B.1 and VI.D.1.d.ii, and elsewhere, the structures of entities have become more complex, allowing for the levers of influence and managerial control to be distributed through a variety of mechanisms beyond controlling equity stakes, or even minority equity stakes. The important role of board members in particular has been recognized in court cases and the focus of consent decrees to resolve competitive issues.[340]

Further, contrary to assertions that the HSR Act limits the Agencies to evaluating whether a notified transaction may violate ''Section 7,'' the HSR Act explicitly directs the Agencies to promulgate rules necessary and appropriate to determine whether a notified acquisition may, if consummated, violate the ''antitrust laws.'' [341] The HSR Act amended the Clayton Act, and the term ''antitrust laws'' is defined in the Clayton Act to include the Sherman Act and the Clayton Act, including section 8's prohibition on interlocking directorates.[342] As discussed in the NPRM, when the Agencies do become aware of existing or potential interlocks created by a reported transaction, they typically seek to remediate them consistent with the Agencies' enforcement authority and before consummation of the transaction. Counter to suggestions that the proposal sought to create a ''dossier'' on the filing parties for general enforcement purposes, this information is relevant to enforcing the antitrust laws with respect to the transaction under review.

Moreover, while a notified transaction could create a violation of section 8 as described in the NPRM, the same competitive concerns that underpin section 8 are also relevant to whether a transaction would violate section 7. In fact, as highlighted by some commenters, section 8 does not necessarily cover all officer and director relationships that may give rise to competition issues. But that does not mean that these relationships are benign or that they do not create the same opportunities or incentives to coordinate competitive decision-making, for example, if the CEO or director of the acquiring entity serves as a member of the board of a rival of the target. In this scenario, section 8's thresholds for strict liability may not capture this relationship, but it would be relevant to analysis under section 7, particularly in nascent markets where one of the entities involved does not meet the minimum sales trigger for application of section 8.[343] That risk alone is relevant to the Agencies' assessment of whether the transaction is likely to substantially lessen competition or tend to create a monopoly in violation of section 7, regardless of whether the interlock is of the type that violates section 8. It is in part because the Agencies cannot rely on section 8 compliance to capture all relationships that create interlocks between entities with competitive relationships that the Commission proposed the new section.[344]

Currently, the Agencies cannot screen for these relationships unless they are mentioned in the transaction documents submitted with the HSR Filing, and often they are not. This information is often not publicly available from any source other than the filers. As explained in the NPRM, information on the identity of officers and directors will help the Agencies identify potential anticompetitive harms that may arise from the proposed transaction.

Additionally, identification of these individuals will assist the Agencies in determining whether the filers have had an opportunity to improperly share confidential information or integrate their businesses before the HSR Act's waiting period expires. For the Agencies to conduct a thorough premerger review, the business operations of the two filing entities must maintain their premerger competitive status quo until the HSR waiting period expires. When the Agencies are aware that there are common officers and directors, they may investigate whether there are on-going communications or interactions affecting the premerger competitive status quo, for example, by interfering with the other filer's competitive decision-making or placing executives from one entity into management positions at the other.[345] The Commission believes that information about these relationships is relevant to ensuring that the parties are complying with the requirements of the HSR Act to hold their operations separate and continue to compete until the expiration of the waiting period. This is true regardless of the antitrust risk presented by the transaction or the possibility that these relationships are improper interlocks; parties must wait until the waiting period has expired to begin integrating operations. Violations of the

[340] *See, e.g., In re Red Ventures Holdco, LP,* No. C–4627 (F.T.C. Nov. 2, 2017) (complaint) (overlapping limited partnership holdings that provided board seats violated section 7); *In re TC Group, L.L.C.,* No. C–4183 (F.T.C. Mar. 16, 2006) (complaint) (acquisition involving minority stake giving two private equity investors seats on the boards of competitors); *In re Time Warner Inc.,* No. C–3709 (F.T.C. Sept. 12, 1996) (analysis to aid public comment) (walling off two individuals and one entity to prevent them from influencing officer, directors, and employees of competitor and its day-to-day operations). *See also* cases cited in section II.B.1.

[341] *See* 15 U.S.C. 18a(d)(1).

[342] *See* 15 U.S.C. 12.

[343] Section 8 of the Clayton Act, 15 U.S.C. 19, prohibits, with certain exceptions, one person from serving as an officer or director of two competing corporations if two thresholds are met. Competitor corporations are covered by section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000 with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. In accordance with section 8(a)(5), the Commission adjusts these thresholds annually based on changes in gross national product. The thresholds in effect for 2024 are $48,559,000 and $4,855,900 respectively. 89 FR 3926 (Jan. 22, 2024).

[344] Commenter International Bar Association notes that beginning in September 2023, the European Union requires merging parties to provide information on any current interlocking directorships, and that Brazil requires similar information for both fast-track and regular notifications. *See* Comment of Int'l Bar Ass'n, Doc. No. FTC–2023–0040–0687 at 16–17. While this is not a basis for the final rule, the Commission notes that this information is relevant to competition issues examined in other jurisdictions.

[345] The Agencies' concern about premature coordination between merging firms, referred to as ''gun jumping,'' dates back many decades, and they have brought enforcement actions for violations of the HSR Act, as well as other antitrust laws that prohibit competitors from acting jointly prior to consummation of any acquisition. *See also* Note by the United States to the OECD, Suspensory Effects of Merger Notifications and Gun Jumping (Nov. 27, 2018) (DAF/COMP/WD(2018)94), *https://www.ftc.gov/system/files/attachments/us-submissions-fjun-2010-present-other-international-competition-fora/gun-jumping_united_states.pdf.* For a discussion of cases prior to 1995, see Mary Lou Steptoe, Acting Dir., Bureau of Competition, Fed. Trade Comm'n, Prepared Remarks Before A.B.A. Sec. Antitrust L. Spring Meeting, 1994 WL 642386 (Apr. 7, 1994).

stay provisions of the HSR Act are subject to civil penalties.[346]

Two commenters objected to requiring board observer information as outside the scope of section 8 and not related to the Agencies' antitrust assessment of the transaction. The Commission is aware that board observers do not have the same rights and duties as officers or directors. Comments submitted in response to the Commission's December 2020 Advance Notice of Proposed Rulemaking stated that individuals serving as board observers typically receive the same information as the board of directors but there may be ways to exclude them from reviewing privileged or competitively sensitive information. Consequently, the Commission views the risks of sharing competitively sensitive information or changing competitive decision making via board observers to be lower than the risk present with officers and directors. As a result, the Commission agrees that the need for information about board observers is not as great at this time for the purpose of the Agencies' premerger risk assessment, and the final rule does not require filers to identify individuals who have these rights.

In addition to comments related to the authority [347] and purpose of the proposed rule, several commenters raised concerns about the burden of collecting this information, especially historical information about individuals no longer serving in one of these roles, noting that it has little relevance and would be burdensome to collect. One commenter suggested that the requested information on officers and directors be limited to any positions they currently serve or expect to serve in the future. Another comment agreed, noting that current and expected future overlaps are relevant for assessing interlocking directorships and coordinated effects, but that detailed and historic information across all entities of the company has minimal relevance to the antitrust assessment of a particular transaction. Citing practical concerns, another comment noted that there should be no requirement to collect post-departure information from former personnel.

Other commenters stated that the burden of collecting any information about officers and directors was not justified by the benefit to the Agencies' review of any reported transaction. Some cited the higher burden of this requirement for large companies. For instance, one commenter noted that, in some instances, the individuals that would be identified would not be relevant to the Agencies' premerger review because, for small subsidiaries within a large entity's corporate structure, an officer might be someone who merely drew up the paperwork forming the entity whose role would not be relevant to the Agencies' antitrust assessment. Another suggested limiting this requirement to certain revenue thresholds or entities with overlaps or other relationships.

Additional commenters objected to having to report information regarding any individual's board membership or other association. They raised concern that this requirement could sweep in memberships with religious, political, or other non-commercial groups. One commenter stated that some of these individuals do not want to share information about their membership in certain organizations. The Commission has no intention of forcing disclosure in the HSR Filing of any officers or members of the governing board of non-commercial entities, or other non-profit entities with a religious or political purpose. The Form and Instructions that are part of this final rule counsel filers not to report any individual's role as a director, officer, or member of a non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce. Filers who would otherwise be required to report these affiliations are excused from such reporting.

In response to the comments and to better tailor this requirement to the purpose of premerger review, the Commission has further decided to limit this requirement in several ways. First, the Commission has eliminated the requirement to identify officers or directors of acquired entities; the requirements of the final rule related to reporting information for officers and directors will apply to the acquiring person only. Second, the Commission limits the entities within the acquiring person to entities that (1) have responsibility for the development, marketing, or sale of products or services that are reported overlaps identified in the Overlap Description or supply relationships identified in the Supply Relationships Description or (2) directly or indirectly control or are controlled by the acquiring entity. If any of these entities is a non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce, no reporting is required for individuals serving as officers or directors. Third, the Commission has limited the lookback periods contained in the proposed rule. For entities in category (1), filers will report officers and directors serving within three months prior to the HSR Filing. For category (2), there is no requirement to lookback to any individual who is no longer serving as an officer or director at the time of the HSR Filing but filers must consider individuals who have not yet officially taken the relevant positions. Fourth, the acquiring person will only be required to report the names of officers and directors of these entities if those individuals also serve as an officer or director of an entity that derives revenue in the same NAICS code (or is in the same industry) as the target at the time of filing and the name of such other entities. This will result in a list of only those individuals with the relevant connection.

As noted elsewhere, the Commission has carefully evaluated each of the requirements of the proposed rule in light of the comments and adjusted the final rule to calibrate information requirements to antitrust risk, burden, and importance to the Agencies' ability to screen for transactions that may violate the antitrust laws. On balance, the Commission has determined that an analysis of the board of the target entities is less probative in analyzing the potential effects of the transaction than is an analysis of certain entities within the acquiring person. Many filings are for acquisitions of control, and therefore the officers or directors of the target often change upon consummation. For those transactions where control is not being acquired, the acquired person may not be a party to the transaction, making the burden of collecting the information in the period of time between when it receives the required notice letter and when its filing is required higher than that of the acquiring person, which generally controls the timing of its filing. As a result, the Commission has not adopted the proposal for the acquired person.

For the acquiring person, as discussed elsewhere, due to the competitive significance of entities with products or services in development that have not

[346] 15 U.S.C. 18a(g)(1). *See, e.g., United States* v. *Legends Hospitality Parent Holdings, LLC,* No. 1:24–cv–5927 (S.D.N.Y. filed Aug. 5, 2024) (seeking civil penalties for obtaining beneficial ownership of acquired person prior to expiration of HSR waiting period); *United States* v. *Duke Energy Corp.,* No. 17–cv–00116 (D.D.C. Apr. 7, 2017); *United States* v. *Input/Output, Inc.,* No. 1:99–cv–00912 (D.D.C. May 13, 1999).

[347] Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2020–0086–0015 at 10 (board observers generally receive the same information that a director would except when there are conflict-of-interest issues or when the information concerns competitively sensitive topics); Comment of Comput. & Commc'ns Indus. Ass'n, Doc. No. FTC–2020–0086–0002 at 11 (board observers are usually entitled to the same information as board directors although companies have more leeway to exclude observers from privileged or competitively sensitive information).

yet generated any revenue, the Commission declines to adopt a de minimis revenue requirement for this information but agrees that information related to officers and directors is most relevant to the antitrust assessment when the companies have an existing business relationship or are related to the entity making the acquisition. Thus, the Commission modifies this proposal to look only at those entities within the acquiring person that are responsible for the development, marketing, or sale of the products or services identified in the Overlap Description or the Supply Relationships Description, or directly or indirectly control or are controlled by the acquiring entity. This modification addresses commenters' concern about potentially needing to report information on many officers and directors, especially across larger or more diffuse organizations with many subsidiaries irrespective of antitrust risk. So modified, this requirement would focus the Agencies' inquiry on those entities that would be most likely to have a competitively important relationship with the target post-consummation.

The Commission believes that limiting this information requirement to those entities for which the acquiring person and the target have reported overlaps or supply relationships in the same sector as well as the entities that are related to the acquiring entity provides information the Agencies need for premerger screening. As modified, this requirement properly targets the information that reveals any antitrust risk that common officers and directors could act to undermine competition during the waiting period or post-consummation. The Commission acknowledges that there may be other such relationships involving the parties to the transaction that may be relevant to the competition assessment under section 7 or that present section 8 concerns but agrees that the Agencies can continue to collect this information only for those transactions that are flagged for closer review. While the final rule may impose a higher cost to large companies with many competitively relevant business lines, the Commission believes that the benefit to the Agencies is necessary and proportionate: it is more difficult for the Agencies to discover on their own all the individuals who serve in these key roles at different levels of larger companies when those companies have many business lines related to the target.

The Commission has also considered comments related to the proposed lookback period, and, in light of these concerns and to minimize the cost of collecting historical information about officers and directors, the Commission has modified this requirement to shorten the lookback period to three months before the filing date. The Commission believes providing information about individuals who served in one of these positions recently, but not at the time of the filing, is sufficient to identify those individuals who would have been in a position to share competitively sensitive information during a due diligence or negotiation phase for the transaction. It will also serve as a disincentive for these individuals to step down temporarily to avoid disclosure on the HSR Form.

Once the relevant entities and individuals have been identified (and excepting any non-profit entities organized for religious or political purposes), the acquiring person must determine whether those individuals also serve as an officer or director (or in the case of unincorporated entities, roles that serve similar functions) of another entity that derives revenue in the same NAICS codes as the target. If NAICS codes are unavailable, reporting should be based upon the industry overlaps, to the knowledge and belief of the acquiring person or the officer or director. Only if an individual serves in such capacity does the acquiring person need to provide the name of that individual, along with the name of the entity within the acquiring person they serve as an officer or director, their title at that entity, and the name of the other entity for which they serve as an officer or director (and excepting any non-profit entity organized for religious or political purposes). The Commission believes that these limitations will allow the Agencies to have information about key affiliations with other businesses in competitive overlap relationships while limiting the burden on filing parties and their officers and directors.

Finally, commenters representing the pharmaceutical industry voiced concerns about the applicability and effects of the proposed instruction on reportable transactions in the pharmaceutical and biomedical sectors. For example, one pointed out that biotech firms generally rely on a small cadre of qualified directors and officers who have the appropriate business background and stated that disclosure of these positions in an HSR Filing would discourage highly sought-after experts and specialists from accepting biotech leadership roles. Another explained that many pharmaceutical transactions that trigger HSR Filings involve only the acquisition of exclusive licenses, where the parties remain as independent firms post-transaction. This commenter also objected to reporting this information for acquisitions of companies with no sales.

The Commission is aware, from its own experience and from research done by others,[348] that there are individuals who serve on the boards of multiple life science companies. The final rule does not impose a disproportionate obligation for companies operating in this sector; these individuals are obligated to comply with the antitrust laws regarding interlocks as much as individuals serving in other sectors. The Commission does not agree that there is a unique risk that disclosure of recent, current, or future leadership positions will limit the number of talented and qualified individuals who are available to serve as officers or directors in the biopharma or life sciences sector beyond whatever limits the antitrust laws impose. Many sectors prefer knowledgeable professionals with distinct credentials and experience to serve as board members. Moreover, the cost of reporting these relationships is directly related to the number of reportable transactions that occur each year in this sector and the number of existing or potential relationships. The Commission does not believe that HSR reporting requirements will improperly deter qualified individuals from serving on the boards of these or any other companies.

The Commission believes that the modifications made to the final rule will ensure that the Agencies receive the information about recent, current, and future officers and directors that may create opportunities for anticompetitive harm under any antitrust law, including section 7 of the Clayton Act, section 1 of the Sherman Act, or the HSR Act itself. The Commission disagrees that the instruction will newly create a chilling effect on lawful and procompetitive activity or board membership. When individuals agree to serve as board members, they take on fiduciary responsibilities that statutory and common law require. Separate from any HSR requirements, these fiduciary duties require directors to, inter alia, act in the best interest of the organization and to ensure that the organization follows applicable laws.[349] Courts have found that directors may breach their duty of loyalty if they do not make a good faith effort to provide adequate

[348] *See* Lemley, *supra* note 316.

[349] Jeremy S. Piccini, ''Director Liability, the Duty of Oversight, and the Need to Investigate,'' Bus. L. Today 1 (Feb./Mar. 2011).

oversight and monitoring.[350] A merger or acquisition that requires reporting under the HSR Act is not an insignificant occurrence. When an organization to which an individual owes a fiduciary duty is involved in a reportable transaction, it is reasonable to expect those individuals to exercise their duties of care and loyalty by participating in compliance activities. Moreover, individuals who serve on boards must comply with the prohibitions in the antitrust laws that relate to interlocks and should be aware of how their role in a senior leadership position is relevant to the Agencies' assessment of proposed transactions. These risks exist without regard to the disclosure of their board position in an HSR Filing. Given the responsibilities that board members already carry, the Commission believes that the reporting requirement is reasonable and appropriate, particularly when balanced against the increased transparency and value it provides to the Agencies' premerger antitrust analysis.

In sum, the Commission has determined that the reporting requirements for UPEs contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws because the acquiring person and the target have existing business relationships, including through shared individuals or entities, that must be considered as part of that assessment, and that these requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

E. Transaction Information

This section of the Form and Instructions reorganizes, clarifies, and expands the information required in the initial portion of the current Form as well as in Items 2, 3, and 5. The Commission proposed new sections to facilitate the reorganization, clarification, and expansion of these items and received comments on certain portions of the Transaction Information section. As discussed below, the Commission adopts some of these proposals without change and some with modifications.

1. Parties

This section requires the information currently mandated by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

2. Transaction Details

This section requires the information currently mandated by Items 2(b), 2(c) and 2(d). The Commission did not propose and does not adopt any material changes to the information required by these items. The Commission notes that the requirement to indicate the notification threshold in Item 2(c) is not applicable to the acquired person and is therefore excluded from the Form and Instructions for the acquired person. The Commission did not propose and does not adopt any material changes to the information required by this item.

3. Transaction Description

This section requires the information currently mandated by Items 2(a) and Item 3(a). The Commission did not propose and does not adopt any material changes to information required by these items. The Commission also proposed requiring the acquiring person to describe the business operations of all the entities within the acquiring person, which it adopts with modification, as discussed below.

a. Business of the Acquiring Person

The Commission proposed requiring the acquiring person to briefly describe the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person's pre-transaction business. The Commission adopts the proposal with modification.

The Commission received two comments expressing general support for the proposal, with one noting that the change is essential to ensuring that the Agencies can meet the statutory deadline. One law firm commenter was critical of the burden that the proposal would impose, stating that companies may have several dozen subsidiaries and written descriptions as to each of the respective business operations is not information readily maintained in the ordinary course of business and could be incredibly burdensome to collate.

The Commission adopts a clarified version of this requirement. The proposal was intended to require a short description of the operating businesses within the acquiring person, not an entity-by-entity description. The Commission understands that a single operating business may comprise multiple entities, such as shell entities or separate entities for each location of the business. Therefore, the Commission amends the requirement to remove ''of all entities within'' to make clear that the acquiring person does not need to describe its operations on an entity-by-entity basis.

Understanding the business of the acquiring person is necessary to understanding the potential competitive implications of the transaction. Investment groups often control multiple portfolio companies across many lines of business. Similarly, some corporations also have multiple and varied operations. These other operations may be related to the operations of the target, even if they do not directly overlap with it. Therefore, particularly for acquiring persons with complex structures or many businesses, knowing just the business of the acquiring entity is not sufficient for the Agencies to evaluate the impact of the acquiring person merging with or acquiring an interest in the target. The scope of the acquiring person's holdings is often not publicly available, necessitating the Agencies receiving the information from the acquiring person itself.

b. Business of the Target

This section requires the information currently required by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

c. Non-Reportable UPEs

This section requires the listing of non-reportable UPEs, which is currently required by Item 2(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

d. Transaction Description

This section requires the information currently mandated by Item 3(a). The Commission did not propose and does not adopt any material changes to the information required by this item.

e. Related Transactions

This section requires filing persons to identify related transactions, and the Commission proposed a list of common circumstances in which multiple filings are required to guide filing parties in their responses. Although Item 3(a) of the current Form asks parties to indicate whether there are additional filings related to the transaction, filers sometimes overlook this requirement. The Commission received three comments in support of the proposed changes, with one of these commenters

[350] *See Marchand* v. *Barnhill,* 212 A.3d 805, 824 (Del. 2019) (reversing dismissal of stockholder's claims that directors breached their duty of loyalty by failing to establish a reasonable system of controls and reporting regarding food safety in connection with listeria outbreak); *In re Boeing Co. Derivative Litig.,* No. CV 2019–0907–MTZ, 2021 WL 4059934, at *33 (Del. Ch. Sept. 7, 2021) (finding that plaintiffs stated a claim that board breached its duty of oversight by failing to establish a reporting system for airplane safety).

noting that they appear to be reasonably designed to provide potentially helpful clarification. The Commission adopts this requirement as proposed.

f. Transactions Subject to International Antitrust Notification

The Commission proposed creating a Transactions Subject to International Antitrust Notification section that would require parties to identify the jurisdictions where each filing person has already filed or is preparing notifications to be filed as well as a list of the jurisdictions where it has a good faith belief it will file. The Commission adopts this requirement as proposed, but only for the acquiring person.

Although the Form currently asks filing parties to voluntarily identify other jurisdictions in which filings will be made, most filers do not disclose the information even though more and more transactions are subject to review in multiple jurisdictions around the world. As noted in the NPRM, in order to fully benefit from inter-agency consultations, the Agencies need to know as early as possible which foreign jurisdictions may also be evaluating a proposed transaction.

The Commission received two comments in opposition to this proposal. One commenter expressed concern about the effects of inter-agency consultations, and another recommended maintaining the status quo where filers voluntarily identify other jurisdictions where the transaction will trigger premerger notification under the laws of that jurisdiction. Both stated that the proposal would only impact international companies, which might be forced to speculate about potential foreign filings. The Commission acknowledges that the proposed requirement will have a greater impact on companies with operations outside the United States. But the Commission disagrees that it is asking parties to speculate about potential foreign filings; however, it has determined that it is sufficient for the information to be provided only by the acquiring person. As stated in the NPRM, the text of the proposed rule provides flexibility for parties who, at the time of the HSR Filing, may not have yet identified all the other jurisdictions where they will file. Indeed, the final rule specifies that filing parties can respond based on their good faith belief, which provides filing parties with the ability to respond based on their knowledge at the time of filing. Otherwise, the requirement asks for facts that are already known: the jurisdictions where the party has already filed and the ones for which it is preparing a filing. The Form also affords parties the option to voluntarily make certain waivers related to other jurisdictions, as discussed in section VI.K.3. Accordingly, knowing which other jurisdictions are reviewing the transaction can expedite the waiver process if the parties intend to provide a waiver after filing.

Given the importance of knowing which foreign jurisdictions may also be evaluating a proposed transaction and the benefits to the Agencies and the parties of early case-specific cooperation facilitated by waivers, the Commission adopts this necessary change as proposed for the acquiring person. However, because filing parties often coordinate their notification to other jurisdictions and in order to further reduce the burden on acquired persons, the Commission does not adopt the change for acquired persons because it is sufficient to obtain this information from only one filing party.

4. Additional Transaction Information

a. Transaction Rationale

The Commission proposed that the acquiring and acquired person be required to describe all strategic rationales for the transaction. These rationales would include those related to, for example, competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person, expansion into new markets, hiring the sellers' employees (so-called acqui-hires), obtaining certain intellectual property, or integrating certain assets into new or existing products, services, or offerings. The Commission also proposed that the filing person identify which documents submitted with the HSR Filing support the rationale(s) described in the narrative. The Commission adopts the requirement as proposed but does not require the information from select 801.30 transactions.

The Commission received several comments supporting disclosure of transaction rationales. Individual commenters described the changes as common-sense requirements and noted the need to ensure each party in the transaction explains the reasoning from their perspective. One commenter stated that mergers may be beneficial to an acquiring company for anticompetitive reasons that might not be immediately apparent from a surface-level analysis of market shares and concentration in a particular market, and that requiring a firm to submit its justification for the strategic wisdom of a particular transaction would help diminish the role of guesswork in the Agencies' review of a proposed merger.

Commenters opposing disclosure of transaction rationales focused on the evolving nature of the information, which may very well differ across the various personalities and business roles that span an organization and which in some instances may be only discovered in the course of post-signing diligence. The Commission understands that there may be many goals for the transactions and that different perspectives within the filing person may be difficult to resolve. But that is precisely the problem that this requirement is intended to resolve. The Agencies are not in a position to understand which rationales are predominant nor choose among different rationales presented in the other materials submitted with the notification, such as transaction-related documents, without additional context. That is why the Commission believes that requiring filers to point to documents or other materials in the HSR Filing that support the stated rationale would help resolve any uncertainty about which rationale (or rationales) may predominate. The Commission also understands that rationales may change throughout the diligence process. The parties are not required to wait to file their notification until they have settled on a single or predominant rationale.

Others described the request as unfair because in the past the merging parties' strategic rationale for the transaction has only been revealed after the Agencies have sued to block a deal. The Commission disagrees that the parties lack rationales for the transaction until they are before a court defending a lawsuit, or that it is unfair to require them to state each strategic rationale for the transaction known at the time of making an HSR Filing. Indeed, each filer may have different reasons for entering into the transaction. Whatever the reasons for agreeing to the transaction, that is the information the Agencies seek. Knowing why each party sees the transaction as beneficial is highly relevant to the initial antitrust assessment and may cause the Agencies to determine, relying on the documentary support for that rationale, that the transaction does or does not warrant additional investigation.

In addition, commenters noted that a description of transaction rationales would be burdensome to generate and duplicative of other materials submitted in the HSR Filing, particularly documents responsive to current Item 4. The Commission acknowledges that there is some cost to filers to provide a description of strategic rationales but

disagrees that it is duplicative. There is no current requirement that the parties describe the rationale for the transaction, and for many transactions, there are no documents or other information submitted with the HSR Filing that reference a rationale. For these filings, the Agencies do not know what benefits either party hopes to achieve through the transaction. Alternatively, where there are many different rationales discussed in submitted materials, the Agencies lack the context to know which ones predominate or reflect the views of the organization. Requiring each filer to describe each strategic rationale for the transaction provides the Agencies with a starting place to understand the motivation behind the transaction without having to make judgments about which ones are still under consideration. Given the Agencies' experience with asking this question during the initial waiting period or reviewing other white papers that the parties voluntarily provide, the Commission believes that the cost of supplying a transaction rationale will be minimal and, in any event, is necessary for the Agencies to determine whether the transaction may violate the antitrust laws. Filers are invited (but not required) to copy and paste text or provide a summary from documents produced with the HSR Filing and reference the specific portions of those documents where the discussion of that rationale exists. However, if documents provide inconsistent rationales, filers should address these inconsistencies. The Commission believes that relying on statements contained in documents submitted with the HSR Filing will reduce the burden of preparing the filer's description of rationales for the transaction.

One commenter requested clarification as to whether the proposal contemplates a single consistent response submitted by all parties notifying the same transaction (in the context of a simple acquisition, buyer and seller) or whether it contemplates that each notifying party submits a separate narrative, noting that the motivations of buyers and sellers may diverge. The Instructions clarify that each filing party is required to submit a description of its strategic rationales because it is important to have such a description from both sides of a given transaction.

Another commenter suggested that to reduce burden the Commission should only require the acquiring person to submit its transaction rationale, reasoning that the acquiring person's strategy is the most competitively relevant and that the seller's rationale for a transaction is often no more than obtaining cash to distribute to investors or to use for unrelated business purposes. The same commenter suggested that the instruction be limited to requiring a brief description of the primary strategic rationale for the transaction. For the reasons outlined above, the Commission declines to adopt these suggestions but notes that a brief description of the transaction rationale is sufficient so long as it is accurate and does not conflict without explanation with stated rationales in documents submitted with the HSR Filing.

b. Transaction Diagram

The Commission proposed a new requirement that filing persons provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction. The Commission adopts this proposal with modification.

The Commission received many comments in support of this proposal, all of which noted the value of such materials to the Agencies as they work quickly to assess the transaction. One commenter stated that without a diagram of all the entities and their relationships it can be hard to understand what's going on. Another highlighted that the proposed requirement would leverage documentation that often already exists. Noting that transaction diagrams can sometimes be incomplete or inaccurate, a law firm commenter suggested that this proposed instruction be modified to require the submission of the most recent diagram of the transaction, but only to the extent that such a diagram already exists and is not materially inaccurate. Finally, two commenters expressed general support for the proposal.

Three commenters opposed the proposal on the grounds that it would unnecessarily increase the burden on filing parties. One commenter stated that these materials are often not maintained in the ordinary course of business or created in the course of a deal negotiation. Another noted that deal structure may not be ''set in stone'' even after signing. In addition, another commenter pointed out that, besides burdening the parties, the proposal would increase the burden on Agency staff reviewing the information, adding that the additional information is not likely to be any more informative to the Agencies than the information already required under the current HSR Form.

Two commenters proposed modifications in light of the fact that many times these charts are drafted by outside tax advisors to show the pre-transaction reorganization needed to achieve the desired tax structure and benefits and that the charts sometimes include detailed tax advice that is protected by the attorney-client privilege or otherwise commercially sensitive. A law firm commenter suggested modifying the instructions to permit parties to redact, omit, or simplify any diagram, to exclude information that relates solely to tax considerations. Another commenter noted that where the details of the pre-transaction reorganization are irrelevant to the antitrust assessment of the transaction, such as where all or a majority of the outstanding equity of a target is being acquired, less detailed diagrams should provide the agencies with the desired information.

The Commission acknowledges the cost of having to create both a diagram along with a corresponding chart explaining the relevant entities and individuals involved in the transaction. Although such information would be materially useful to the Agencies, the Commission adjusts the proposal to require only the acquiring person in non-select 801.30 transactions to provide a diagram of the deal structure and only if one exists. That is, filers are not required to create a diagram or a chart solely for the purposes of submitting an HSR Filing. The Commission believes that such a diagram would be useful even if prepared for other purposes. With regard to privileged materials, HSR Rules already accommodate withholding certain material based on a claim of attorney-client privilege; if such a claim is made with respect to transaction diagrams, the filer can follow those requirements.

In sum, the Commission has determined that the transaction information requirements contained in the final rule are necessary and appropriate to enable the Agencies to fully understand the scope of the transaction being considered and to identify those that may violate the antitrust laws, and that the requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

F. Joint Ventures

This section requires information currently mandated by Item 5(b) of the Form. As discussed in section VI.J.1.f, the Commission adopts the proposal to eliminate the use of 10-digit NAPCS codes, including in this section. The

Commission did not propose and does not adopt any other material changes to the information required by this item. The Commission notes that no acquired person filings are required for joint ventures, so this section is not included in the Form or Instructions for acquired persons.

G. Business Documents

The Commission proposed a Business Documents section that would require the submission of documents currently required by Items 4(c) and 4(d) of the Form as well as additional categories of documents. Specifically, the Commission proposed expanding the current requirement found in Item 4(c) to the ''supervisory deal team lead(s);'' altering the language of current Item 4(d)(ii); requiring the production of certain ordinary course documents; requiring drafts of Transaction Related Documents; and requiring an organizational chart of authors and recipients. As discussed below, the Commission adopts some of these requirements with modification and does not adopt others.

As noted in the proposed rule, the Agencies compared documents they have received over the years in response to Second Requests with those submitted in the HSR Filing and assessed whether having certain types of documents at the beginning of the waiting period would have changed the Agencies' determination of whether and how to move into an in-depth investigation of the transaction. As a result of this review, the Commission identified documents that are not required by the current Form but would have been highly probative to the initial antitrust assessment of the transaction during the initial waiting period.

1. Transaction-Related Documents

a. Competition Documents

In the proposed rule, the Commission proposed expanding the documents currently required by Item 4(c) of the Form, which are prepared by or for officers and directors for the purpose of evaluating or analyzing the transaction. Since the beginning of the premerger notification program, these transaction-related documents have been a key screening tool for the Agencies to determine whether the transaction may violate the antitrust laws because they discuss the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. The Commission proposed requiring the filing person to submit such documents prepared by or for supervisors of the team of individuals working to complete the transaction, which the Commission referred to as the supervisory deal team lead(s).

In response to comments that the proposal was not clear about whom the Commission intends for filers to search for responsive documents and information in addition to officers and directors, the Commission has introduced a definition of supervisory deal team lead and limited the term to just one person. As discussed in section VI.A.1.g., the Commission believes these changes will provide clarity for filing parties. The Commission now turns to comments that were not directed at the definition of supervisory deal team lead but concerning the requirement to submit documents prepared by or for someone other than officers and directors.

The Commission received one comment from State antitrust enforcers supporting the proposal, but other commenters expressed concerns about the costs associated with identifying, collecting, and producing documents from the supervisory deal team lead. Certain commenters stated that expanding 4(c) to include documents to and from supervisory deal team lead(s) would create a significant burden to filers that is not justified by any benefit to the Agencies. One commenter said that adding documents from these individuals would not likely generate material that would allow staff to better assess the need for Second Requests.

The Commission disagrees that adding documents prepared by or for the senior leader of the deal team would not likely generate additional key documents to help staff better assess whether to issue Second Requests. Since the beginning of the premerger notification program, 4(c) documents have been a principal source of information that allows the Agencies to identify those transactions that may violate the antitrust laws and that require a more in-depth review through the issuance of Second Requests. Based on documents submitted in response to Second Requests, it is the Agencies' experience that someone other than an officer or director is often in charge of the deal team and this person typically has additional documents that would be responsive to 4(c), but the documents have not been transmitted to an officer or director at the time of the HSR Filing. This is even more likely to be true when the HSR Filing occurs before due diligence is complete or a final agreement is executed. Requiring the submission of transaction-related documents prepared by or for the supervisory deal team lead would result in the Agencies receiving additional probative documents that speak directly to whether the transaction may or may not violate the antitrust laws even if the document has not been shared with an officer or director prior to filing the notification. Based on the Agencies' experience, the analysis of the transaction's competitive implications contained in these documents is extremely probative.

Certain commenters explained that the addition of the supervisory deal team lead to the existing officer and director custodians, combined with the other new document requirements, would require filers to submit a significantly larger volume of documents. One commenter estimated that adding documents from the supervisory deal team lead(s) as well as draft documents as proposed in the NPRM may increase the number of documents submitted with each filing by tenfold or greater. Another comment pointed out that adding supervisory deal team lead(s) to Item 4(c) could also add a burden related to internal document preservation and retention. The comments did not provide specific estimates of how many additional documents or pages of materials adding a supervisory deal team lead may generate, however.

As discussed throughout this final rule, the Commission has taken steps to lessen the costs identified by commenters. After careful consideration of the comments, the Commission has modified this proposal to reduce the cost associated with requiring 4(c) documents by limiting new custodians to be searched to a single individual, the supervisory deal team lead. This modest expansion of custodians by one individual is necessary because documents responsive to Item 4(c) are some of the most relevant material that staff receives, and based on the Agencies' experience there are also probative documents containing 4(c) content generated by and for the supervisory deal team lead that, if submitted with the HSR Filing, would allow staff to better gauge the competitive implications of the transaction—as understood by the filing person—and conduct a more informed, efficient screening analysis.

Another concern articulated by a small number of commenters was that documents created by or for the supervisory deal team lead may convey information that does not reflect the actual assessment of the proposed merger at senior levels. As one commenter explained, the Agencies may draw conclusions that do not actually

align with the documents provided to or sent by the personnel that can make final decisions for an entity, such as officers and directors. The Commission acknowledges this concern but believes that the exclusion of these documents from HSR Filings is often technical and simply a matter of timing. HSR Rules do not require filers to complete due diligence or sign an executed agreement before filing a notification. Even the modification discussed in section V.D. which requires filing parties to have agreed to key terms of the transaction still allows parties to file prior to the completion of all diligence and negotiation. In the Agencies' experience, staff often receives these 4(c)-type documents in response to a Second Request and finds that the reason they were not submitted with the filing was that they had not been shared with any officer or director at the time of the HSR Filing but were eventually shared with them. Even if such documents were never shared with an officer or director, any document that is responsive to 4(c) and was only shared with the supervisory deal team lead—the person who has primary responsibility for supervising the strategic assessment of the deal—is still highly probative of whether the transaction is likely to violate the antitrust laws.

The Commission believes that by limiting this requirement to the individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer, it has been tailored to provide a benefit to the Agencies with minimal cost to filers. In the situation where the only individuals supervising the strategic assessment of the deal are already either an officer or director, this requirement will not require searching for responsive documents from anyone new. As discussed above, to the extent that the supervisory deal team lead has responsive documents, it is just often a matter of timing that the document is not submitted with the HSR Filing. Rather than requiring parties to complete their due diligence and provide all responsive transaction assessments provided to key decision makers prior to filing, the Commission has determined that also requiring documents provided to the supervisory deal team lead is the most direct way to obtain these highly relevant assessments of the transaction with the HSR Filing. The cost associated with searching one additional individual for these documents is necessary and appropriate given their importance to the Agencies in quickly identifying those transactions that warrant a closer look. Thus, the Commission adopts this proposal as modified in the final rule.

b. Drafts

The Commission proposed requiring drafts of responsive transaction-related documents if that draft document was provided to an officer, director, or supervisory deal team lead(s). The Commission does not adopt the proposal at this time.

As explained in the NPRM, filers are currently required to submit draft versions of documents responsive to Items 4(c) or 4(d) only if there is no final version or if the draft was sent to the board of directors. Under this guidance, if a not-final version of a document is sent to the board of directors, it ceases to be a ''draft'' and must be submitted, even if a final version is also submitted. Based on the Agencies' experience with receiving other drafts of documents during a Second Request investigation, in some cases prior draft versions have been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors.

The Commission received numerous comments on this proposal, raising four principal issues: (1) the burden of producing draft transaction-related documents is not justified by the benefit to the Agencies; (2) such drafts do not reflect sufficient deliberation to be probative of antitrust risk; (3) the term ''drafts'' is not defined in the NPRM and has no common meaning; and (4) requiring the production of drafts would chill internal discussions related to the strategic assessment of the transaction. These concerns are discussed in turn.

First, some commenters emphasized the burden of producing drafts, noting that filing parties will need assistance from counsel and may have to use e-discovery or forensic collection tools to capture all drafts. Requiring drafts, one commenter stated, would significantly increase the volume of documents produced; another commenter noted that it is not uncommon for the authors of these documents to prepare many discrete drafts as part of the drafting process. Some commenters underscored that Agency staff would also face the challenge of reviewing these additional documents. Another commenter pointed out that the proposal would disproportionately affect smaller businesses, which may not have staff lawyers or the ability to incur hundreds of thousands of dollars in legal fees.

In addition, some commenters expressed doubt regarding the probative value of drafts. Drafts may be duplicative, they noted, and often include boilerplate language that may not be accurate as well as incomplete thoughts, dummy slides, and placeholders. One commenter observed that the Agencies do not typically request drafts during the initial waiting period, and that it is exceedingly rare for Agency staff to use a draft document as a deposition exhibit or in any subsequent litigation.

Commenters also sought guidance from the Agencies regarding what constitutes a ''draft'' transaction-related document. In the context of a shared document platform, where several contributors may be working on a document simultaneously, one commenter asked if each saved iteration would be considered a draft that must be produced. Another commenter asked whether a document is considered to be ''submitted'' to an officer, director, or supervisory deal team lead if that individual simply has access to the document via a collaborative drafting tool. As a result of such vagueness, commenters noted, merging parties will face the enormous practical challenge of preserving all versions of documents, even at highly preliminary, incomplete stages. Moreover, such vagueness will lead to arbitrary and capricious enforcement of the requirement to submit drafts if Agency staff later discovers a draft document that they believe should have been submitted with the HSR Filing, according to one commenter.

Finally, some commenters raised concerns about the implications for internal deliberation during the drafting process. One commenter stated that the proposed requirement would chill open discussion ''for fear of creating documents that do not reflect the final thoughts of the company.'' Another commenter warned that it might cause some risk-averse businesses to remove officers, directors, and supervisory deal team leads from the document-drafting process.

Although several commenters recommended eliminating the proposed requirement entirely, the Commission did receive a few suggestions for ways to narrow the proposal. One suggestion was to limit drafts to specific types of documents identified by the Agencies as likely to contain probative information. Another commenter suggested requiring filers to submit the first draft, the last draft, and the final document. Alternatively, one commenter proposed that only the initial draft version submitted to an officer, director, or supervisory deal team lead be produced. None of the commenters supported the alternative proposed in the NPRM, which would require filing parties to

withhold drafts and submit them within 48 hours only if requested to do so by the Agencies.

Having carefully considered the comments, the Commission has decided not to adopt the proposed change to require draft documents at this time.

However, in light of concerns that the Agencies are receiving documents edited to remove candid assessments of the transaction and market competition, the Commission modifies its informal guidance regarding drafts that were shared with the board of directors or similar body. Currently, a document, even in draft form, that is shared with the board of directors (or similar) is responsive and no longer considered a ''draft.'' This distinction is based on the belief that if a document is shared with the board of directors, it is sufficiently reliable to be submitted with the HSR Filing. However, this guidance has sometimes been limited to require that the document be shared with the entire board. The Commission now clarifies that any Transaction Related Document (currently referred to as 4(c) and 4(d) documents) that was shared with any member of the board of directors (or similar body) is responsive and should not be considered a draft; rather, it should be treated as a final version and submitted with the HSR Filing as a Competition Document.

As explained in the NPRM, draft versions of responsive documents can contain highly relevant, probative, or candid statements about the transaction's competitive impact not reflected in the final version of the document, and in some cases, it appears that the final document has been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors. The Agencies' experience is buttressed by multiple commenters, who similarly acknowledged that 'sanitizing' these documents in anticipation of antitrust investigation by the Agencies is a legitimate concern. The Commission believes that modifying its informal guidance, as well as obtaining additional documents and information as outlined in this final rule, including those shared with the supervisory deal team lead, will help ensure that the documents the Agencies review contain factual, accurate assessments of the strategic and competitive implications of the transaction.

c. Confidential Information Memoranda

This section requires information currently collected in by Item 4(d)(i) of the current Instructions. The Commission did not propose and does not adopt any material changes to the information required by this item.

d. Third-Party Studies, Surveys, Analyses, and Reports

This section requires information currently required by Item 4(d)(ii) of the current Instructions. The Commission did not propose and does not adopt any material changes to this item.

e. Synergies and Efficiencies

The Commission proposed a Synergies and Efficiencies section to collect the information currently required by Item 4(d)(iii) of the Instructions, with a proposed modification to clarify that forward-looking analyses are responsive. Although one comment expressed general support, some objected to the proposed modification, noting that it would expose firms' proprietary information. More generally, another commenter expressed concern that the burden of identifying the documents that relate to potential synergies or efficiencies would increase greatly if expanded to include supervisory deal team lead(s) and drafts, because synergy analyses in particular can generate a large number of drafts.

In light of the comments and to reduce the overall cost of the final rule as compared to the benefit this information would provide to the Agencies, the Commission does not adopt the proposed modification. However, the Commission declines to repeal the requirement to provide documents that reflect expected synergies and efficiencies, as the Agencies find these analyses to be relevant to understanding any such expected benefits of the transaction. Parties often provide more information about potential efficiencies than is strictly required by the Rules if they want the Agencies to consider such information during their initial review. Thus, the current language in the Instructions regarding synergies and efficiencies remains in effect as part of the final rule.

2. Plans and Reports

The Commission proposed requiring filers to submit two sets of plans and reports not created specifically for analyzing the filed-for transaction. First, it proposed requiring the submission of periodic plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a chief executive officer of an entity involved in the transaction, or with certain individuals who report directly to such a CEO. Second, the Commission proposed requiring the submission of all plans and reports submitted to the board of directors (or, in the case of unincorporated entities, individuals exercising those functions) that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity. The NPRM called for all such plans and reports that went to the board, not merely those prepared on a periodic basis, because it is the Commission's experience that any report sent to the board reflects market intelligence that is important to the top decision-makers. As proposed, the Commission limited this document requirement to those materials prepared or modified within one year of the filing date of the notification. The Commission adopts the proposal with modifications explained below.

As explained in the NPRM, plans and reports prepared in the ordinary course often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics—insights that have direct bearing on the Agencies' antitrust assessment of the transaction in the initial waiting period. Staff at the Agencies frequently request these documents voluntarily from filing parties early in their review to better understand and analyze the relevant markets at issue.

The Commission received several comments on these proposals. Some comments stated that the proposed requirement was overly broad and would create a significant burden for filers without commensurate benefit to the Agencies. In particular, for example, some comments said that this requirement would mean that filing company personnel must identify, collect, and produce responsive material from several individuals who are not currently searched for documents or materials submitted with an HSR Filing. These comments disagreed with the NPRM's statement that companies frequently collect these documents as part of the due diligence process for transactions. In addition, one commenter stated that, even if such documents were collected, the collection process would not occur in a systematic way to ensure compliance with HSR requirements. In order to effectively collect and produce responsive material, some comments contended that filers would need to use e-discovery and other forensic discovery tools, which are expensive and add

additional time. Certain comments explained it would be counterproductive and burdensome for the Agencies' staff to review and assess the significant volume of documents this new request will likely yield.

The Commission acknowledges that this proposal would have increased the costs for certain filers and has tailored the final rule to minimize these costs. For instance, commenters suggested that there would be additional costs to collect these types of documents, such as interviewing additional personnel, collecting additional documents for production, and having those documents reviewed by counsel, among other tasks. In response to these concerns, the Commission notes the revised requirement is very targeted: it applies only to documents that already exist and are dated within one year of filing, and that discuss overlapping products and services. But in response to concerns that a search for even this limited set of documents could require forensic document technology or other investments in discovery tools, the Commission modifies this requirement to limit the business executives whose files need be searched, dropping the need to collect and produce documents from any person who reports directly to the relevant CEO. As a result, this requirement will not require documents from any new custodians. With this modification, the Commission believes that the number of responsive documents will be reduced so that the burden on the parties to submit and the burden on staff to review these documents will be manageable.

The Commission believes that limiting responsive plans and reports to those shared with the CEOs and with the Boards of Directors of the entities involved in the transaction will still provide the Agencies with sufficient context necessary to determine whether the transaction is likely to violate the antitrust laws. Importantly, these individuals are often involved in preparing the HSR Filing and are the same individuals who are searched for other responsive documents, such as Competition Documents. From the Agencies' experience, those that report directly to the CEO typically collect and retain the types of reports that contain important and relevant business facts so that documents provided to the CEO contain important market analyses and facts that are highly relevant to the Agencies' initial antitrust assessment. They can be especially important for determining the scope of any investigation, potentially narrowing the areas of inquiry or identifying areas of emerging competition that are not otherwise discussed or described in documents generated in connection with evaluating the reported transaction.

The Commission has determined that at this time, requiring reports provided to lower-level executives who report to the CEO, as proposed in the NPRM, would add cost for filers, even those with known overlapping business lines who may expect that the Agencies will be taking a close look at the documents submitted with the HSR Filing.[351] The Commission is also mindful of the burden to the Agencies of receiving HSR Filings with many additional documents that must be reviewed during the initial waiting period. The Commission believes that getting ordinary course plans and reports from the Board of Directors and CEOs should be sufficient to provide staff with highly relevant information with important market context for other submitted documents and information, including the Overlap Description, without overwhelming the current level of staffing devoted to premerger review.

In addition to limiting the people who must provide plans and reports, the Commission has also determined that these documents are not required for select 801.30 transactions. As discussed above, select 801.30 transactions are those where the Commission believes that certain requirements of the final rule are unlikely to provide information necessary to determine whether that transaction may violate the antitrust laws. Not requiring plans and reports for HSR Filings of select 801.30 transactions is another way the Commission is lessening cost based on the lower likelihood that the transaction may violate the antitrust laws.

Other commenters mentioned that responsive plans and reports are unlikely to contain only information about the specific products or services offered by the other filers and this requirement would thus sweep in irrelevant information. One such comment noted that the material received would contain much irrelevant material that would lack sufficient probative value. The Commission disagrees that requiring the plans and reports at issue will generate irrelevant documents. Based on the Agencies' experience, plans and reports, taken as a whole, are highly relevant to staff's analysis of the nature and scope of product or service markets, geographic markets, competitors and competitive dynamics in the industry, new or potential entrants that could mitigate competition concerns, among other key considerations that could determine whether the transaction may violate the antitrust laws. Documents that were created in the ordinary course of business and not solely for the purpose of evaluating the transaction frequently contain important discussions about development efforts for non-commercial products or services or explain competitive dynamics in a broader way that would reveal ways that the transaction could impact non-horizontal competition. In addition, they may identify potential entrants or emerging threats, or discuss other potential acquisition targets. In the Agencies' experience, such plans and reports provide market facts and long-range assessments that bear directly on whether the transaction is one that may violate the antitrust laws in ways described in section II.B.4. Staff has routinely requested that filers provide these documents on a voluntary basis during preliminary-phase investigations, however, because of the voluntary nature of the request there is no requirement that filers produce all or even any of these materials.

Moreover, the modifications the Commission has made to the final rule ensure that the plans and reports are relevant to understanding the nature and extent of existing competition between the merging parties. The only filers who must provide these documents are those involved in transactions in which both parties provide the same types of products or services or that are known to be under development. The Commission acknowledges that these plans are also important to investigate competitive effects in transactions involving supply relationships but has limited this request in the interest of administrability, efficiency, and reducing cost. Transactions between two entities that currently compete (or have pre-revenue products in development that will result in direct

[351] In the final rule, the Commission adopts the suggestion of one commenter to limit plans and reports to those provided to the CEO but declines to seek another round of public comment before finalizing this requirement as modified. Another commenter suggested that the Commission only require these documents that were provided to the board and not to the CEOs. The Commission declines to adopt this suggestion because it believes that excluding CEOs would prevent the Agencies from having the type of relevant information that is routinely provided to senior leaders related to markets with overlapping products and services. Based on its cumulative experience in collecting these types of documents during merger investigations, the Commission has determined that it is necessary and appropriate to collect a limited set of plans and reports that were provided to the highest level of decision-makers, including the CEOs, because they contain important context for conducting the Agencies' initial antitrust assessment of the transaction.

competition soon) typically warrant a close look during the initial waiting period. For these transactions, filers need provide only the plans and reports that discuss market shares, competition, competitors, or markets for those overlapping lines of business created within a year of filing. This is exactly the kind of information the Agencies rely on to determine whether to investigate a transaction during the initial waiting period because it provides key information about the competitive landscape at issue in the transaction. While the Commission acknowledges there may be select portions of these responsive documents that do not contain relevant information, it is often the case that responsive documents contain non-responsive portions. Therefore, the Commission adopts this requirement with a clarification that the relevant products and services are those that both the acquiring person and target produce, sell, or are known to be developing.

One commenter explained that this requirement means filers must self-assess the products and services in which they overlap, and filers may disagree on the existence or degree of the overlap. The Commission agrees that this requirement requires a self-assessment by each party and does not expect that the products and services that are identified in the Overlap Description by each filer will always align, since the acquired person may not have complete information about all the products and services that the acquiring person offers or is developing. The Commission expects that the acquiring person, through its normal diligence of the target, will have a more fulsome understanding of the target's products and services, including those under development. However, as discussed in section VI.I.1., filers should not exchange information with each other when responding to the Overlap Description and each filer may refer to any submitted business document that supports the analysis of overlaps contained in the Overlap Description. In this way, the Commission expects that the analysis of markets reflected in the submitted plans and reports will be reflected in each party's assessment of overlaps contained in the Overlap Description. As is currently the case with a filer's identification of overlapping NAICS codes and for the new requirement to provide an Overlap Description, the Commission will rely on the good faith of the filer to provide accurate information.

Another commenter explained that ordinary course documents not prepared for the transaction are arguably outside the HSR statutory mandate because the Commission had previously declined to adopt a proposal to include such ordinary course documents. The Commission's 1976 proposal had contemplated filers providing, among other items, copies of studies, surveys, analyses, and/or reports prepared by or for the company in the three years before filing, which contain information regarding market shares, competition, competitors, markets and more in relation to any product or service currently made or sold by the other filing party. The Commission states that merely because it declined to require the submission of ordinary course documents with the HSR Filing in the past does not mean it lacks the authority to do so now. The Commission believed that it had the statutory authority to require ordinary course documents in 1976 when it first set up the premerger review program but determined that excluding these types of documents was unlikely to impede effective premerger review.

The Commission believes that it is now necessary and appropriate to require such documents to be submitted with the HSR Filing. As discussed in section II.B., many aspects of the economy, deal structure, and technology have changed dramatically since Congress passed the HSR Act. Based on their experience, the Agencies know that ordinary course documents often contain important horizon-scanning discussions, including market intelligence about other competitors in the market or emerging competitive threats, and that these high-level plans and reports provide important information about the competitive dynamics that may be affected by the transaction. Indeed, these documents often identify other competitors, including their strengths and weaknesses, and this information is highly probative of the competitive assessment of the transaction. Moreover, with the practical limitation to collect and submit only documents that were shared at the highest levels of management—those provided to the CEO or the Board of Directors—the Commission believes the final rule carefully balances the burden of this requirement (for the parties and the Agencies) in light of their clear relevance to the antitrust assessment of the transaction.

One comment noted that requiring plans and reports would be inconsistent with international jurisdictions' merger control regimes. However, the Commission does not find the issue of varying international jurisdictions' document requirements for government merger review dispositive. Each jurisdiction establishes, for itself, the information needed for the particulars of their laws, economies, and priorities. The Commission relies on its own experience in enforcing the U.S. antitrust laws, in light of binding precedent, to assess the most relevant and probative information to determine whether an acquisition may violate those laws. Based on its own experience and expertise in enforcing the U.S. antitrust laws, the Commission has determined that due to the changes in corporate structure and market dynamics described in section II.B., it is now necessary and appropriate to collect a limited set of plans and reports with the HSR Filing.

A smaller set of comments stated that the terms used in the new proposed requirements were vague and unclear. For example, one comment said that the proposed instructions do not provide a clear definition of ''semi-annual and quarterly'' or ''plans and reports,'' which creates uncertainty and compliance risks for filers. Another comment said that the expanded requirements will create uncertainty because they do not directly reference the transaction under review or documents shared during the due diligence process, which would lead filers to make subjective determinations as to which materials are responsive.

The Commission disagrees that there is uncertainty or ambiguity about what is responsive. As stated in the NPRM, regularly prepared plans and reports are high-level strategic business documents created not in contemplation of the transaction but in the ordinary course of business within one year of filing and that are prepared at regular intervals. Responsive plans and reports will discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a CEO of an entity involved in the transaction, or of any entity it controls or is controlled by. Targeting documents that discuss market shares, competition, competitors, or markets tracks similar language in Item 4(c) of the current HSR Form, which in the Commission's experience is familiar to many filers and uses phrases that are known to businesspeople. The NPRM references to semi-annual and quarterly rely on standard terms that are routinely used in document requests sent to filers and third parties by the Agencies during their investigations. In the interest of clarity, however, the Commission notes that regularly prepared documents

include those that are produced at regular intervals, such as ''annual'' (once a year), ''semi-annually'' (two reports or plans each year), and ''quarterly'' (once every quarter or every three months). To help resolve any remaining uncertainty, the Commission clarifies that regularly prepared plans and reports are those that are prepared by the filers in the ordinary course and at regular intervals and does not include special reports prepared for a specific purpose. Filers should submit one year's worth of annual, semi-annual, or quarterly plans or reports provided to a CEO but do not need to submit plans or reports that are produced more frequently, such as monthly or weekly. The Commission clarifies that filers should submit all plans and reports provided to the Board of Directors and not only those that are regularly prepared. These documents, which were shared at the highest level of decision-making, may include special reports if they contain responsive material.

Yet other commenters were concerned that requiring plans and reports would raise confidentiality concerns, forcing filers to disclose potential transactions to employees before they are ready to do so. As modified, this requirement alone would not lead other personnel to become aware of the transaction prematurely. The Commission believes that plans and reports can be obtained from these CEOs and Board members in a way that does not necessitate divulging the transaction to other executives and businesspeople who do not otherwise know about the pending transaction. Finally, the Commission notes that plans and reports are also not required in filings for select 801.30 transactions.

Certain comments that opposed the requirement to submit plans and reports also offered suggested modifications. One of these comments recommended that the Commission tailor the requirements to clarify that it is limited only to the filing party's products and services in the United States and that filers need only produce documents, or portions thereof, that discuss specifically identified subject matter. Certain comments agreed that the Commission should allow filers to redact non-responsive materials from these documents. The Commission declines to adopt these suggestions because it finds that allowing filers to redact non-privileged information or information related solely to matters outside the United States on the basis of relevance would introduce too much uncertainty into the value of these documents, leaving Agency staff with incomplete, piecemeal material. Agency staff is experienced with reviewing documents that contain relevant as well as non-relevant content and the Commission believes it is important for documents be produced as they were shared with the relevant decision-makers, properly redacted for privilege only.

The Commission also considered alternatives proposed by commenters. One commenter explained that the Agencies could request filers to submit these documents on a voluntary basis, because those requests are narrowly tailored and have historically followed initial substantive discussions between filers and Agency staff. When used in combination with withdrawing and refiling, this process would provide the Agencies, the commenter said, with at least 30 days to review and analyze strategic plans before issuing Second Requests. The Commission disagrees that it is sufficient to continue to obtain plans and reports on a voluntary basis after staff has identified that they are needed because there is no obligation for filers to comply, substantially or minimally, with such a request for information prior to the expiration of the initial waiting period. In the Agencies' experience, even when parties are asked to provide these documents on a voluntary basis, they are often do not provide them prior to the end of the first review period (either 30 or 15 days) and often choose to pull and refile their notification in order to submit these and other materials that were requested on a voluntary basis. Moreover, in the Agencies' experience, these particular documents contain important information that is currently missing from the HSR Filing that would identify the transaction as one that requires a closer look.

Another comment suggested that Agencies could get these documents using Second Requests as they do now. While either Agency can obtain these documents through the issuance of Second Requests, the Commission believes that the probative value of these documents makes them necessary for staff's initial screening assessment, both because they can identify different areas of antitrust risk, including for areas of future competition, and because they may contain additional information about the business lines of interest that may alleviate the need to issue Second Requests or narrow their scope. As discussed above, because issuing Second Requests is time- and resource-intensive for both the parties and the investigating agency, is it not a substitute for having additional information in the HSR Filing that minimizes the need to issue Second Requests at all. Having additional relevant and targeted information on the front-end benefits both the Agencies and the parties because it allows the Agencies to focus on the most concerning transactions, and allows parties to avoid Second Requests when they are not warranted, and thereby avoid unnecessary expense and delay.

Finally, certain comments discussed earlier also suggested not adopting the proposed requirement at all. In light of the Agencies' experience with the probative value of high-level ordinary course documents and their belief that having them would provide necessary context to other material submitted with an HSR Filing, the Commission declines to dismiss the requirement altogether. The Commission believes this final rule, as modified, reflects a reasonable balancing of the importance of these documents to a premerger assessment and the burden of requiring them for any transaction where filers have overlapping business lines. The Commission has in considered the specific concerns raised by comments and tailored the requirement to preserve the important benefit to the Agencies while mitigating the cost to filers (and to the Agencies).

3. Organizational Chart of Authors

As the final part of its Business Documents section, the Commission proposed requiring an organizational chart(s) that would reflect the position(s) within the filing person's organization held by identified authors and, for privileged documents, recipients of each document submitted with the HSR Filing. The Commission also proposed requiring the filer to identify the individuals searched for responsive documents. The Commission does not adopt this proposal.

The Commission received several comments opposing this proposed instruction, with commenters noting that many companies do not maintain these types of organizational charts in the ordinary course of business, and to the extent they do, such charts are often incomplete or inaccurate. According to one commenter, such charts would need to be prepared solely for the purpose of the HSR Filing, which would be time-consuming. Other commenters pointed out that authors of certain documents may not even be employees of the filing entity, thereby complicating the certification of the filing.

In addition, multiple commenters questioned the Agencies' need for organizational charts to determine whether to issue a Second Request. As one commenter noted, it is unclear why organizational charts will assist staff in

assessing whether a particular transaction merits further review as opposed to their value for identifying potential custodians for a potential Second Request.

As to the proposed requirement to identify the individuals searched for responsive documents, one commenter stated that parties may claim privilege on information regarding whose files were searched. Another commenter observed that, for the majority of HSR filings, documents are identified through targeted self-collection, directed and overseen by legal counsel, rather than running Second Request-style searches through custodial files. The same commenter cautioned that the proposed disclosure requirement would disincentivize companies to err on the side of over-collection so as not to raise a red flag to the Agencies or suggest that the persons searched should be custodians in a Second Request.

Finally, as an alternative to providing an organizational chart, one commenter suggested requiring parties to identify the person who supervised the drafting and the person to whom that drafter directly reports.

After considering the comments and weighing the benefit to the Agencies during the initial waiting period in light of the cost of complying, the Commission does not adopt this proposal. As discussed in section VI.A.3., elsewhere the final rule requires filers to identify authors of documents if the filer has identified a NAICS overlap, product or service overlaps in the Overlap Description, or a supply relationship in the Supply Relationships Description. The Commission has determined that author information is not relevant for all filers and that limiting author information in this way provides sufficient benefit to the Agencies while reducing the cost for filings without such relationships.

In sum, the Commission has determined that the requirements to submit business documents contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws and to provide important information about each party's view of market realities and that these requirements, as modified, have been tailored to reduce the cost of submitting responsive documents as much as practicable.

H. Agreements

The Commission proposed an Agreements and Timeline section to require filing persons to provide a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to demonstrate the transaction is more than hypothetical, if a definitive agreement has not been executed. In addition, the Commission proposed additional changes to require the submission of the entirety of all agreements related to the transaction and a new requirement to submit other agreements between the filing persons that are not related to the transaction, as well as a timetable for the transaction. As discussed below, the Commission adopts some proposals with modification and does not adopt the requirement to submit a timeline.

1. Transaction-Specific Agreements

The Commission proposed requiring filing persons to produce all documents that constitute the agreement between the acquiring person(s) and the person(s) whose assets, voting securities, or non-corporate interests are to be acquired, inclusive of schedules, exhibits, and the like, that relate to the transaction, regardless of whether both parties to the transaction are signatories. Further, consistent with the proposed changes to § 803.5, the Commission proposed requiring the most recent draft agreement or term sheet, if filers were not submitting a definitive agreement. The Commission adopts the requirements with modification.

Currently, only the production of certain schedules is required, although many filers do provide schedules regardless. As noted in the NPRM, in the Commission's experience, the structure of transactions has become increasingly complex, often comprising not only multiple agreements between the filing persons but also agreements with third parties. Understanding the entirety of the transaction, including but not limited to non-competition and non-solicitation agreements and other agreements negotiated with key employees, suppliers, or customers in conjunction with the transaction, is crucial to determining the totality of the transaction and assessing during the initial waiting period the transaction's potential competitive impact.

The Commission received one comment in support of this proposal. The State antitrust enforcers wrote in support of the request for non-competition agreements, noting that non-compete clauses that bind employees post-employment prevent new businesses from emerging and stifle entrepreneurship and innovation. One commenter opposed the proposal, noting that this requirement will significantly increase the burdens for filers and recommended requiring that notifying parties provide a descriptive index of such agreements from which investigating staffs could identify specific agreements that they require (with translations if needed). Another commenter expressed the concern that, as written, the proposed instruction would capture clean-team agreements, used by merging parties to reduce the antitrust risk associated with exchanging competitively sensitive information, as well as confidentiality agreements that include similar antitrust safeguards, and that in doing so this proposal might have unintended effects. The commenter cautioned that in response some parties might forgo using clean-team agreements entirely, on the thinking that including a clean-team agreement in the HSR filing would signal a larger competitive concern than actually exists.

The Commission finds that having the complete set of documents that will govern the transaction is necessary to understand the potential effects of ''the transaction.'' Therefore, it does not adopt suggestions to provide an index in lieu of the actual documents that constitute the agreement. In the Commission's experience, voluntary production of documents can delay the review of transactions within the initial waiting period. The Commission does limit the requirement to those agreements that will be in effect on and after closing, with the intention of excluding agreements such as clean team agreements. The Commission also adopts the clarification, discussed in section V.D., that the requirement relates to the transaction that the parties intend to consummate.

The Commission also proposed requiring that, if there is no definitive executed agreement, the filing parties provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate. As discussed in section V.D., the Commission is modifying the proposed instructions in response to certain comments that requested clarification. One commenter sought clarity on what constitutes ''sufficient detail'' about the scope of the transaction, noting that certain transaction details are often not fully determined at the time of signing a definitive agreement or filing HSR, but also may not be necessary to determine whether to issue Second Requests. The same commenter cautioned that the proposed requirement will likely cause undue delays and risk unnecessarily increasing the overall timing to close a transaction especially in instances where parties intend to file on the basis of a letter of intent.

To address this concern, the Commission has revised the Instructions to describe what would be sufficient:

> some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

The Commission notes that these examples are meant to be illustrative and not exhaustive.

2. Other Agreements Between the Parties

The Commission proposed requiring filing persons to submit all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within the year prior to the date of filing. The Commission adopts the proposal with a significant modification to reduce the burden that would have been associated with producing copies of these agreements with the HSR Filing.

As explained in the NPRM, understanding the scope of any existing contractual relationships between the filers, such as an existing customer-supplier relationship, would materially assist the Agencies' review by revealing any business interactions or relationships that exist prior to the transaction and that may be affecting premerger competition, which is material to assessing how the transaction may affect post-acquisition competition.

The Commission received two comments in support of the proposed requirement. The State antitrust enforcers noted that it would shed light on any licensing or supply agreements, as well as any non-compete agreements, between the parties. A union commenter also supported the request and suggested expanding it for certain non-compete and non-solicitation agreements. The commenter noted that the filing parties might have such agreements related to the products, but these agreements might be with third parties and not between the filing persons. In addition, the same commenter suggested requiring parties to submit copies of collective bargaining agreements, at least with any common unions.

Several commenters, however, objected to the burden the proposed requirement would impose, particularly in industries where companies rely heavily on agreements with other industry participants to do business. One commenter noted that broadband and telecommunications providers routinely have myriad agreements with each other, covering a wide range of aspects of the services they offer. The commenter stated that many, if not most, of these agreements have little potential to create competition concerns, and in fact many are pro-competitive. Another commenter stated that, in the wireless communications industry, some pairs of wireless carriers might have up to 1,000 agreements to which they are both parties.

A few commenters recommended modifications of the proposed instruction to reduce the burden. One commenter suggested relying on the Competition Descriptions or excluding de minimis agreements and only requiring ''Material Other Agreements,'' which would be defined as exceeding in value some percentage of entity revenues. Another commenter recommended only requiring the production of three categories of pre-existing contracts between the acquiring person and the acquired entity or assets: (i) noncompete agreements in effect within one year of filing, (ii) non-solicitation agreements in effect within one year of filing, and (iii) supply or license agreements that generated annual revenue of $10 million or more within one year of filing. The commenter also suggested clarifying that purchase orders do not need to be produced, nor do contracts that have expired or terminated before the filing date. A third commenter also recommended limiting the requirement to contracts that are material in terms of dollar value. In addition, the commenter proposed that notifying parties be permitted to exclude standard-form agreements that they use with numerous other counterparties.

In light of the comments, the Commission has made significant modifications to this proposal. First, the Commission has determined that only one party need provide this information; in accordance with its general approach, the Commission has determined to require only the acquiring person to indicate if there are existing agreements between the parties. Second, the acquiring person will not be required to provide the agreements, but rather only to answer whether any such contractual agreements exist and, if so, to indicate via checkbox which types. The Commission has identified specific types of agreements that reflect a significant business relationship that is relevant to the premerger assessment: agreements with non-compete or non-solicitation terms; leases, licensing agreements, master service agreements, operating agreements, or supply agreements. If the there are other types of agreements, the acquiring person should indicate ''other.'' The Commission clarifies that these are agreements that the parties have with one another and which may affect the antitrust assessment of the reported transaction.[352] Third, the Commission has limited the requirement to those agreements that are between the acquiring person and the target, rather than the acquired person. This is the specific relationship that is of interest to the Agencies for the premerger assessment and should limit the information to those agreements most relevant to that analysis. These limitations should provide the Agencies with sufficient information to screen for transactions that may require further review due to existing contractual obligations, while relieving much of the cost associated with the requirement.

3. Timeline

The Commission proposed that filing persons provide a narrative timeline of key dates and conditions for closing. After careful consideration of concerns raised by commenters, the Commission does not adopt this proposal.

In the NPRM, the Commission reasoned that, just as it is critical for the Agencies to understand the totality of the transaction during the initial waiting period, it is critical to understand the timing of key milestones and the conditions to closing, which are often complex and not easily understood from the transaction documents themselves. The Commission suggested that this basic information would help the Agencies understand key deal milestones and better manage the timing and focus of the investigation during the initial waiting period.

The Commission received a few comments expressing general support for the proposal; however, one commenter raised concerns regarding the burden, noting that the proposed

[352] For example, a non-compete or non-solicitation agreement between two otherwise independent companies is indicative that the parties may have a competitively significant relationship, and in certain situations, may violate the antitrust laws. *See, e.g., United States* v. *Brown,* 936 F.2d 1042 (9th Cir. 1991). In a merger context, non-compete restrictions can implicate post-merger competition in ways that violate the antitrust laws. *See, e.g., In re ARKO Corp.,* No. C–4773 (F.T.C. Aug. 9, 2022) (final decision and order); *In re DTE Energy Co.,* No. C–4691 (F.T.C. Nov. 24, 2021) (decision and final order). Other agreements between the parties, including those related to distribution or licensing, can limit competition post-merger in ways that may violate section 7, including by increasing the risk of foreclosure. *See, e.g., FTC* v. *Tempur Sealy Int'l, Inc.,* 4:24–cv–02508 (S.D. Tex. filed July 2, 2024) (complaint) (alleging that buyer attempted to use existing distribution relationship to exclude rival mattress brands premerger).

requirement is broader and more onerous than the interrogatory that staff routinely requires during in-depth investigations. The same commenter suggested that this instruction be limited to requiring a brief description of the timetable for the transaction and a brief description of any termination fees, break-up fees, ticking fees, or similar arrangements.

After considering the comments and weighing the benefit to the Agencies of requiring a deal timeline in light of the cost of compliance presented by commenters, the Commission is not adopting this proposal. Even though the Agencies would benefit from knowing the timeline for the transaction to help manage their time and investigative resources during the initial waiting period, the Commission does not adopt the proposed change to require one. In the Agencies' experience, these timelines can change throughout the course of an investigation, although not typically within the initial waiting period. The decision not to require a timeline is one of the ways in which the Commission aims to lessen cost on all filers of preparing an HSR Filing and staff can continue to ask for (or parties can choose to provide) this relevant information when warranted.

In sum, the Commission has determined that the requirements for the transaction agreement and information about other types of agreements between the parties contained in the final rule are necessary and appropriate to enable the Agencies to understand the scope of the transaction as well as any existing business relationship that might be affected by the transaction and that these requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

I. Competition Descriptions

The Commission proposed a new Competition Analysis section in the Instructions to require filers to provide three categories of narrative responses: (1) an Overlap Narrative, (2) a Supply Relationships Narrative, and (3) Information related to Labor Markets. As proposed, filers would provide, among other things, a description of their basic business lines as well as product and service information for all related entities; identify current and potential future overlaps and supply relationships between the filing persons; and provide information about their employees and what services these employees provide in areas where both parties employ the same types of workers. As noted in the NPRM, this information would supply crucial information about existing and future competitive relationships between the filing parties, which is the starting point for any assessment of whether the transaction may violate the antitrust laws.

As discussed in detail below, in the final rule the Commission does not adopt requirements related to Labor Market Information, and adopts requirements to submit an Overlap Description and a Supply Relationships Description with significant modifications. On the Form, this section is now labeled Competition Descriptions.

The Commission received several comments that supported the introduction of narrative responses. One commenter strongly supported the collection of information in narrative form related to products, services, workers, supply and distribution relationships, licensing, and industry and geographic overlaps, believing that this information is necessary to help the Agencies evaluate the effects of an acquisition more thoroughly and efficiently, and identify potential threats to competition. Another commenter suggested that pre-acquisition disclosure of vertical linkages is necessary for antitrust agencies to effectively assess the potential anticompetitive impact of these non-horizontal acquisitions. Another noted that, while HSR rules have always required parties to identify downstream products and revenues by NAICS and NAPCS codes, they have never required the disclosure of any information at all about input markets, including those for labor. It stated that this lack of information leaves initial filing screeners at a loss to spot these competition issues and potential violations, and further noted that this omission forces investigatory staff scrambling to ask companies to volunteer such critical input market information. The same commenter stated that the proposed rule would help narrow this information asymmetry and empower the Agencies to clearly identify impact in both output and input markets.

The Commission also received several comments that objected to the collection of this information in narrative form. In general, comments asserted that expansive narrative requirements are arbitrary and capricious because they would change HSR notification from an objective task to a subjective task, creating delays, disputes, and uncertainty with no countervailing benefit especially for those deals where no antitrust issues are present. For a number of reasons discussed in detail below, the Commission disagrees, but has nonetheless modified these requirements as appropriate to tailor them to their relevance in determining whether the transaction may violate the antitrust laws and warrant a Second Request.

Experience With Narratives

The Agencies have extensive experience reviewing narrative responses to requests for voluntary submissions from the filing parties during the initial waiting period (and to other types of investigative demands where responses can be compelled) and are aware of the effort required to produce them. From this experience, the Commission knows that when the parties submit this information on a voluntary basis during the initial waiting period—and it is complete and timely—narratives that discuss existing business relationships between the parties are critically important to determining whether there is a need to issue a Second Request. In the Agencies' experience, voluntary narrative responses are especially helpful in focusing any potential Second Request on the areas of competition most in need of in-depth review but just as often can lead staff to conclude that no Second Request is necessary. As discussed above in section III.A.2., when the Agencies engage with the parties during a withdraw-and-refile investigation, which typically involves the submission of some narrative responses from the parties, the transaction is more likely to proceed without the need for a Second Request.

But voluntary narrative responses often come late in the initial waiting period and are frequently incomplete. More importantly, staff only asks for additional information on a voluntary basis when it has determined, on the basis of other information contained in the HSR Filing, that the transaction may alter existing competitive conditions in a way that may violate the antitrust laws but that more information is needed. As discussed in section II.B., the current information requirements do not surface the facts that would flag transactions for certain types of violations, and for those filings staff has no basis to know that additional information is needed. Where there are deficiencies in the initial information requirements, resorting to collecting information on a voluntary basis does not cure the deficiency because staff will not know that relevant facts exist to flag the transaction for follow up.

The Commission believes that requiring additional information with the HSR Filing that would reliably reveal any existing business relationships between the filers is

necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. Because the information called for in the Competition Descriptions is provided directly by the parties to the transaction and is reflective of each filer's business operations, it is highly probative and reliable for the purpose of conducting a quick and thorough premerger assessment of existing and future business relationships between them. The information collected on the current Form does not reveal these relationships, yet these are the relationships that are foundational to flagging whether the transaction is one that warrants a closer look. As discussed in sections II.B.3. and 4., the need is especially great for information related to potential non-horizontal concerns because there is currently no information that specifically identifies existing supply relationships. Information about existing supply relationships will fill critical information gap in the current Form and provide a factual basis for the Agencies to screen for potential non-horizontal impacts during the initial waiting period.

Nonetheless, to make clear that the Commission does not require the parties to submit an antitrust analysis akin to a ''white paper,'' or hire counsel or experts simply to create narratives for the purpose of an HSR Filing, the Commission eschews the use of the term ''narratives'' and instead adopts the term ''description'' to better reflect the type of answer that is required. Filers should rely on business personnel to describe the products and services they offer (or that are under development) using terms and language that is natural in the marketplace. Given the breadth and tone of the objections to the proposed narratives, the Commission believes that commenters misunderstood what is sought. The Commission intends to collect factual information about overlaps and supply relationships via a written answer (as opposed to documents or data) but is not seeking opinions or arguments about what those facts should imply. While in other contexts a narrative response may contain opinions, tell a story, or take a position, the final rule does not require any of that from filers. Instead, filers should collect and report the type of information it provides to customers, suppliers, investors, or the public for purposes other than an antitrust analysis—to simply describe the products or services it offers for sale. This is the type of basic business description required by the final rule, and the Commission adopts with terms Overlap Description and Supply Relationships Description to address concerns that the final rule requires something other than that. Moreover, the Instructions ask filers to provide a brief description in an attempt to discourage lengthy responses or unnecessary commentary beyond what is strictly required. [353]

The Overlap Description is a key reform and is motivated by the Commission's experience over time with relying on NAICS codes to identify areas of horizontal competition. Based on its experience reviewing narrative responses submitted on a voluntary basis during the initial waiting period, the Commission has identified problems with relying exclusively on NAICS code overlaps as the basis for screening whether the merging parties are current competitors. While NAICS codes are well suited for reporting in some sectors, the Commission agrees that NAICS codes can be both overinclusive and underinclusive in reflecting whether the parties offer competing products or services to any set of customers. As discussed in section II.B.4., when it comes to certain sectors of the economy that are undergoing technological change or growth, including through the introduction of novel products or services, NAICS codes are especially unhelpful, and have not been updated to reflect current market offerings.

The mismatch between existing NAICS codes and market realities can be most acute in new sectors of the economy, for which there are not many codes. For instance, NAICS code 518210 is for companies that provide computing infrastructure, data processing, web hosting, and related services, which covers businesses as diverse as those providing data entry services, cloud storage services and cryptocurrency mining.[354] Included in this six-digit NAICS code are a whole array of businesses offering complex and evolving products, some of which may compete for the same customers but some of which surely do not. Adding further complexity, the Census Bureau provides cross-references to fourteen other NAICS codes with related business lines. This single category is very broad, potentially reflecting ''competition'' between the parties that does not exist in the marketplace. As a result, each filer in a transaction may report revenues in 518210 reflecting an ''overlap'' in their respective business lines, when in reality they offer very different products or service.

These cross-references create a different but equally vexing problem. For instance, NAICS code 541511 is for companies that offer custom computer programming services to meet the needs of a particular customer while NAICS code 513210 is for companies primarily engaged in software publishing. Here, a company that provides both standard and custom solutions may report revenues only in 513210 even if some of the companies it competes with would only report revenues in 541511, reflecting its focus on custom products. Overall, companies select their own NAICS codes for revenue reporting, introducing discretion into the use of this ''objective'' system of classification, which was established for a purpose other than identifying companies that offer competing products or services. As a result, companies that may regularly compete against one another may not identify any overlapping NAICS codes.

Despite these shortcomings, the Commission will continue to rely on NAICS code reporting for revenues and the identification of overlaps to give filers some common system of reference and because the identification of horizontal overlaps is a key screening step in the Agencies' initial antitrust assessment. But new sectors have emerged over the years and NAICS codes have not been refined or updated. Accordingly, the Commission has determined that receiving overlap information in description provided by the filer is necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. The Agencies may also use the Overlap Description to conclude that the parties are not current or future rivals because the exercise provides filers with an opportunity to correct any ''false positives'' that result from inaccurate reporting of NAICS revenue overlaps. As a result, the Overlap Description may contain a factual basis for the Agencies to determine, solely on the basis of information contained in the HSR Filing, that the transaction is not likely

[353] A significant number of filers who report NAICS overlaps initiate contact with the Agencies to provide supplemental information (often in the form of white papers) that supplies context for how they view competition, regardless of NAICS reporting. In the Agencies' experience, these presentations often contain descriptions of the parties' respective business operations as well conclusions that the parties would like the Agencies to reach to dismiss concerns about the transaction. The former is now required by the final rule while the latter is not.

[354] *See* U.S. Census Bureau, North American Industry Classification System, 51280 Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services (rev. Sept. 10, 2024), *https://www.census.gov/naics/?input=518210&year=2022&details=518210*.

to violate the antitrust laws at that time. In the Overlap Description, a filer can make clear that further investigation is unnecessary. Allowing the agencies to reach these conclusions at the outset is more efficient than having the parties provide the information at a later stage or requiring the Agencies to discover this information indirectly through document requests.

As the Commission acknowledged in the NPRM, the cost to filers to create these descriptions could be significant, especially for transactions involving close competitors with multiple overlapping product or service lines or those who operate in the same supply chain. But identifying those transactions that present broad and complex competition issues is a critical first step for the Agencies, and information from these descriptions is highly relevant to flagging the transaction as one that may violate the antitrust laws. Thus, the cost of providing these descriptions is proportional to the likelihood that the transaction is one that warrants a close look: the more extensive the existing competitive relationship between the parties, the more relevant these relationships are in identifying the transaction as one that warrants further investigation. It is also possible that these descriptions will provide important context for other information contained in the HSR Filing that would allow the Agencies to narrow any potential investigation to those areas of important existing or future competitive interaction, or to conclude that the transaction is not one that is likely to violate the antitrust laws. Thus, the descriptions are necessary and appropriate for the Agencies to assess the potential for anticompetitive impacts, including some indication of their scope. This information will also permit the Agencies to manage their resources appropriately, increasing overall efficiency. For example, if the Overlap Description identifies hundreds of products or services, the Agencies can devote sufficient staff resources to reviewing those areas of overlap to determine whether any rise to the level of requiring a Second Request investigation. On the other hand, if the notification identifies no areas of overlap, the Agencies may be able to quickly determine whether there are other materials in the filing that would nonetheless raise concerns about the competitive impact of the transaction.

It is appropriate for the filers to bear the burden of providing basic business information that they possess. It is unreasonable and inefficient to require the Agencies, who do not possess basic information about the filers' businesses, to expend resources gathering the information from outside sources, or to require the Agencies to issue a separate request for this critical information which only delays the review process and in turn the filers' ability to consummate transactions. Yet the status quo requires the Agencies to obtain basic business facts that are needed to evaluate transactions through voluntary requests to the parties or Second Requests. As one commenter noted, the Federal Rules of Civil Procedure encourage Federal courts to order civil discovery based on the obvious principle that the person already in possession of the information is in the best position to provide it, and properly so.[355] This principle is apt here.

The Commission also believes that parties will be able to reduce the cost of creating descriptions by drafting them during the period of due diligence when the companies are learning more about their respective business operations. Discovering the extent of existing business operations is key to the diligence process, and companies often create descriptions of their operations as part of the process.[356]

The Commission has made every effort to calibrate its need for the requested information and the availability of that information from the parties or from others, including the cost to filers associated with collecting information and creating the descriptive responses. For this reason, as discussed below, the Commission has decided to significantly modify certain aspects of the proposed descriptions, for instance when the information is duplicative of other information in the notification or when the information is available from a source other than the parties. In taking this approach, the Commission rejects alternatives suggested by commenters to reduce the cost by excusing transactions below a certain value or without a NAICS overlap, because it has found no basis for doing so. In the Agencies' experience, deal value is not a reliable indicator of the potential for antitrust harm,[357] especially when the transaction involves multiple business lines or when competition occurs in local markets.[358] Instead, the Commission has determined to excuse select 801.30 transactions from the requirement to provide Competition Descriptions. As discussed in section VI.A.1.f., these transactions rarely involve entities with existing competitive relationships and do not confer control, and thus the Commission has determined not to require these filers to provide descriptions of any existing business relationships, should they exist.

The Commission now turns to a discussion of both the general and specific objections to the Competition Descriptions requirements.

General Objections to the Competition Descriptions

Several commenters questioned the general utility of these requirements. One commenter suggested that burdening all filers with these descriptive requirements is not particularly well targeted to identifying acquisition-related antitrust concerns. Another stated that the information called for is duplicative of documentary materials that are now also required. Two other commenters suggested that the Commission continue to ask for this information on a voluntary basis and only for deals that have been flagged for closer review.

The Commission disagrees that the information required by the Competition Descriptions would be of little use or contain repetitive information. Requiring filers to provide a description of their existing competitive relationships is a key reform of the final rule to make the premerger review process more effective and efficient. Such descriptions should contain a factual summary of the parties' existing business relationships, which is critical information for identifying those transactions that require a closer look. This is information that is known to filers and bears directly on whether the transaction may violate the antitrust laws. The Commission has determined

[355] Fed. R. Civ. P. 26(b)(1) advisory committee note (2015) (identifying information asymmetry as a justification for placing a heavier burden on the party who has the information).

[356] When establishing the premerger regime, the Commission acknowledged that requiring information in the notification may actually reduce the cost associated with compiling it. 42 FR 39040, 39043 (Aug. 1, 1977).

[357] *See, e.g., United States* v. *Neenah Enterprises, Inc.,* No. 1:21–cv–02701 (D.D.C. Oct. 14, 2021) (complaint) ($110 million asset purchase); *In re Global Partners LP,* No. C–4755 (F.T.C. Mar. 2, 2022) (decision and final order) ($151 million acquisition); *In re ANI Pharmaceuticals, Inc.,* No. C–4754 (F.T.C. Jan. 12, 2022) (decision and final order) ($210 million acquisition); *United States* v. *Grupo Verzatec S.A. de C.V.,* No. 1:22–cv–01401 (N.D. Ill. Mar. 17, 2022) (complaint) ($360 million acquisition). Note that the value of the transaction is considered by some filers to be confidential information and is not always disclosed in public filings. *See FTC* v. *IQVIA Holdings Inc.,* No. 1:23–civ–06188 (S.D.N.Y. Dec. 29, 2023); *In re Lifespan Corp.,* No. C–9406 (F.T.C. Feb. 17, 2022) (complaint).

[358] *See, e.g., In re The Golub Corp.,* No. C–4753 (F.T.C. Jan. 20, 2022) (decision and final order) (divestiture of 12 supermarkets); *United States* v. *B.S.A. S.A.,* No. 1:21–cv–02976 (D.D.C. Mar. 15, 2022) (divesture of two business lines).

that it is necessary to require this descriptive information from filers because other information in the HSR Filing is not sufficient to screen transactions for all types of potential harm, and, as discussed above, staff cannot rely solely on voluntary collection of this information to flag the transaction for a closer review.

Moreover, as discussed elsewhere, the Commission intends to rely on information in the Competition Descriptions as the basis for determining whether the filer also has to provide other information required by the final rule. The Commission has determined that, for many additional information requirements, these descriptions (in addition to the NAICS code overlap reporting) will determine the scope of most of the other information requirements in the HSR Filing. It is appropriate for the Commission to condition additional information requests on the identification of an existing business relationship as the most effective way to calibrate the cost of reporting the antitrust risk associated with each transaction. In order to reduce the cost for filers whose transactions raise little to no antitrust risk, it is necessary that all filers go through the exercise of determining whether they are in a horizontal or supply relationship with the other party. Those filers who do not have such relationships will so indicate by responding ''none'' and will be relieved of the obligation to respond to other questions that are conditional on an affirmative response. Relying on this conditional response format is a key feature of the final rule to ensure that filers who do not have an existing business relationship with the other party (*e.g.,* as a competitor or supplier) have a lower cost associated with submitting an HSR Filing.

One commenter stated that because these descriptions are not prepared in the ordinary course, they cannot be required to be submitted with the notification. Further, this commenter stated that Congress only intended the Commission to collect information and documentary materials reasonably available to the reporting companies, suggesting that anything not kept in the ordinary course of business runs afoul of Congressional intent. The Commission disagrees with the commenter's reading of both the statute and the legislative history. The rulemaking provision in 15 U.S.C. 18a(d) contains no ordinary course limitation. To the contrary, it states that HSR filings shall be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Agencies to determine whether an acquisition may, if consummated, violate the antitrust laws. The commenter quotes the Commission's 1977 Notice of Proposed Rulemaking for the premerger notification rules when making this assertion, but in that notice, the Commission did not state that information reasonably available was limited to ordinary course documents.[359] Further, the Competition Narratives as adopted do not require any information that is not kept in the ordinary course of business of the acquiring or acquired person. These descriptions require parties to gather and present this information in a format that will permit the Agencies to understand their lines of business, areas in which the parties offer similar products and services, and relationships in the relevant supply chains.

The Commission also disagrees that businesses do not develop an understanding of their business operations in comparison to those of the other merging party ''in the ordinary course.'' In the Agencies' experience, businesses routinely conduct competitive assessments in which they compare their operations to those of others. These internal assessments of other market participants are often done long before any specific assessment of a particular transaction and may be contained in documents such as plans and reports. In the specific context of a proposed transaction, parties (especially those that are publicly traded) conduct due diligence assessments of prospective targets. These comparative assessments may be done specifically for the purpose of analyzing the filed-for transaction, and the Commission considers those to be in the ordinary course of acquisition planning. The descriptions required by the final rule would summarize these types of assessments and reflect their underlying business facts. In the Commission's view, this is exactly the type of materials the House conferees intended would be submitted with the notification: ''the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.''[360]

Compliance Concerns

Some comments expressed concern that the descriptions would create HSR Act compliance issues, noting that, because the descriptions require subjective judgments, the Agencies have no objective standards or precedent against which compliance or substantial compliance could be judged. One commenter suggested that each of the descriptions may generate disagreements between the Agencies and the merging parties regarding the accuracy or completeness of the information provided, leading the Agencies to retroactively declare a notification to be incomplete and restarting the initial waiting period. One commenter stated that the descriptive responses will require extensive iterative discussions with PNO to determine compliance, which will delay the start of the waiting period. Others asserted that the Commission could deem a descriptive answer to be incomplete simply because staff disagrees with the assessment, or that the Agencies may be tempted to second-guess or nitpick the parties' responses, leading to uncertainty about deal timelines.

As discussed above, the Agencies have decades of experience with reviewing descriptive responses, including those submitted on a voluntary basis during the initial waiting period and in response to Second Requests. In fact, staff routinely seeks this information as the first supplement to the information contained in the HSR Filing for any transaction that is identified as requiring a closer look. But the current practice of permitting parties to submit descriptive responses on a voluntary basis while the waiting period is underway has encouraged parties to submit incomplete responses or submit them at a time when staff is unable to verify the information before it must make a determination whether to issue Second Requests. Any deficiency in a voluntary descriptive response prevents staff from being able to quickly determine whether the Agency should issue a Second Request to require a more complete narrative answer.

The Commission believes that requiring Competition Descriptions to be submitted with the HSR Filing provides the proper incentive for filers to submit a complete and accurate response, one that is certified by the responsible executive who signs the notification and that is available at a time when the information can be reviewed and assessed by staff. The certification allows the Commission to accept filings containing descriptive responses and to start the waiting period. If, upon reviewing the notification, staff determines that the

[359] 42 FR 39040, 39043 (Aug. 1, 1977).

[360] 122 Cong. Rec. 30877 (1976) (remarks of Rep. Rodino).

descriptive responses are directly contradicted by other information submitted with the notification, staff may request supplementary information to explain the contradictions, which could require a restarting of the waiting period. If the notification contains no such materials that call into question the reliability of the descriptions, any supplementary submissions to clarify or correct them would likely not require a restarting of the waiting period under the Act.

Other comments raised compliance concerns related to who must help prepare the information. Some comments stated that the descriptive responses will require filers to hire expensive antitrust counsel, and possibly an expert economist, to draft the descriptions prior to filing. According to one commenter, filing parties will be forced to engage antitrust counsel, economists, and other professional class consultants on every deal, regardless of its impact on competition. Another commenter suggested that hiring consultants to draft narratives may be prohibitive for some parties that may be most in need of a merger or affiliation. One comment noted that, as a practical matter, the only people who are eligible to certify the notification often lack personal knowledge necessary to opine about things like the relevant product market definition or the competitive effects of a transaction. The Commission disagrees that filers need to hire outside personnel, who do not know the filer's business operations and would need to be given the very information that the Competition Descriptions call for in order to draft them. As noted in the NPRM, those who author the descriptive responses should be the individuals who best know the business of the filing person. The Commission reiterates that the Competition Descriptions should be based on a businessperson's understanding of the filer's business operations and consistent with other business documents and materials submitted with the HSR Filing.

Other comments raised a related point, stating that the type of detailed, competitively sensitive information necessary to draft these narratives is often deliberately kept away from the business executives, which would require certain filing parties to employ antitrust safeguards to collect information without sharing confidential business information with or about one another. Several commenters asserted that providing customer contact information, including identifying specific individuals for Agency outreach, would create significant uncertainty and further increase the risk that confidential acquisition plans would be known more widely, or increase the risk of insider trading.[361]

As discussed in the section below, the Commission agrees that it is important to reduce the need to share information about the transaction more broadly than is necessary to complete an HSR Filing, but rejects the idea that companies are unfamiliar with managing these risks or that the rule would significantly increase them. Also, complying with securities laws to prevent insider trading in public shares is an obligation of every publicly traded company, and the rule does not increase the risk that those with knowledge of the deal will violate those laws. Nonetheless, in response to these concerns, as discussed below, the Commission has determined to modify certain requirements for the Competition Descriptions in order to reduce the need for filers to share information outside of the company, for instance with customers or suppliers. The Commission agrees that the process required to collect information for the notification should not require information-sharing beyond what is absolutely necessary. Specifically, the Commission has added to the instruction a statement that the parties should not exchange information for the purpose of responding to the Overlap or Supply Relationships Descriptions. The acquiring and acquired persons should each respond on the basis of information known to them in the ordinary course of their business or through normal transaction diligence. The Commission understands that, unlike the NAICS overlap identification, the filings may not identify the same products and services in the Competition Descriptions. This may require those contemplating a transaction to plan for limits on the flow of information about the deal, including ''clean teams'' and data rooms with limited access, but the Commission believes filers have experience with managing these risks and employ protections to prevent the sharing of information or disclosing knowledge of the deal beyond these limits. The Commission has determined that the requirement to prepare descriptive responses does not increase the risk that those protections will be breached or that filers will be required to change their approach to comply with the final rule. To the extent that this process reveals existing business relationships of which either or both parties were not aware, this is an appropriate outcome of requiring this analysis to be done prior to filing.

Another group of comments raised compliance concerns related to taking an affirmative position on specific elements of an antitrust violation, such as the definition of relevant markets and any competitive effects, impermissibly shifting the burden of proving such elements of an antitrust violation to the parties. For instance, one commenter read the rule as not requiring filers to define a relevant market or provide market shares but nonetheless objected that filers lack the benefit of established competition law principles to guide the scope of their responses. Others suggested that the Commission adopt the practice of the European Union and other regimes and make available written decisions about market definitions.

As stated in the NPRM, the Commission does not intend for the Competition Descriptions to contain an assessment of relevant markets or reference any ''market.'' The Commission understands that the determination of a relevant antitrust market is a fact-bound process that is the result of extensive information gathering, including from third parties (who may be other participants in the ''market''). Information contained in the notification has never been, and never could be, sufficient to determine whether a relevant antitrust market exists in which the transaction could potentially cause harm. Rather, the Commission intends the identification of competing products or supply relationships to be a statement of business fact, not a conclusion that there is a relevant antitrust market that comprises an area of effective competition.[362] The Agencies recently

[361] Commenter American Securities Association states that certain aspects of the proposed rule would require public companies to announce and file details with the SEC about signed deals, ''creating additional hurdles that will test investor confidence.'' Comment of Am. Sec. Ass'n, Doc. No. FTC–2023–0040–0682 at 2. Because the final rule does not change who is required to file notification under the Act, there are no new obligations to disclose transactions nor to make statements to the SEC. To the extent that this comment is based on a concern that the Agencies may flag additional deals as requiring Second Requests because they may determine that a particular transaction may violate the antitrust laws, that is the intention of the final rule and well within the Commission's authority under the Act, regardless of filers' obligations to make statements required by the securities laws.

[362] A party responding to an interrogatory under Rule 33 of the Federal Rules of Civil Procedure ''must furnish information that is available to it and that can be given without undue labor and expense,'' and a party must ''provide relevant facts reasonably available to it but should not be required to enter upon independent research in order to

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released updated Merger Guidelines that contain a detailed discussion of how and why the Agencies undertake the exercise of defining markets.[363] Thus, the Commission disagrees that filers are unable to understand how information about whether and to what extent the merging parties are direct competitors factors into the Agencies' initial antitrust assessment.

Comparison to Other Jurisdictions

Some comments suggested that the Commission is improperly attempting to model the U.S. premerger notification regimes on those in other jurisdictions. The Commission rejects this suggestion. The purpose of this rulemaking is to maintain a premerger notification regime that fulfills the Agencies' congressional mandate to vigorously enforce the U.S. antitrust laws and prevent undue concentration in its incipiency. As the Commission noted in the NPRM, many other jurisdictions rely on submissions from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.[364] The Commission expects that the burden on filers (or their counsel) with experience drafting these submissions for other jurisdictions will be comparatively low because of their familiarity with such drafting. This does not mean that the Commission is relying on the experience of other jurisdictions in enforcing their laws. Rather, the Commission is simply noting that the prevalence of descriptive requirements among other competition enforcers supports its belief that, for some filers, preparing descriptive responses is not a new exercise or overly burdensome. The Commission further notes that other businesses might be familiar with preparing a business plan or conducting a market research and competitive analyses, which would contain much of the same information as is required by the narratives.[365]

One commenter stated that pharmaceutical transactions are not acquisitions of other companies but instead involve exclusive licenses, which are not reportable in other jurisdictions. As a result, according to this commenter, the descriptive requirements introduce an entirely new and significant burden that will fall disproportionately on parties to pharmaceutical transactions. The Commission disagrees that there will be a measurably different impact on pharmaceutical companies. As discussed above, the requirement to submit Competition Descriptions is not dependent on having prepared similar materials for other jurisdictions, and there are many kinds of transactions that are not reportable in other jurisdictions for which the parties will now be required to submit a descriptive response. In addition, the Commission has no reason to exempt pharmaceutical licensing deals from any requirements of the Act because these transactions, like other reportable transactions, can raise antitrust concerns.[366] As the D.C. Circuit found when it upheld the Commission's authority to require the reporting of pharmaceutical licensing transactions, the Act does not prevent the Commission from adopting rules of general applicability and the Commission can rely on its experience in reviewing HSR Filings to adjust the HSR rules.[367] Certain sectors have more reportable transactions, but the Commission is not imposing different requirements on any sector. Nor should it remove information reporting requirements for those sectors where there are more reportable transactions merely because more companies in those sectors are involved in reportable transactions. Moreover, the Commission believes that complying with the Competition Description requirements for transactions involving licensing agreements will be less costly than for other types of transactions because those transactions are fairly limited in purpose as they relate to uses for the licensed technology.

After careful consideration of the comments raising general objections to requiring descriptions of existing business operations of the merging parties, the Commission has determined to require Competition Descriptions in the final rule due to the benefit they would provide to the Agencies. These responses will provide the Agencies with key information that is necessary to determine whether an acquisition, if consummated, may violate the antitrust laws. It is appropriate for filers to provide this information because they are in the best position to do so. Competition Descriptions will allow the Agencies to conduct a fact-based assessment of the antitrust risks posed by each transaction, rather than expend time and resources issuing voluntary access letters and Second Requests for information that bears directly on the determination that further investigation is warranted. Nonetheless, in light of the concerns expressed by commenters, the Commission has made significant modifications to these requirements to better calibrate the information that would be most beneficial to the Agencies while reducing the cost as much as practical, including excusing select 801.30 transactions from these requirements.

1. Overlap Description

The Commission proposed a new Overlap Narrative section that would require each filing person to provide an overview of its principal categories of products or services (current and planned) as well as information on whether it currently competes with the other filing person. The Commission further proposed that each filing person would describe its current and planned principal categories of products and services in a way that those business lines are referred to in the company's day-to-day operations, and identify any documents submitted with the HSR Filing that support information contained in the narrative. For each identified overlapping product or service, the Commission proposed that the filing person would also provide sales, customer information (including contacts), a description of any licensing arrangements, and a description of any non-compete or non-solicitation agreements applicable to the employees or business units related to the product or service.[368]

The Commission received numerous comments on this requirement. As one commenter noted, the Commission's original proposal in 1977 would have required a filer to identify its top five most significant competitors for overlapping operations. The Commission did not adopt this proposal, as well as other proposals, not because they were improper, as suggested by this commenter, but because the Commission determined at the time that it was important to reduce

acquire information merely to answer interrogatories.'' *Lynn* v. *Monarch Recovery Mgmt., Inc.,* 285 FRD. 350, 357 (D. Md. 2012) (citation and internal quotations omitted). Filers should take a similar approach to providing business facts here.

[363] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 4.3 (2023).

[364] NPRM at 42180.

[365] The Small Business Administration provides guidance for how to conduct market research and find a competitive advantage, including links to free government databases and resources to help with that assessment. *See* U.S. Small Bus. Admin, ''SBA Business Guide, Market research and competitive analysis'' (last updated May 31, 2024), *https://www.sba.gov/business-guide/plan-your-business/market-research-competitive-analysis#id-use-market-research-to-find-customers.*

[366] *See, e.g., In re Sanofi Corp.,* No. 9422 (F.T.C. Dec. 11, 2023) (complaint) (transaction abandoned); *FTC* v. *Mallinckrodt ARD Inc. (f/k/a Questcor Pharms., Inc.),* No. 1:17–cv–120 (D.D.C. Jan. 30, 2017) (stipulated order for permanent injunction and equitable monetary relief).

[367] *PhRMA,* 790 F.3d at 201.

[368] NPRM at 42196.

the overall burden of complying with notification requirements,[369] which were unfamiliar to the M&A business community at that time. After forty-five years of experience with reviewing thousands of transactions each year, the Agencies are now well aware of the importance of understanding who the parties view as their competitors, especially if that group includes the other merging party, because it is relevant to whether the transaction may violate the antitrust laws.[370] The need for this self-identification of competitors has grown over time as NAICS codes and other information do not always provide a consistent and reliable benchmark for filers, resulting in over- or under-reporting of competitive overlaps. In this rule, filers are merely required to describe each of the principal categories of products and services they offer, and list and describe each product or service that they both provide to the market. The Commission believes that in light of the shortcomings of other more objective reference points, it is necessary to require filers to identify whether they offer products or service that compete with the other filing party.

Several comments pointed to the burden of providing an Overlap Description for all filings. For instance, one commenter stated that the proposal lacks a relevance test or de minimis threshold so that companies will be required to delve deep into complex corporate structures to identify individual products and services offered by their subsidiaries. Another raised concerns that providing a detailed analysis of competitive dynamics in each of these theoretical segments, particularly in transactions that are occurring in manifestly competitive environments, is wasteful and unduly burdensome.

As discussed above, in light of concerns about the cost this requirement places on all filers, the Commission has modified its proposal in several ways to reduce the cost on filer. First, it has decided to limit the requirement to report planned or future products to those referenced in another document submitted with the HSR Filing. The Commission has also eliminated the requirement to provide an estimate of how much of the product or service each customer category purchased or used monthly for the last fiscal year. And rather than require reporting for the two most recent fiscal years, the Commission has limited reporting to the most recent fiscal year. In addition, the Commission has decided not to require sales information in units—only dollars. It has also eliminated the requirement to provide individual contact information for customers. Additionally, the Commission has eliminated the requirement to describe licensing agreements and non-compete or non-solicitation agreements in this section. These changes are discussed in greater detail in the sections that follow. Finally, the Commission has decided not to require Overlap Descriptions for select 801.30 transactions. In the Commission's experience, these filings almost never report overlaps on the basis of NAICS codes and there is no reason to think that requiring this class of filers to provide a descriptive confirmation would provide a benefit to the Agencies that would enhance premerger screening of this particular set of transactions.

At this time, the Commission lacks a basis to excuse other categories of filings either on the basis of complexity of the filer's corporate structure or the general robustness of competition in the markets in which the filers compete. In fact, complex corporate structures can make it much harder for the Agencies to discover competing lines of business from any source other than the filers. When information in the HSR Filing is inconclusive, staff often must try to discover these existing relationships based on imperfect information from public sources, the parties' submitted documents, and other sources of market information, such as third parties. Requiring filers to provide a description of any overlap is a much more direct, efficient, and reliable way to get this critical information because it will be coming from the parties. If the parties are aware of other companies that also provide products or services that compete, they can (but are not required to) provide that information as part of their descriptive response. If this requirement creates a significant cost to filers, it is due to their significant pre-acquisition business relationships, meaning that the effort to provide the description is directly proportional to the risk that the transaction may violate the antitrust laws.

After careful consideration of the comments, the Commission has made significant modifications to the Overlap Description to reduce the cost to filers while also providing a factual basis for identifying whether the filing parties are actual or potential competitors. This information will improve Agency decision-making during the initial waiting period. Modifications reflected in the final rule are discussed below.

a. Identification of Current or Future Overlaps

The Commission proposed that each filing person provide a brief overview of its principal categories of products and services (current and planned) as well as information on whether it currently competes with the other filing person. As noted in the NPRM and discussed above, such information is core to the Agencies' substantive antitrust analysis during the initial waiting period and is not readily accessible from sources other than the filers themselves.[371] A comment from State antitrust enforcers supported the requirement for additional information about present and potential horizonal competitive overlaps, noting that State antitrust enforcers are particularly concerned with acquisitions of potential or nascent competitors and the protection of rivalrous innovation. As fellow enforcers of the Federal antitrust laws, they noted that most research and development (''R&D'') pipelines are known only to the companies and that disclosing current or known plans, including R&D efforts, up front would ensure effective deal reviews. They noted that, at times, deals that appear benign may mask significant anticompetitive effects lurking below the surface. Sophisticated incumbent companies have a greater incentive and more developed means to detect industry developments—and a correspondingly far-reaching ability to curb competition in ways that harm consumers.

As discussed in section II.B.4., the Agencies currently lack a sufficient basis from information in the notification to determine if the transaction is likely to violate the antitrust laws by eliminating on-going innovation competition, a potential competitor, or a nascent competitive threat that has yet to make sales. Without information that indicates there are known areas of competition based on expected revenues, this will continue to be a blind spot that results in less-than-optimal enforcement on this basis. Because these areas of potential or emerging competition are typically not well-known to others uninvolved in the transaction, the Agencies do not have a source for this information other than the filing parties.

The need for information related to planned products and services is especially important for transactions in which one (or both) filers already have

[369] *See* 42 FR 39040, 39043 (Aug. 1, 1977).

[370] *See, e.g., Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049 (5th Cir. 2023); *FTC* v. *Whole Foods Market, Inc.,* 548 F.3d 1028, 1045 (D.C. Cir. 2008) (Tatel, J., concurring in judgment).

[371] NPRM at 42196.

a dominant position and the other party has planned products that could soon be introduced to the market to provide some level of competition to the dominant player. According to the State antitrust enforcers, acquisitions of potential or nascent entrants may empower already dominant incumbents to discontinue either the target firm's or its own innovation, thereby eliminating existing and future competition between the merging parties and information supplied by the Overlap Description is critical for the Agencies to analyze acquisitions affecting potential competition or present rivalrous innovation.

Other commenters object to the requirement to identify overlaps based on planned products or services under development by the other party. One pointed out that many companies have a pipeline of product ideas that may or may not result in an actual product sold to customers. Others indicated that in the pharmaceutical and biotechnical sectors, this information would be speculative at best for many ongoing R&D initiatives. The Commission acknowledges that the assessment of when a planned product or service will start generating revenues is likely imprecise, and that products in development often do not meet important deadlines for commercial release. But the Commission disagrees that companies with extensive R&D pipelines are unfamiliar with these drawbacks or that imprecision prevents them from having target launch dates based on their best information. In the Agencies' experience, companies with ongoing product development efforts routinely adjust expected timelines to commercialization based on new information. In particular, as part of preparing for the transaction, many of these companies prepare an assessment of the target's products, including products in development. Products in development can compete with other products in various stages of commercialization, forming the basis for antitrust liability in certain circumstances.[372]

Nonetheless, to provide an objective reference point that would determine whether a filer would need to include a product in development as part of its descriptive response, the Commission modifies this requirement to limit the reporting of current or known planned products or services to those that are reflected in documents submitted with the filing. This limitation should serve to reduce the cost and increase the certainty that the planned product or service is likely to be introduced. In particular, plans and reports provided to the CEOs and Boards of Directors and submitted with the HSR Filing would likely provide a solid reference point for filers to determine if the planned product is sufficiently likely to meet targets for commercial introduction because it is discussed in these high-level reports shared with key decision-makers.

In addition to the objections discussed above, several commenters objected to the specific requirements of identifying overlaps or customers based on sales information, which might include sales generated in markets outside the United States. One commenter stated that the requirement to provide historical information should be limited to sales and customers from U.S. operations and should be further limited to sales information based solely on sales by dollars, not additionally by units. The Commission declines to limit the Overlap Description to U.S. sales information. Many transactions every year involve industries whose companies compete on a global basis such that the relevant antitrust markets in which they compete are broader than the United States or involve facilities or customers that are located outside the United States.[373] Having this information is critical to the Agencies' assessment during the initial waiting period.

The Commission agrees with the other modification suggested by one commenter to limit this requirement by reporting revenues only based on sales by dollars and not also by units. As the commenter notes, in many service sectors such as healthcare or professional services, the concept of ''units'' is arbitrary and estimates would be both burdensome and unreliable. The Commission believes that it is less costly for filers to rely on only one measure of sales and that reporting by other measures in addition to sales often does not lead to different results. Thus, the Commission does not adopt the requirement to report sales based on units in addition to dollars and limits the reporting of sales and customer information only to dollar sales.

To further reduce the cost of collecting data to support the Overlap Description, the final rule requires the reporting of sales data only for the most recent fiscal year, down from the last two years as proposed. This limitation parallels other reporting requirements that are similarly limited to the most recent fiscal year.

The commenter also suggested that, in order to prevent the sharing of information between existing competitors that would inadvertently increase the risk of anticompetitive coordination, the information required by the Overlap Description be limited to information within the knowledge, information, or belief of the person filing. The Commission confirms that filers should prepare the Overlap Description based on the knowledge and belief of the filing person.

b. Customer Information

The Commission proposed that, for each principal category of products and services and each overlapping product or service, filers (a) describe all categories of customers, including an estimate of monthly sales or purchases in each category; (b) contact information (including the individual's names, title, phone, and email) for the top 10 customers (based on units and sales) for the last year, and the top 10 customers in each customer category.

Some individual commenters supported this proposal, urging the Agencies to take steps to better understand the impact of acquisitions on those most affected by them, including customers. Other comments raised concerns about the type and amount of information collected about customers, as well as the risks associated with identifying them in an HSR Filing, including providing individual contact information. One commenter asserted that the Agencies' stated intention to contact customers during the initial waiting period raises serious confidentiality concerns and places a transaction at considerable risk. Another commented that there may be legitimate business justifications for not disclosing a potential transaction internally or to commercial partners at the time of filing, and requiring specific contact information practically necessitates such disclosures to maintain employee and customer relations. According to another commenter, for the vast majority of transactions, customer information is not required to make an assessment that the transaction requires Second Requests, and thus the Agencies should

[372] *See, e.g., Illumina* v. *FTC,* 88 F.4th at 1050.

[373] *See, e.g., Polypore Int'l, Inc.* v. *FTC,* 686 F.3d 1208 (11th Cir. 2012); *FTC* v. *Wilh. Wilhelmsen Holding ASA,* 341 F. Supp. 3d 27 (D.D.C. 2018); *FTC* v. *Tronox Ltd.,* 332 F.Supp.3d 187 (D.D.C. 2018); *In re Nvidia Corp.,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint)*; United States* v. *ZF Friedrichshafen A.G.,* No. 1:20–cv–00182 (D.D.C. Jan. 23, 2020) (complaint); *United States* v. *United Techs. Corp.,* No 1:18–cv–02279 (D.D.C. Oct. 1, 2018) (complaint); *United States* v. *Novelis, Inc.,* No. 1:19–cv–02033 (N.D. Ohio Sept. 4, 2019) (complaint); *In re Corpus Christi Polymers LLC,* No. C–4672 (F.T.C. Feb. 20, 2019) (decision and final order): *In re Quaker Chem. Corp.,* No. C–4681 (F.T.C. Sept. 9, 2019) (decision and final order).

continue to ask for customer contact information on a voluntary basis only when it may be necessary.

After considering these comments and others, the Commission modifies the amount of information required in the Overlap Description related to customers but has determined that some information related to customers is important for the initial antitrust assessment of the transaction. The Agencies will continue to reach out to customers in order to get their input and reactions to reportable transactions as time and resources allow during the initial waiting period regardless of whether they are referenced in the notification. Contacting customers to learn about the business lines of the filing parties is often the very first thing staff does to begin the investigation of a potentially problematic transaction. As discussed in section III.C.1., the Agencies routinely contact many customers of the filing parties, often without the filing parties' knowledge, during the course of an investigation, especially if the initial waiting period is prolonged by a withdrawal and refile.

There is nothing improper about the Agencies' contacts with third parties to learn facts about the industry or the operations of the filing parties. The HSR Act contains strict limits on the disclosure of information submitted or collected during an investigation,[374] and unauthorized disclosure carries criminal penalties.[375] At all times during the investigation, Agency staff comply with these requirements. For example, when contacting customers or other market participants, Agency staff may disclose that the agency is conducting a nonpublic investigation of the proposed transaction, but Agency staff will not disclose any information contained in an HSR Filing without a waiver.

Although collecting more information from filers in the HSR Filing should reduce the Agencies' reliance on contacting third parties to learn basic business facts about the merging parties, conducting outreach with third parties is an essential task of premerger screening to ensure that the Agencies' antitrust assessment fully considers any potential impact of the transaction on other market participants.[376] Because transactions may not have been publicly disclosed, it is imperative that the Agencies initiate contact with third parties and not wait for them to reach out. The Agencies routinely conduct public research to learn about customers for potential outreach, regardless of whether the filing parties have provided their contact information. Moreover, customer information is typically in the agency's first request to filers to submit additional information on a voluntary basis during the initial waiting period. At times, filers have anticipated this voluntary request and provide this information quickly, sometimes the same day. However, this is not universally true and any delay in obtaining this information about top customers is inefficient and undermines the Agencies' ability to conduct third-party outreach. While the Agencies may be able, on their own, to identify some customers of the filing parties, it is important that such third-party outreach also include those customers most affected by the transaction, that is, those customers who are most reliant on the filing parties to conduct their own business.

Nonetheless, in light of concerns about identifying particular individuals as customer contacts, the Commission does not adopt that requirement as proposed. Instead, the Commission modifies the requirement so that filers must identify customers by company name without providing contact information for any individual employed by the company. The Commission believes that company contact information has value even without knowing the name or title of the individual at the customer business that is most knowledgeable about the existing business relationship with the filer. Moreover, knowing which companies are top customers provides important context to determining whether any particular customer may be affected by the elimination of competition between the parties and is additional information beyond knowing what the overlapping product or service is.

To further reduce the cost of providing information related to customers, the Commission has modified this requirement so that filers do not have to estimate monthly purchases or sales by customer category as proposed. Filers will be required to describe all categories of customers without providing specific sales or purchase estimates by category. Simply describing categories of customers will enable the Agencies to determine if there are unique end-uses for the product, possibly reflecting some degree of non-uniform demand that would indicate limits on substitutability across different customers. Qualitative descriptions of customer categories are sufficient for the Agencies to determine, at a preliminary stage, whether demand is segmented, a fact that is important for gauging potential competitive effects of the transaction. Relatedly, this additional information may help eliminate or reduce antitrust concerns if the parties serve very different customers or customer categories.

With these significant modifications, the Commission adopts the requirement that filers providing an Overlap Description also include some information about customers for those products or services.

c. Descriptions of Agreements With the Other Filing Party

The Commission proposed that as part of the Overlap Description, for each overlap product or service identified, filers would provide a description of certain competitively significant agreements between the filing parties, such as licensing arrangements and any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service.[377]

One commenter supported the collection of information related to existing agreements between the filing parties because it may be relevant to an assessment of whether something short of a full merger may be sufficient to enable the parties to realize the potential procompetitive benefits of a transaction without potential competitive harm. No commenter specifically objected to this particular requirement of the Overlap Description. However, in light of objections to the overall cost of the final rule, the Commission does not adopt this proposal at this time. Instead, the Commission believes that the requirement, discussed in section VI.I.1, to indicate via check boxes whether certain types of agreements exist between the acquiring person and target will alert the Agencies to transactions that may require further investigation.

2. Supply Relationships Description

The Commission proposed to require each filing person to provide information about existing or potential purchase or supply relationships between the filing persons. This description would require filers to describe each product, service or asset (including data) that the filer sold, licensed or otherwise supplied, to the other party or to any other business that, to the filer's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or

[374] 15 U.S.C. 18a(h).

[375] *See* 18 U.S.C. 1905, 15 U.S.C. 50.

[376] Some commenters believe that the Agencies have been insufficiently attentive in the past to those most affected by harmful consolidation.

[377] NPRM at 42196.

service that competes with the other party's products or services.[378] Similar information is required for purchases from the other party. According to the NPRM, this information would allow the Agencies to identify whether the transaction would create opportunities for post-acquisition foreclosure of rivals arising from vertical or diagonal relationships.[379] As discussed in section II.B.3., current information requirements do not provide a factual basis to alert the Agencies that there is an existing supply relationship that might require a closer look to determine whether the transaction is likely to violate the antitrust laws.

As noted in the NPRM, in the past the Commission had required filers to provide similar information about vertical vendor-vendee relationships, but the requirement was eliminated in 2001; since that time, filers have provided no specific information related to existing vertical or other supply relationships. Several commenters objected to including this information again, noting that vertical concerns will not be a feature of most transactions, and information related to these issues is more appropriate for a Second Request once the Agencies have determined that the transaction genuinely raises vertical foreclosure concerns. One commenter stated that information about sales to and purchases from non-transacting parties has limited, if any, relevance to the transaction and is thus outside the scope of the Act. Another noted that concerns about unwinding already-consummated transactions that motivated the Act are not present in non-horizontal transactions, and urged the Agencies to exempt purely non-horizontal transactions from the reporting requirements of the Act on that basis.

Other commenters supported the reintroduction of the requirement to report information related to key supply relationships, suggesting that descriptive responses should provide a more accurate and complete basis for screening transactions. One commenter commended the Commission for recognizing the need to request information about input markets and noted the historical lack of such information has resulted in an information asymmetry between the Agencies and filing parties. Others identified industry-specific concerns related to non-horizontal implications of acquisitions. One commenter cited the example of the seed industry, commenting that to understand market power in that industry the Agencies must have information regarding the unique supply, distribution, and licensing dynamics that are present. Another commenter discussed the proposal's impact on private equity firms, claiming it is common for firms to have portfolios that include upstream and downstream segments, a structure that can incentivize preferential treatment between portfolio companies in ways that disadvantage rivals.

State antitrust enforcers also supported the need to better understand any supply relationships, including through the collection of information regarding data assets. They explained that the merger of two firms' complementary data sets can create, augment, and maintain market power. As antitrust enforcers, they stated that they also seek to understand how the target's data can be combined with the buyer's, and whether the combined data can be used to leverage power into further applications. To fully account for the potential that the combination of the buyer's and seller's data could be leveraged into additional applications, the State antitrust enforcers recommended the Commission consider whether these requests should be expanded beyond the related purchases and related sales narrative.

After considering the concerns raised by commenters on both sides, the Commission has determined that the final rule will require, once again, the submission of information related to supply relationships. Contrary to assertions that the Agencies rarely challenge, and even more rarely prevail against, non-horizontal acquisitions, the Agencies have blocked several non-horizontal mergers since 2021 and have another challenge pending review.[380] The Commission specifically rejects the suggestion that the final rule exempt non-horizontal mergers from the reporting requirements of the Act. Such an exemption would abrogate the Agencies' direct Congressional mandate not to ignore mergers that do not involve horizontal competitors. With the 1950 amendments to the Clayton Act, Congress made clear that section 7 applies not only to mergers between actual competitors but also to vertical and conglomerate mergers.[381]

The Commission observes that mergers that create a risk of non-horizontal concerns are more varied in their effects, with the over-arching concern being the risk that the transaction provides the merged firm with the ability and incentive to foreclose rivals. According to controlling precedent, there are myriad ways in which the merged firm could engage in foreclosing behavior, such as by making late deliveries or subtly reducing the level of support services.[382] In light of that variety of potential mechanisms, it is important to have some basis to assess whether the transaction creates a risk that the merged firm may limit access to products or services that its rivals use to compete.[383]

Some commenters questioned whether, as a practical matter, filers will be able to gather the information required by the Supply Relationships Description. For instance, one commenter stated that providing this information would require filers to create a new tool for tracking related sales and purchases, while another noted that, especially for retailers who are often ''price takers,'' there may be no need internally for conducting this type of analysis, meaning it would be undertaken solely to comply with the Act for reporting transactions. Two other commenters stated that this narrative is duplicative of document requests and thus should be eliminated.

The Commission disagrees that the new Supply Relationships Description requires special reporting tools or is duplicative of document requests. In the Agencies' experience, documents submitted with the HSR Filing often do not contain references to key suppliers or purchasers, or the documents do not

[378] *Id.* at 42196–97.

[379] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

[380] *See* Press Release, Fed. Trade Comm'n, ''Statement Regarding Illumina's Decision to Divest Grail'' (Dec. 18, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail*; *In re Lockheed Martin Corp.,* No. 9405 (F.T.C. Jan. 25, 2022) (complaint alleging merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corporation,* No. 9404 (F.T.C. Dec. 2, 2021) (complaint alleging merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Microsoft Corp.,* No. 9412 (F.T.C. Dec. 8, 2022) (complaint). *See also FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 577 (1967) (whether classified as horizontal, vertical, conglomerate or other, all mergers tested by the same standard under section 7).

[381] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317 (1962) (explaining that by the deletion of the acquiring-acquired language in the original statutory text, Congress hoped to make plain that section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country). *See also* H.R. Rep. No. 1191, at 11 (1949).

[382] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1053 (5th Cir. 2023).

[383] *See* Dep't of Justice & Fed Trade Comm'n, Merger Guidelines 2.5 (2023).

provide sufficient context to understand whether the merged firm will have the ability to foreclose key inputs in violation of the antitrust laws. Nor does the Commission agree that companies are unaware that they are in an existing supply relationship or that there would be no records for a company to determine that it has purchases from or sales to another company. As with the Overlap Description, requiring filers to provide a brief description of any sales or purchase relationship is a much more direct, efficient, and reliable way to get this critical information because it will be coming from the parties and does not require staff to interpret references in documents to these types of relationships. Even given the expansion of document requirements in the final rule, this specific information that describes an existing business relationship in the same supply chain is unlikely to be revealed in transaction-specific documents or those generated in the ordinary course. This is especially true because the Supply Relationships Description requires each filer to identify whether it supplies not just the other party but a different company that competes with the other party.

Two commenters urged the Commission to narrow the scope of the required information by adopting a limitation for de minimis levels of related sales or related purchases, for example by restricting requirements to those related sales or purchases generating over $10 million in U.S. revenue in the past fiscal year. One commenter noted that the pre-2001 reporting for vendor-vendee information was limited to transactions between the parties and to purchases or sales over $1 million, and stressed the need for the Agencies to establish a similar objective criteria to guide filers and avoid reporting thousands of routine or competitively benign purchases. Another commenter questioned the need for the Commission to revive a request that it deemed insufficient as a screen for potential non-horizontal relationships.

After careful consideration of these comments, and in light of the Commission's intention to reduce cost wherever practical, the Commission has made several modifications to the Supply Relationships Description. As with the Overlap Description, the Commission declines to exclude information related to sales outside the United States. Here too, such an exclusion is not justified for the significant number of transactions for which sales occur outside the United States and yet the transaction has sufficient nexus to the United States to require reporting. Nonetheless, the Commission has determined that the rule should include a de minimis exclusion to reduce the cost of collecting information related to competitively insignificant sales or purchases. The final rule excludes reporting unless the product, service, or asset (including data) represented at least $10 million in revenue. In order to ensure that the de minimis exclusion does not cause filers to underrepresent their own production or capacity to supply the market, the de minimis amount is inclusive of internal transfers within the filing person. That means that when applying the de minimis exclusion, the filer should include the value of the product that it supplies to itself because that reflects the filer's ability to meet the demand for the product. For example, if the acquiring firm sells Product X to the target, when calculating the total revenue for Product X to determine whether Product X represents at least $10 million in revenue, the filer must include its own consumption of Product X and sales of Product X to anyone else. If all of the filer's sales (including internal sales) of Product X represent less than $10 million in revenue, the filer does not need to respond to the Supply Relationships Description for sales of Product X.

As with the Overlap Description, several commenters objected to the Supply Relationships Description on the grounds that it is subjective and burdensome and that it would require premature disclosure of the deal or improperly shift the burden of proving an antitrust violation from the Agencies to the filing parties. Accordingly, the Commission has determined to make similar modifications to the Supply Relationships Description as it did for the Overlap Description, in order to reduce the cost of reporting. Specifically, the final rule limits the reporting period to the most recent fiscal year and requires reporting for sales only in dollars, not also in units. It also eliminates the requirement for contact information for individuals at customers or suppliers, requiring only the identity of the company to limit the risk of inadvertent disclosure. With these modifications, the Supply Relationships Description will provide a factual basis to determine whether the transaction requires a closer look to assess the risk of foreclosure, while minimizing the cost as much as practicable.

3. Labor Markets Information

The Commission proposed creating a new Labor Markets Information section within the Instructions that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction. As noted in the NPRM, the Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets.[384] Yet, as noted in section II.B.2., the Agencies' HSR Form does not collect information from filers about their employees or the type of work that their employees do that would allow the Agencies to identify the parties as competitors for certain labor services, raising challenges for the effective enforcement of section 7 to protect competition that benefits workers.[385]

Within the Labor Markets section, the Commission proposed requiring each filing person to (1) provide the aggregate number of employees for each of the five largest 6-digit Standard Occupational Classification (SOC) codes; (2) identify the top five largest 6-digit SOC codes in which both parties employ workers, and for each of these SOCs, list the overlapping ERS-defined commuting zones and the total number of employees within each commuting zone; and (3) identify any penalties or findings that were issued against the acquiring person or acquired entity by the DOL's Wage and Hour Division, NLRB, or OSHA during the five-year period before the filing.[386]

The Commission received many comments focused on the labor market proposals. Several commenters, including hundreds of individual commenters, supported the Agencies' attention to the potential for merger-induced harm in labor markets and the requirement that parties submit information about their employees for premerger screening. Supportive commenters stated that filers have sophisticated legal and accounting personnel and systems to minimize the burden on the companies of collecting and reporting employee information. Other commenters asserted that requesting labor market information in the earlier stages of merger review would lead to a more efficient and uniform process that could result in the Agencies' termination of the HSR waiting period prior to the end of the initial 15 or 30 days in a greater number of mergers where no labor market issues exist.

[384] NPRM at 42197.

[385] 15 U.S.C. 18.

[386] NPRM at 42197–42198.

Other commenters, including law firms, private equity and venture capital groups, and industry groups, raised broad objections to the Commission's proposal to collect labor market information in the HSR Form. These organizations argued that the effort required by the Labor Markets section would be significant and would greatly increase costs for companies wishing to engage in reportable transactions. Moreover, they argued that this increased burden was not justified by the utility of the employee information required by the proposed rule for antitrust screening. Some commenters stated that the increased burden of complying with these reporting requirements would have a chilling effect on transactions.

In light of the comments, as well as the Agencies' recent experience in identifying and investigating transactions that may harm competition for workers, the Commission has determined not to require specific information about employees at this time. After considering several options to collect worker information that would be specific enough to allow the Agencies to screen for potential labor market effects without unduly burdening filers, the Commission has determined that the Agencies will rely on other information required by the final rule to identify transactions that require an in-depth investigation for potential labor market effects. This includes the new Competition Descriptions, which together will provide the Agencies with a better understanding of the premerger competition between the merging parties. The Commission believes that this information is likely to reveal those transactions where the filers are likely to compete for workers that do the same or similar types of jobs because they supply similar or related products or services. In addition, the new document requirements, including plans and reports and additional transaction-related documents, should reveal whether the parties view themselves as competing for labor services. From these documents, as well as a description of the rationale for the transaction from the buyer, the HSR Filing should reveal whether the buyer anticipates any impact on workers or labor costs as a result of the transaction.

The Commission acknowledges the need to obtain detailed information about employees for some transactions during the merger review process and will continue to consider whether it is appropriate, on a case-by-case basis, to require the production of such information in a Second Request.

a. Worker and Workplace Safety Information

The Commission proposed to create a Worker and Workplace Safety Information section that would require filing persons to identify any penalties or findings that were issued against the acquiring person or acquired entity by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the five-year period before the filing. Several commenters supported the inclusion of the Worker and Workplace Safety Information, noting that the information could prove indicative of a concentrated labor market and market power. One commenter stated that it had previously alleged that repeated and widespread labor law violations constituted direct evidence of labor market dominance that could be relevant to merger analysis. Others noted that this information is often known to the filers and may be indicative of a concentrated labor market.

Some commenters urged the Commission not to require the submission information about past workplace violations due to the lack of a clear nexus between labor law violations and merger analysis. Other commenters stated that labor law violations may be tied to issues that are irrelevant to market power, such as the presence of an organized labor group that is more inclined to report potential violations, and the requirement should be limited to the industries where violations are more prevalent. Some stated that the existence of labor law violations was government data that was already available to the Agencies without placing the obligation on parties to report such violations.

The Commission acknowledges that information regarding some of these violations may be publicly available or otherwise available to the Agencies. The U.S. Department of Labor and the National Labor Relations Board maintain public accessible databases containing labor enforcement case information on their respective websites.[387] In addition, the Agencies have each established Memoranda of Understanding (MOUs) with the Department of Labor and the National Labor Relations Board that would allow for the Agencies to obtain relevant non-public information regarding labor law violations.[388] Accordingly, when the Agencies identify potential harms to labor market competition through information contained in the HSR Filing or through other means, they can seek information on labor violations from publicly available sources, from the Department of Labor and the National Labor Relations Board under their respective MOUs, and when appropriate, from the filers on a voluntary basis or in response to Second Requests. Because this information may be available to the Agencies through means that would not require filers to provide this information in the HSR Filing, the Commission does not adopt the requirement for filers to submit information on worker and workplace safety, and it is not required by the final rule.

b. Requests To Expand Requirements for Information Related to Labor Markets

Some commenters encouraged the Commission to request more information about employees, including the merging companies' histories of labor law violations dating back ten years rather than only five years; information about their remote, temporary, or contract workers; and the merging companies' union avoidance activities and expenditures. Certain commenters encouraged the Agencies to consider the role of unions and collective bargaining to accurately assess employer market or monopsony power. In particular, commenters suggested that the Agencies could collect the following information to animate such an analysis: (1) a list of unions at controlled entities, associates, and franchisee/cooperatives; (2) copies of collective bargaining agreements, at least with any common unions; and (3) a narrative describing any opposition to

[387] *See* U.S. Dep't of Labor, ''Enforcement Data,'' *https://enforcedata.dol.gov/Enfdata/search.php*; Nat'l Labor Relations Bd., ''Case Search,'' *https://www.nlrb.gov/search/case.*

[388] *See* Press Release, Fed. Trade Comm'n, ''FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices'' (Sept. 21, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices*; Press Release, Fed. Trade Comm'n, ''Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices'' (July 19, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers*; Press Release, U.S. Dep't of Justice, ''Justice Department and National Labor Relations Board Announce Partnership to Protect Workers'' (July 26, 2022), *https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers*; Press Release, U.S. Dep't of Justice, ''Departments of Justice and Labor Strengthen Partnership to Protect Workers'' (Mar. 10, 2022), *https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.*

efforts to unionize, including union avoidance activities and expenditures. The Commission acknowledges the utility of collecting this information for some transactions during the merger review process but does not believe that this information is necessary for all filings at the screening stage. As a result, the Commission has not included requirements for this information in the final rule but will continue to consider whether it is appropriate, on a case-by-case basis, to request such information during the investigation of the transaction.

In sum, the Commission has determined that the requirements of the final rule to provide descriptions of areas of competitive interaction between the parties are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws and that the requirements, as modified, have been tailored to reduce the cost of reporting as much as practicable.

J. Revenues and Overlaps

The Commission proposed a Revenues and Overlaps section to collect information currently required by Items 5(a), 6(c), 7, and 8, subject to proposed modifications. The Commission proposed substantive changes to the reporting of revenue by NAICS code, how NAICS overlaps of controlled entities are reported, which minority-held entities must be reported, and which prior acquisitions must be reported. As discussed below, the Commission adopts some of the changes as proposed, adopts others with modifications, and does not adopt others.

1. NAICS Codes

In the NPRM, the Commission proposed several changes related to revenue reporting. One of the changes was ministerial in nature—adopting the 2022 version of the NAICS codes. This proposal received no comments, and the Commission adopts it as proposed.

The Commission proposed other, non-ministerial changes to revenue reporting that reflect a substantively different approach to revenue information by: (1) eliminating the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code and instead report revenues within ranges; (2) reporting NAICS codes on a descriptive basis through engagement with individuals familiar with the business operations of each operating company and providing additional information if more than one code would be appropriate; (3) requiring acquiring persons and acquired entities with more than one operating company or unit to identify which entity(s) derives revenue in each code; (4) requiring acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products; (5) clarifying that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing; and (6) eliminating the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based codes. As discussed below the Commission adopts some of these changes, adopts a modified version of others, and does not adopt certain of these proposed changes.

a. Reporting Revenues in Ranges

The Commission received several comments in support of the proposal to eliminate the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code and instead report revenues within one of five ranges. One commenter stated that the introduction of levels proposed in the NPRM will simplify compliance with the NAICS allocation requirement. Two other commenters expressed general support for the proposed set of reorganized revenue information. The Commission did not receive any comments opposed to this change and adopts it as proposed.

b. Reporting Revenues on a Descriptive Basis

Regarding the proposal to report NAICS codes on a descriptive basis through engagement with individuals familiar with the business operations of each operating company and provide additional information if more than one code would be appropriate, two commenters objected on the grounds that it would be overly burdensome. One commenter noted that many NAICS codes are broad and disconnected from the modern economy, making it difficult to determine whether a particular code applies. The other commenter objected to the proposal to list all the codes that describe the products or services offered, explaining that it would be extremely difficult to comply with when relying on personnel at various operating companies that have varying familiarity with the NAICS system. The same commenter noted that if the Agencies are concerned about missing potential overlaps, the Overlap Description is a more effective way to address that concern.

The Commission acknowledges the concerns about cost and adopts this proposal with modifications. As noted in the proposed rule, in the Commission's experience, reliance on financial records often results in under-reporting or reporting revenues in codes that may not actually be descriptive of the products or services provided. Having knowledgeable business personnel select the appropriate NAICS codes that best describe the filer's business lines is the best way to ensure that the NAICS code revenues contained in the HSR Filing reflect the full range of products and services offered from a business perspective. However, the Commission will not require a particular methodology to collect NAICS codes and notes that the intent of this change is to have filers report codes that descriptively represent their revenues, and not need to rely on how they are captured in financial systems.

c. Identifying Entities That Derive Revenues in Each Code

Two commenters objected to the proposed requirement to report NAICS information separately by operating entity. Each of the commenters asserted that this additional requirement would likely create significant new burdens, in particular for larger companies with numerous subsidiaries. While this type of reporting may be more difficult for those with numerous subsidiaries, these are exactly the filings for which the Agencies cannot determine which entities generate revenues that are related to those of the other party. When parties report revenues by entity, the Agencies can quickly home in on which business lines are competitively relevant. The Commission notes that some filers already provide revenues in this way and it is extremely useful to the Agencies when they do. Although the Commission acknowledges that this proposal may be more difficult for some filers, it is necessary for the Agencies to have at the outset a clear picture of how revenues are generated within the filing person. The Commission adopts this change as proposed.

d. Reporting Revenues for Pre-Revenue Products or Services

The Commission received several comments regarding the proposal to require acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products. A group of State antitrust enforcers supported the proposal, noting that they are particularly concerned with acquisitions of potential or nascent competitors and the protection of rivalrous innovation. Critics of the proposed requirement expressed concerns about compliance. One commenter pointed out that the Commission did not provide a clear standard for what ''under development''

means or what information the acquiring person must have to ''know'' about the target's product pipeline. Other commenters noted that classifying pre-revenue products or products under development is inherently speculative and that the NAICS classifications sometimes lag changes in technology and business.

The Commission acknowledges the potential challenges in complying with this change and believes it is sufficient for the Agencies to rely on the Competition Descriptions section for information related to pre-revenue products or services. In the Overlap Description, filers are required to list and briefly describe each current or known planned products or services that compete or could compete with those of the other party. As a result, similar information related to potential NAICS code revenues would be largely duplicative. Given the Commission's interest in reducing the cost of complying with the final rule where the additional information provides little benefit to the Agencies, the Commission does not adopt this proposal.

e. Overlap Reporting Revenues as of Time of Closing

Regarding the proposal to clarify that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing, the Commission did not receive any comments. The Commission adopts this item as proposed.

f. Eliminating Reporting by NAPCS Codes

Regarding the proposal to eliminate the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based code, the Commission did not receive any comments. The Commission adopts this item as proposed.

2. Controlled Entity Geographic Overlaps

Information about the geographic areas related to overlapping products and services is currently required by Item 7. The Commission proposed modifying these requirements to: (i) add a requirement to provide the name(s) by which entities have done business within the last three years, (ii) require the filing person to identify the overlapping entity within its own person, rather than the other filing person, (iii) update the NAICS codes that require geographic reporting at the street address level, (iv) require the identification of locations of franchisees for certain NAICS codes, and (v) add a requirement to provide geolocation data. As discussed below, the Commission adopts the some of the proposals as proposed, some with modification, and does not adopt others.

a. NAICS Overlaps of Controlled Entities

The Commission proposed several changes to the information concerning NAICS overlaps of controlled entities. First, the Commission proposed requiring the acquiring person to identify the entity(s) within its own person that has operations in the same NAICS code as the acquired entity(s), and the acquired person to identify the entity(s) within the acquired entity(s) that has operations in the same NAICS codes as the acquiring person. Second, it proposed requiring the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes. Finally, the Commission proposed that filing persons be required to identify the entity(s) that have U.S. operations in the overlapping NAICS code(s).

Regarding the proposal to require the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes, the Commission received two comments. One commenter expressed support for the proposal, noting that information regarding how private equity portfolio companies are commonly known in the marketplace is necessary for the Agencies to assess potential anticompetitive overlaps. Another commenter, however, stated that the new requirement may be difficult for filing parties to meet if they do not maintain such records, meaning they would need to recreate the information for the HSR filing. The same commenter questioned the value of the information for entities beyond those that either (i) generate revenue that results in a NAICS overlap or (ii) are parties to Material Other Agreements.

The Commission believes ''doing business as'' names will be of great value to the Agencies in the initial waiting period and thus adopts the proposal to require filing parties to identify names by which entities do business at the time of filing. However, as part of its overall efforts to lessen costs, the Commission does not adopt the proposal to require ''formerly known as'' names.

Regarding the proposal to have each filing person only report entities within its own person that derive revenue in the overlapping NAICS codes, the Commission did not receive any comments. The Commission adopts this change as proposed.

Finally, regarding the proposal to require filing persons to identify the entity(s) that have U.S. operations in the overlapping NAICS codes, the Commission did not receive any comments. The Commission adopts this change as proposed.

In addition, one commenter suggested that the Commission require identification of overlaps at the 3-digit, rather than 6-digit level, stating that 6-digit NAICS codes are too narrow. While the Commission agrees that some 6-digit NAICS codes are too narrow to identify products or services that effectively compete in the market, it also finds that other codes are overly broad. Further, identification of overlaps also triggers the reporting of additional information, including geographic information, identification of authors of documents, production of certain annual reports, information about certain officers and directors, identification of certain prior acquisitions, and certain defense and intelligence contracts. Thus, the Commission declines to adopt this suggestion but notes that this final rule includes a Competition Descriptions section, as discussed in section VI.I, to address the shortcomings of revenue reporting by NAICS codes.

b. Geographic Market Information

The Commission proposed two changes related to geographic markets. First, the Commission proposed updating the list of NAICS codes for which locations need only be identified at the State level and NAICS codes for which street-level information would be required. These adjustments reflect the Commission's periodic review of which NAICS codes need more granular street, city, and State address information, and which NAICS codes need only be reported at the State level. Information about where each filer generates revenues is important to determining whether the parties sell or supply products or services in the same local markets. Geographic market information often provides a factual basis for the Agencies to conclude that the merging parties do not sell the same products in the same local areas. Keeping this information up-to-date allows the Agencies to rely on geographic market information to conclude that the transaction does not warrant the issuance of Second Requests.

The Commission received two comments regarding this requirement, one in support of it and one opposed. The supportive comment emphasized the need for street-level information in

the agriculture industry, where the relevant markets for evaluating competition tend to be local and regional due to the perishable nature of agricultural products. The Commission agrees that street-level information is key in local and regional markets and articulated this as the basis for the expansion of the requirement in the NPRM.

The comment in opposition to the proposal stated that it would impose additional costs on filing parties given the wide range of industries for which street-level information would be required. The Commission acknowledges the cost, but for the reasons discussed above, believes that street-level geographic information is necessary to the Agencies' ability to conduct appropriate premerger screening of transactions that are most likely to affect competition at a local level. The Commission adopts this change as proposed.

The Commission also proposed requiring filers to list locations where franchisees of the acquiring or acquired person (as appropriate) generate revenue in overlapping NAICS codes that require street-level reporting. The Commission did not receive any comments on this change and adopts it as proposed.

c. Geolocation

The Commission also proposed requiring filers to report latitude and longitude information for street addresses. The Commission received comments both in support and in opposition to this requirement. The supportive comment stated that many companies already keep lists of latitude/longitude waypoints, while the comment opposed stated that exceedingly few businesses maintain geolocation data in the ordinary course of business.

As helpful as this information would be to the Agencies, especially during the initial waiting period when the Agencies need to determine whether there are any geographic markets in which the parties compete, in its overall effort to reduce costs to filing parties, the Commission does not adopt this proposal. Agency staff can continue to pursue sources for this information when necessary and as time permits during the initial waiting period.

3. Minority-Held Entity Overlaps

The Commission proposed creating a Minority-Held Overlaps section to collect information related to minority holdings that is currently required by Item 6(c). Item 6(c) requires the identification of holdings of the acquiring person and its associates or the acquired entity (as appropriate) of greater than 5% but less than 50% if such holdings derive revenue in any of the same 6-digit NAICS codes (or industries) as the other party. In the NPRM, the Commission proposed eliminating the option to list all the minority-held entities, rather than just those that are in overlapping NAICS codes or industries. The Commission also proposed requiring filers to provide the names by which the listed entities do business, if known. The Commission adopts these changes as proposed.

Regarding the proposal to eliminate the option to list all minority-held entities, the Commission received three comments, one comment in support of the proposed change and two comments opposed to it. The supporter of the proposal stated that it is critical to understand a company's minority holdings, which may allow it to exercise a level of competitive control in a market. One commenter questioned the probative value of information about minority interests generally but did not address this specific proposal. Another commenter expressed concern that the proposal could lead to greater scrutiny of ''growth equity'' firms that primarily take minority stakes in companies, and asserted that it could have a chilling effect on certain investments.

The Commission addresses concerns that increased transparency may lead to more enforcement actions in section III.C.1. and states that the identification of overlapping minority holdings is a key reform of the final rule because where these relationships exist, the Agencies should scrutinize them as part of their premerger review. The Commission also emphasizes that filers are currently required to identify overlapping minority holdings. However, the current Instructions allow filers to identify all minority holdings rather than only those that overlap. The Commission has found that lists not limited to the overlapping entities hinder efficient screening for transactions that may require further investigation, resulting in extra effort even when it would not be required if the overlaps were known as well as not surfacing transactions that do have such overlaps. In contrast, when filers submit a list of only those minority-held entities that derive revenue in the same NAICS code, or are in the same industry as the other party, the Agencies can quickly focus in on holdings that could create a competitive concern. Additionally, as minority interest holders, the filers are in a better position than the Agencies to identify which, if any, of their holdings operate in the same space as the other party. Given the importance of this information to the Agencies, the Commission adopts this change as proposed.

Regarding the proposal to require filers to provide the names by which the listed entities do business, if known, one commenter supported the proposal while another stated that it may be difficult for filing parties to comply with if they do not maintain such records. As discussed in sections VI.D.1.d.(i) and (iii) and VI.D.2.a., the legal names of entities are not always directly related to the name by which the entity is known to the marketplace. Knowing the public-facing names of entities facilitates efficient review of transactions by the Agencies because those names may be better known to other market participants. For investors of 5% or more, the Commission believes this information should be readily available to filers. However, if this information is not known, a statement of non-compliance can be submitted with the filing, as discussed in section VI.A.5. Accordingly, the Commission adopts this requirement as proposed.

In sum, the Commission has determined that the reporting requirements for revenues and overlaps contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions that may violate the antitrust laws in any line of commerce or section of the country and that the requirement, as modified, has been tailored to reduce the cost of reporting as much as practicable.

4. Prior Acquisitions

The Commission proposed creating a Prior Acquisitions section within the Instructions to collect information required by Item 8 of the current Form, as well as additional information. First, the Commission proposed requiring both the acquiring person and the acquired entity to provide information about prior acquisitions, expanding the current requirement that is limited to the acquiring person. Second, the Commission proposed extending the time frame to report prior acquisitions from five years to ten years. Third, the Commission proposed eliminating the dollar threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition. Fourth, the Commission proposed treating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests. The Commission also proposed requiring

filers to report whether all or substantially all of the acquired voting securities, non-corporate interests, or assets are still held at the time of filing. As discussed below the Commission declines to adopt several of these proposals and modifies others.

As noted in the NPRM, information about prior acquisitions has always been important for the Agencies, allowing them to identify strategies to gain market share through acquisitions rather than internal expansion or more vigorous competition. Filers have been required to provide information about prior acquisitions from the beginning of the premerger notification program. As discussed in section II.B.5., the Commission believes that additional information about prior acquisitions will reveal roll-up or serial acquisition strategies that have become increasingly prevalent in certain sectors as well as among certain investors and acquirors, and that have been an effective strategy for increasing concentration. A history of prior acquisitions in the same sector can provide an independent basis for the Agencies to take a closer look at the filed-for transaction to ensure that merger enforcement takes place at a time when it can be effective in preventing undue levels of market concentration.

Several comments provided general support for the Commission's efforts to expand this item. According to a group of State antitrust enforcers, details about a filing entity's prior acquisitions are vital for evaluating mergers and industry concentration trends. They contend that, in an era of so-called ''stealth acquisitions,'' premerger tools used by antitrust enforcers require sharpening. Another commenter also expressed this concern, observing a rise in serial acquisition strategies that are potentially aimed at sidestepping regulatory scrutiny.

Other commenters provided research supporting the proposed expansion of information about prior acquisitions. One commenter offered that his research supports claims made in the NPRM that prior acquisitions have important consequences for competition. He explained that even minor deals can produce major changes in market structure, firm behavior, and consumer welfare. Other commenters described their research or experience with roll-up acquisitions that have occurred in various sectors of the economy, explaining that more expansive disclosures of prior acquisitions will allow the Agencies to better identify serial acquisitions and their potentially anticompetitive effects.

But several comments raised broad objections to the Commission's proposal to collect additional information on prior acquisitions. Several comments broadly asserted that the burden of providing this additional information about prior acquisitions would be too high. One commenter asserted that expanding the information required would create a chilling effect that could discourage acquisitions of startups, as many potential acquirers of startups are likely to have made several small acquisitions in the technology sector. Similarly, some comments explained that the expansion of information related to prior acquisitions would have particular impact on specific industries or financial sectors, including pharmaceuticals, technology, agriculture, and private equity. Other commenters said that providing more complete information about prior acquisitions would reduce investments in startup companies. Finally, certain comments suggested that the proposed changes would adversely affect venture capital and funding acquisitions.

The Commission has addressed some of these general concerns in section III.C., as well as more detailed concerns about the cost to complete this requirement, below. It believes that many of these broad concerns are either not directly relevant to this rulemaking or otherwise in tension with historical reporting practice.[389] Nonetheless, the Commission has determined not to adopt most of the expansions contained in the proposed rule, including the extension of the lookback period from five to ten years or the elimination of the $10 million exception. Instead, the Commission adopts modest adjustments to the current requirements and extends the reporting requirement to prior acquisitions of the target. The adopted adjustments contained in the final rule include: (1) the elimination of the $1 million threshold for revenue when determining which overlapping NAICS codes are relevant; (2) the requirement to include prior acquisitions of assets or entities that also provide competing products or services listed in the filing person's Overlap Description; and (3) the proposal to treat prior acquisitions of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests.

[389] The Commission previously required information about prior acquisitions for a full ten years. The Commission is not aware of any evidence, and commenters did not point to any, of any noticeable impact on the level of startup activity or venture capital funding during that period.

This information related to prior acquisitions will better reflect current market dynamics in the very lines of business that will be the focus of the Agencies' premerger assessment. The final rule does not require reporting on all prior acquisitions, only those in in business lines which the parties have identified as areas of overlapping current or future competition, either on the basis of NAICS code reporting or in the Overlap Description. This limitation focuses the required information on the specific antitrust risk that one or both parties have a pattern or strategy of rolling up competitors. It also alerts the agencies to potential changes in the competitive environment that may not be publicly available, which is valuable information in assessing whether or not the filed for transaction may violate the antitrust laws. In addition, parties are required to report only those acquisitions of U.S. entities or assets and foreign entities or assets with U.S. sales, thus targeting acquisitions that are likely to affect local markets within the United States. With these limitations, information collected about prior acquisitions is properly focused on the antitrust risk that the merging parties are pursuing a roll up strategy that is harming or could harm competition in the United States in violation of the antitrust laws.

As discussed in section II.B.5., the antitrust laws have always applied to anticompetitive serial acquisitions. In light of the increased use of these strategies and evidence of their harmful effects in certain sectors, there is a clear benefit to antitrust enforcement from disclosing prior acquisitions that may reveal a pattern or strategy of rolling up competitors in violation of the antitrust laws. This risk can be especially acute when the transaction involves a merger between 'consolidators,' with both firms having many prior acquisitions in the same lines of business. The final rule is properly tailored to focus on the risk that the transaction is part of such a strategy. Information about prior acquisitions need only be submitted for business lines that the parties have identified as areas of current or future competition. Moreover, any burden imposed by the additional reporting requirements would be limited. Based on the Agencies' experience, information about prior acquisitions is well-known to companies that are parties to an acquisition agreement, as this information is often collected as part of the due diligence process for the pending transaction. Other companies, even relatively small companies, routinely provide this information to the

Agencies in response to a Second Request.

The Commission acknowledges that this requirement imposes a new obligation on acquired companies but believes this information is necessary and appropriate for the Agencies to conduct their premerger review. Information about prior acquisitions is specifically targeted to uncover prior acquisitions where the parties have existing or emerging overlaps; if the acquired person completed many acquisitions over the past five years in these overlapping business lines, that information would be highly relevant to assessing the transaction's likely effect on future competition in those overlap sectors. Moreover, serial acquisition strategies may be going on simultaneously in a particular business line, and the acquired person's history would reveal whether the acquiring person is acquiring a firm that was also pursuing such a strategy.

The benefit to the Agencies from collecting this information from both parties is directly related to the number of prior acquisitions in the same business lines: the more acquisitions recorded during the prior five years, the more relevant is the information about them. Both the acquiring person and the acquired entity can and do make acquisitions that have an impact on the relevant competitive landscape. In addition, requiring this information from both filers may help deter acquisition strategies whereby a target buys several related companies that fall under the HSR thresholds and then the acquiring person purchases the target; the current rule does not reveal this history of prior acquisitions in the same business lines. Being able to clearly understand this history from the time a filing is made assists the Agencies in identifying a potential pattern of acquisitions in a particular industry that has contributed to a trend toward concentration or vertical integration that affects the competitive dynamics for the parties to the transaction, as well as the commercial realities of post-merger competition. One commenter suggested that parties report prior acquisitions only from the point in time when the current UPE acquired control of the acquiring or acquired entity, but this would limit the Agencies' ability to fully understand patterns and current competition. Thus, the Commission declines to further limit the requirement in this way.

The Commission also proposed expanding the time frame for reporting prior acquisitions from five to ten years to allow the Agencies to have a more complete understanding of how past acquisitions in the affected business lines affect the competitive landscape of the current transaction under review. Even though the Commission has required ten years of prior acquisition information on the HSR Form in the past, commenters questioned the expansion of the requirement now. Some comments focused on the added burden, noting that individuals who have institutional knowledge of past acquisitions may no longer be employed by the filing entity. Another comment pointed out that the Commission previously recognized that a ten-year lookback period was unduly burdensome when it reduced the information request from ten years to five years in 1987. The Commission acknowledges the cost associated with reporting many prior acquisitions, and after careful consideration of the comments, has determined not to require reporting for prior acquisitions occurring more than 5 years prior to filing.

But the Commission disagrees that concerns about roll-up strategies are not well-grounded in antitrust law. As discussed in section II.B.5., U.S. antitrust law clearly addresses concerns about the acquisition or maintenance of market power through serial acquisitions. As stated above, it is precisely this information that allows the Agencies to fairly measure the competitive landscape and on-going trends toward concentration in certain business lines, making the information relevant to the Agencies' initial antitrust assessment of the transaction. The Commission also disagrees that the HSR Act does not permit the Agencies to use section 7 of the Clayton Act to challenge serial acquisitions. Section 7 clearly prohibits acquisitions that were preceded by a series of acquisitions that rendered the market(s) under review concentrated,[390] and it is not improper for the Commission to require the reporting of prior acquisitions to better detect a pattern of acquisitions that may also violate other antitrust statutes, such as section 2 of the Sherman Act or section 5 of the FTC Act. Although the Commission agrees that the information submitted with the HSR Form must be used to examine the potential competitive impact of the filed-for transaction, it disagrees that the scope of section 7 is so limited as to prevent the Agencies (or other enforcers of the Federal antitrust laws) from alleging harm that derives from a cumulation of similar acquisitions in the same market.[391]

The Commission also proposed eliminating the $10 million threshold for identifying prior acquisitions and received several comments on this point. One comment urged the Commission to keep the existing limitation that requires reporting only those acquisitions of more than $10 million in total assets and annual net sales in the year prior to the acquisition as a way to eliminate the burden of reporting a large number of extremely small transactions that are competitively insignificant. One comment suggested maintaining the current $10 million threshold for prior acquisitions but exempting certain, specified NAICS codes related to emerging technology sectors from the threshold.

Yet another commenter suggested the Commission broaden its proposed rule to include prior acquisitions based on three-digit NAICS codes, rather than relying on six-digit NAICS code overlaps, which the commenter found to be often too narrow or imprecisely defined. The Commission acknowledges that three-digit NAICS codes would include more prior acquisitions and present a broader picture of the competitive landscape. But because prior acquisitions also include products or services described in the Overlap Description, which in some instances may encompass a broader set of acquisitions than reliance on NAICS codes alone, the Commission declines to use three-digit NAICS codes as the standard.

In sum, the Commission has determined that the reporting requirements for prior acquisitions contained in the final rule are necessary and appropriate to enable the Agencies to identify transactions in which the merging parties are engaged in a pattern or strategy of roll-up acquisitions and that the requirement, as modified, has been tailored to reduce the cost of reporting as much as practicable.

K. Additional Information

1. Subsidies From Foreign Entities or Governments of Concern

While the Commission did not receive any comments objecting to the proposed new defined terms ''foreign entity or

[390] *See United States* v. *Phila. Nat'l Bank,* 374 U.S. at 367. *See also Credit Bureau Reps., Inc.,* v. *Retail Credit Co.,* 358 F. Supp. 780, 794 (S.D. Tex. 1971), aff'd, 476 F.2d 989 (5th Cir. 1973).

[391] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 334 (1962) (citing S. Rep. No. 81–1775, at 5 (1950) and H.R. Rep. No. 81–1191, at 8 (1949)). In particular, S. Rep. No. 81–1775, at 5 noted that where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which only a few large concerns supply the market.

government of concern'' and ''subsidy'' discussed in section IV.B., it did receive several comments about the reporting requirements included in the proposed Instructions. One commenter objected that the Committee on Foreign Investment in the US (''CFIUS'') already is tasked with the review of certain transactions involving foreign investment in the United States and that requiring information about foreign subsidiaries in the HSR form would add to the burden of notifying parties (and the Agencies) without providing concurrent value for the substantive antitrust analysis. In response to this comment, the Commission notes that it must defer to Congress in implementing the requirement to report information about foreign subsidies in the HSR Form.

Another commenter suggested introducing a de minimis threshold so that the reporting obligation is limited to only those subsidiaries from foreign governments and entities of sufficiently large amounts to potentially distort the competitive process in markets in the United States in which the merging parties compete. Citing the EU Foreign Subsidies Regulation as an example, this commenter claimed that such a threshold would save merging parties the burden of compiling small subsidy amounts that could not be expected to result in competition concerns. The Commission acknowledges that a de minimis requirement may indeed make sense as part of the information required, but Congress did not provide for a de minimis threshold, and the Commission does not yet have sufficient data to make that determination or establish an amount at this time. Once the Agencies have begun to receive information about foreign subsidies, the Commission can revisit this issue, if warranted.

Finally, a comment from a senator and a representative noted that information about the financing activities of merging parties would also be useful in addressing a host of national security challenges and encouraged the Agencies to share such information with other governmental bodies, including Congressional committees. The Commission agrees the Agencies should facilitate this kind of information sharing to the extent permitted by current law, regulations, guidelines, and practices governing information sharing within the Federal government.

2. Defense or Intelligence Contracts

The Commission proposed creating a Defense or Intelligence Contracts section that would require filing persons to report information related to certain contracts with defense or intelligence agencies to speed up outreach to those agencies related to the reported transaction. As proposed, both the acquiring and acquired person would have been required to identify whether they have existing or pending procurement contracts with the Department of Defense (''DoD'') or Intelligence Community (''IC''), as defined by 10 U.S.C. 101(a)(6) and 50 U.S.C. 3003(4), valued at $10 million or more, and provide identifying information about the award and relevant DoD or IC personnel. The Commission reasoned that for filings from companies that supply DoD or IC with products or services, this information would greatly enhance the Agencies' ability during the initial waiting period to identify and contact appropriate stakeholders within DoD or IC to seek their input as customers that might be impacted by the proposed transaction and to speak to knowledgeable experts about the products or services provided to the government by the parties. As discussed below and in response to concerns raised in public comments, the Commission adopts the proposal with modification.

The Commission received several comments on this proposal. One commenter stated that the Commission provides limited explanation of its authority or justification for this proposed requirement and that it does not explain its focus on these agencies. The Commission responds that it proposed special reporting requirements for the defense and intelligence agencies because they are often the only customer for products and services offered by defense companies, and a thorough review of these transactions is a priority for the Agencies. Products and services sold to DoD or the IC are often unique and not sold to any other customer. As noted in the NPRM, the Agencies regularly review filings from companies that supply the DoD or the IC with products or services, and it is important for them to be able to quickly contact DoD and IC staff to collect key insights and information to prevent mergers that may have an anticompetitive impact. A recent study by the General Accountability Office highlights the importance of DoD's input to the Agencies regarding potential competition risks to the defense industrial base and DoD programs.[392] The Agencies have relied on interactions with DoD personnel, and to a lesser extent IC personnel, to investigate and challenge defense mergers over the years. Without information about specific DoD or IC contracts or knowledge of which unit handles that contract, the Agencies often face difficulty and delay in identifying appropriate relevant personnel or stakeholders with knowledge of the contracts, programs, or products or services at issue.

Any delay in identifying the right DoD or IC personnel with deep knowledge of complex and highly sensitive programs hinders the Agencies' ability to identify and fully assess competition issues in the reported transaction that would impact DoD or IC programs or budget. The Commission has determined that to be fully proactive about these concerns, and to seek DoD or IC input at an early stage of the inquiry, parties with certain pending or current DoD or IC contracts need to provide that information with their notification. Although the Agencies are also attentive to any merger that may affect purchases by other parts of the government, these transactions involve products and services that are also sold to commercial customers and can be investigated using our standard approach.

Beyond this comment on the general focus of the requirement, commenters addressed three primary areas of concern: vagueness, confidentiality, and the burden of compliance. First, commenters expressed concern about the lack of clarity in the proposed rule, for instance pointing out that neither the NPRM nor the cited statutes define what constitutes a ''pending'' procurement contract. This commenter suggested that, to avoid this ambiguity, the new rule should apply only to active procurement contracts, not pending contracts. The Commission agrees there is a need to clarify which contracts should be reported and modifies the Final Rule to require reporting for (1) pending proposals submitted to the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3003(4), and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3003(4). The Commission declines to limit the reporting requirement to active contracts only. Submission of a proposal indicates that the filer is a competitor, regardless of

[392] *See* U.S. Gov't Accountability Office, Defense Industrial Base: DOD Needs Better Insight into Risks from Mergers and Acquisitions 28 (Oct. 2023) (GAO–24–106129).

whether it is ultimately awarded the contract. The Commission believes that these changes address some of the ambiguities raised by commenters.

According to one commenter, it is not clear what method of valuation should be used to determine if a contract is valued at $10 million or more, particularly for open-ended supply contracts. First, as discussed below, the Commission increases the threshold to $100 million. Second, the Commission clarifies that filers should use the maximum estimated quantity or value in their proposed or awarded prices to determine the estimated value of the contract. Otherwise, filers should use reasonable judgment in determining how to value their contracts and may explain the method of valuation used.

With respect to confidentiality concerns, one commenter stated that it is not clear how a company may provide this information without violating Federal laws and regulations restricting the dissemination of such sensitive information. Commenters proposed suggestions to avoid such conflicts. For instance, one suggested that the proposed instruction should be clarified to exclude any contracts that are classified or otherwise subject to a government-imposed duty of confidentiality. Another recommended that the Agencies consider the appropriateness and potential applicability of a national security exception to certain requirements within this proposed rule.

As an initial matter, the Commission notes that there is nothing in the HSR Act that overrides the protections due classified information, and the Commission specifically intends to not require the submission of classified information. To alleviate concerns about the sensitivity of the information related to these contracts, the Commission revises the Instructions to expressly state that parties should not include classified information but that they should note when responsive information is withheld on that basis. The Commission believes that this modification addresses the concerns raised in the comments and preserves protections for classified information. The Commission declines to adopt the proposal to exclude any contracts that are classified or otherwise subject to a government-imposed duty of confidentiality. The fact that the parties have submitted a proposal in response to a request from DoD or the IC or have an existing contract is not classified information. Such an exclusion is overbroad and would not allow the Agencies the benefit of reviewing non-classified information related to these pending proposals or active contracts. The Commission believes that the revision stating that parties should not include classified information in their submissions addresses this issue. For the same reason, the Commission declines to adopt the proposal to create a national security exception to the rule. The confidentiality provisions of the Act provide sufficient protection for any confidential but unclassified information about these documents. The Commission additionally notes that many of the products and services the Agencies investigate have similar national security implications even if they involve customers other than DoD or the IC.

As to the burden of complying with this requirement, one commenter noted that the requested information is often not maintained in the ordinary course of business, nor is it created in the course of a deal negotiation, and that due to confidentiality concerns, these data are often not centrally maintained and may not be known, even among senior leadership. To limit the burden, one commenter recommended that the requested information be limited to those DoD or IC contracts with a primary NAICS code for which the filing parties have identified NAICS overlaps or that the Agencies obtain this information from the Federal Procurement Data System.

To reduce the cost of complying with this request, and in light of the general concern that classified materials are not widely known or shared, the Commission makes two significant modifications to limit the scope of this requirement. In line with the proposal above, the Commission limits the set of responsive contracts to those involving a 6-digit NAICS industry code overlap or a product or service described in the Overlap Description or the Supply Relationships Description. The Agencies' need for information about pending or active DoD or IC contracts is directly related to the specific antitrust risks associated with the transaction, and limiting this information in this way targets the most relevant contracts, if they exist. In addition, in response to concerns that the $10 million de minimis level will require reporting for purchases by DoD or the IC of mundane products and services, rather than critical defense purchases, the Commission has determined to increase the de minimis threshold for these contracts from $10 million to $100 million. The Commission believes that this is the appropriate threshold for limiting this request to products that are uniquely sold to the DoD or the IC. The Commission declines to make any modification in response to the suggestion that the Agencies get this information from the Federal Procurement Data System. It is not feasible for the Agencies to rely on discovering critical DoD or IC proposals or contracts from this database for the purpose of identifying key personnel at those agencies and obtaining information about complex products and services during the initial waiting period. This information is known by the parties and easy to verify, especially with the limitation that the contracts be worth more than $100 million annually. Contracts or commitments of this size are likely subject to close monitoring.

In addition, to further reduce the burden of this requirement, the Commission excuses select 801.30 transactions from reporting information related to DoD or IC proposals or contracts. These transactions do not involve an agreement between the parties.

Finally, two commenters noted a typographical error in the proposed Instructions: the reference to 50 U.S.C. 3033(4) should refer to 50 U.S.C. 3003(4). The Commission revises the instructions to correct the typographical error noted by the commenters.

In sum, the Commission has determined that the reporting requirements for pending proposals and active contracts with DoD or the IC contained in the final rule are necessary to provide the Agencies with the ability to identify transactions in which the merging parties are providing critical products or services to the government and to quickly reach out to those agencies for their input. The requirement, as modified, has been appropriately tailored to reduce the cost of reporting as much as practicable.

3. Voluntary Waivers

The Commission proposed amending the Instructions to allow filing persons to waive the confidentiality provision contained in the Act, 15 U.S.C. 18a(h), for any non-U.S. competition authorities or State Attorneys General they identify. As stated in the NPRM, allowing filers to waive the confidentiality protections in the HSR Filing would provide an efficient mechanism for filers to consent to limited waivers of confidentiality at the outset of any agency review to facilitate early cooperation among competition enforcers. The proposed voluntary waivers would allow the Agencies to disclose the existence of an HSR Filing and the information contained in the HSR Filing, but only for those non-U.S. competition authorities or State Attorneys General identified by the filing person. The

Commission also proposed modifying the language that would inform filers about potential disclosures based on the waivers to track the language of the Act more closely. As discussed below, the Commission adopts this proposed change with modifications.

The Commission received three comments addressing this proposal. A group of State Attorneys General, who would be the recipients of HSR-related information if filers granted access on a voluntary basis, encouraged the Commission to consider three changes. First, they proposed requiring filing persons to identify the relevant States where the parties do business, regardless of whether they opt to provide waivers or check the box. Second, they encouraged the Agencies to, by default, disclose to the public the fact of filing and the expiration date of the waiting period. They argued that nothing in the HSR Act requires that the fact of filing and the waiting period be kept confidential and that this information should not be treated as such. The comment urged the Agencies to exercise their authority to disclose this information to the public or to the States. They recommended that to avoid disclosure, the parties should have to provide a basis for keeping the fact and timing of the filing confidential. If the Agencies adopted the second proposal, they also encouraged the Agencies to include a check box to allow parties to waive confidentiality of the information and documents filed with the notification so that these materials could be shared with affected States. Third, if the Agencies chose not to adopt the above recommendation regarding public disclosure, the State antitrust enforcers suggested disaggregating the check box into two separate boxes, one to allow disclosure of the fact of filing and the associated waiting period and another to allow sharing of the information and documents in the filing with affected State Attorneys General. They stated that disaggregating the check box increases the likelihood that States at least receive notification of the transaction.

The Agencies have historically not publicly disclosed or provided to the States or international enforcers information regarding HSR filings, including the fact that a filing was made and the waiting period, in the absence of a waiver from the parties. Without weighing on the merits of the States' legal arguments regarding the scope of the HSR Act's confidentiality protections, the Commission at this time believes it is appropriate to maintain its prior practice. The Commission does adopt the States' suggestion to disaggregate the waiver check boxes, which would allow for greater flexibility in providing the Agencies consent to disclose and provide filers with the option to disclose some information but not all information contained in the HSR Filing.[393] The waiver would apply only to those non-U.S. competition authorities or State Attorneys General selected by the filing person. The Commission declines to adopt the proposal by the State antitrust enforcers to require parties to identify the relevant States where they do business, regardless of whether they waive confidentiality. The Commission will likely receive much of this information through the new requirements contained in the final rule.

The Commission received two other comments on this proposal. One commenter expressed concern about confidential information becoming publicly known once it is shared more widely due to the increased risk of leaks. On this point, the Commission notes that these waivers are voluntary. The parties can decide not to waive confidentiality if they have concerns about confidentiality. Further, the Agencies take seriously the confidentiality requirements of the Act and require law enforcement colleagues to abide by these protections. In the many decades of case cooperation pursuant to voluntary waivers, these protections have worked to prevent improper disclosures. The Commission believes that concerns about an increased risk of leaking due to the option to waive confidentiality at the time of filing are unfounded.

Finally, according to one commenter, the proposed rule appears to contemplate a single check box that does not permit notifying parties to communicate their willingness to waive confidentiality as to some international competition authorities but not as to others. The Commission notes that this commenter misunderstands the requirement and clarifies that the voluntary waiver will only apply to those jurisdictions that the party affirmatively indicates in the HSR Filing. In addition, failure to check either box or indication of only a few jurisdictions for waivers does not prevent the parties from providing these waivers or adding jurisdictions later. The inclusion of these waiver options in the Form is simply meant to serve as an efficient mechanism for filers to provide their clear consent at the outset even if only on a limited basis.

The Commission did not receive any comments regarding the proposal to modify the language informing filers about potential disclosures based on the waivers to track the language of the Act more closely. Thus, the Commission adopts this change as proposed.

In sum, the Commission has determined that offering the option for parties to waive the confidentiality provisions of the Act to allow for the sharing of HSR materials with non-U.S. jurisdictions or State enforcers in the final rule will provide a benefit to the Agencies in facilitating case cooperation at an early stage in the Agencies' assessment of antitrust risk. The option, as modified, has been tailored to provide a clear choice for filers who wish to facilitate the sharing of information by providing a waiver.

4. Identification of Communications and Messaging Systems

In conjunction with the proposed requirement that filing persons certify they have taken steps to prevent destruction of relevant information, as discussed in section VI.L., the Commission also proposed that filers identify and list all communications systems or messaging applications on any device used by the filing person that could be used to store or transmit information or documents related to its business operations. The Commission does not adopt this proposal.

In the proposed rule, the Commission reasoned that, as companies have increasingly been relying on new forms of communication to do business and make key operational decisions, these communications systems have become an important part of the Agencies' investigations. In the Agencies' experience, these systems contain highly relevant information on the transaction itself, as well as on topics that are critical for the Agencies' assessment of the transaction such as competition, competitors, markets, customers, and industry characteristics. Nevertheless, many parties do not appear to fully understand or comply with document preservation obligations for these new modalities.

The Commission received several comments on this proposal, mainly regarding the burden of the request and its utility in screening for anticompetitive transactions during the initial waiting period. Multiple commenters expressed doubt about the Commission's assertion that this

[393] The Commission's implementation of this suggestion differs from the text proposed by the States. The Commission does not adopt the States' suggestion, with respect to the fact of filing and the waiting period, that, in order to prevent disclosure, the parties be required to affirmatively check a box and provide a basis for keeping the information confidential.

information is readily available to the filing person and that identifying these systems would impose minimal burden. One association of antitrust practitioners noted that because there is no limitation on the requirement, large or diffuse organizations may have hundreds of communications systems that would require identification but are unknown or unused by the filing person's employees who are involved in preparing the HSR filing. One commenter also flagged the inevitable complications caused by, for example, special IT systems, legacy IT systems, and individual employees who do not follow corporate IT policies. According to another, the process of gathering this information often requires the expertise of counsel and entails interviews of key employees as well as a careful review of company practices and policies. As a result, this commenter stated that the burdens associated with the additional requirements would fall more harshly on small companies that are not equipped to navigate the regulatory process. In addition, comments also objected that the information requested would not assist the Agencies in determining whether to issue a Second Request. They noted that the identification of these systems is best reserved for the transactions that are investigated as is the Commission's current practice when issuing Second Requests.

After carefully considering these comments, and as part of its overall effort to reduce burden on filing parties, the Commission does not adopt this proposal. The Commission notes, however, that the Agencies have taken steps to update their guidance related to obligations to preserve ephemeral messages and similar communications systems, and have provided language in the Model Second Request to reflect document production and retention obligations for these communication systems.[394] Based on this guidance, companies that take steps to preserve information related to these communications systems may reduce the likelihood that they will face consequences for non-compliance with a Second Request.

L. Certification

Each HSR Filing is accompanied by a notarized certification, signed by the person preparing or supervising the preparation of the filing. The person signing the certification attests to the veracity of the information submitted in the filing. The Commission proposed amending this certification to require filers to affirm that they have taken the steps necessary to prevent the destruction of documents and information relevant to the transaction. The Commission also proposed adding language to the Instructions to remind filers that criminal statutes prohibit practices that impede or frustrate functions of government agencies, such as submitting false information. This proposal would require most HSR filers to establish new document retention policies or revise existing policies prior to filing. As explained in the NPRM, the deletion of information or documents that could be called for in a Second Request could lead to a loss of information critical to the Agency's ability to conduct an in-depth investigation.

The Commission received approximately ten comments on this proposal. Some commenters noted that the proposed rule would expand document preservation beyond current law, which obligates parties to preserve documents and information related to an ongoing or anticipated government investigation [395] or if they have a reasonable anticipation of litigation.[396] Commenters noted that very few filers have an obligation to preserve information about the transaction since they are not yet under investigation and do not have a reasonable anticipation of litigation.

Commenters also described the burden, particularly the cost, associated with document preservation obligations. Several commenters explained that litigation holds are expensive and difficult to design and implement, especially concerning the breadth of documents and information that would be subject to a hold. One commenter noted that a document hold does not simply encompass the suspension of auto-delete policies, can be difficult and expensive to implement with precision, and typically extends to individuals, databases, communication systems, and materials beyond the scope of the transaction. Another pointed out that data is expensive to store and that filers would be required to retain documents that cover large components of their day-to-day operations. According to one commenter, at the time of filing, the notifying party may not know enough about what issues will be of interest to the Agencies to identify a set of custodians who are likely to have information related to the proposed transaction.

After carefully considering the comments, the Commission has determined not to adopt this proposal. The Commission notes that, under current law, when litigation is reasonably foreseeable, parties have an obligation to preserve documents relating to the proposed transaction. This obligation could arise before or after HSR filing. In addition, it is a Federal crime for any person to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated Federal investigation.[397]

The Commission also received a few comments on the addition of language reminding the filer of potential criminal liability under other Federal statutes that prohibit various deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies. Commenters raised general concerns about how this language could alter how filers prepared their notification. One commenter stated that when read together with the requirement to preserve documents, the reminder of criminal penalties would prevent filers from instituting a tailored legal hold. Another stated that it seems to suggest that filers should fully expect a harsh and punitive response to filing errors. Commenters primarily noted that the added language merely restated existing law. Given that the proposed certification on criminal liability does not increase the burden or cost of filing and may have a benefit of putting some unaware filers on notice of possible criminal penalties, the Commission adopts this proposal as a simple restatement of existing penalties.

[394] *See* Press Release, U.S. Dep't of Justice, ''Justice Department and FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging'' (Jan. 26, 2024), *https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations. See also* Fed. Trade Comm'n, ''Slack, Google Chats, and other Collaborative Messaging Platforms Have Always Been and Will Continue to be Subject to Document Requests,'' Fed. Trade Comm'n Competition Matters blog (Jan. 26, 2024), *https://www.ftc.gov/enforcement/competition-matters/2024/01/slack-google-chats-other-collaborative-messaging-platforms-have-always-been-will-continue-be-subject.*

[395] Federal law provides serious criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated Federal investigation. *See, e.g.,* 18 U.S.C. 1519.

[396] *Zubulake* v. *UBS Warburg LLC,* 220 FRD. 212, 218 (S.D.N.Y. 2003) (holding that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents).

[397] *See* 18 U.S.C. 1519.

M. Affidavit

As discussed in section V.D., the Commission proposed requiring filings for transactions without definitive agreements to include a term sheet or draft agreement that describes with specificity the scope of the transaction that would be consummated. In conjunction with that proposal, the Commission also proposed that parties making such filings attest in their affidavit that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

As described above, the Commission modified the proposal and has made a conforming change to this section of the Instructions as part of the final rule.

VII. Severability

In the NPRM, the Commission noted that § 803.90 contains a separability (or severability) provision such that, if any provision of the Rules (including the Form) or the application of any such provision to any person or circumstance is held invalid, the other provisions of the Rules and their application to other persons or circumstances shall be unaffected.

The Commission did not propose any changes to the severability provision in § 803.90 and does not adopt any changes. However, as it did in the NPRM, the Commission confirms its intent that, if a court were to invalidate any provision, any part of any provision, or any application of the final rule, the remainder of the final rule would remain in effect to the greatest extent possible. The Commission's general view is that each substantive requirement of the final rule is severable from each of the others. The Agencies need the information requested by the final rule for the reasons discussed above. Each requirement in the final rule serves an important, related, but distinct purpose and provides a distinct benefit separate from, and in addition to, the benefit provided by other requirements. However, if a court finds that certain provisions are invalid, the following analysis applies.

The Commission notes that some reporting requirements are contingent upon filers reporting overlapping products or services in (1) the Overlap Description; (2) the Supply Relationships Description; and (3) the same NAICS codes. The severability of these reporting requirements are as follows:

Officers and Directors

If product or service overlaps are identified in the Overlap Description or Supply Relationships Description, the final rule requires the acquiring person to list officers and directors (or in the case of unincorporated entities, individuals exercising similar functions), and those who have served in the position within the past three months for each entity within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as overlaps and who have also served in these roles with the target. The Commission does not view this requirement as severable from the Overlap or Supply Relationships Descriptions. However, the Commission's view is that the two other reporting requirements regarding Officers and Directors are severable and would remain if the Overlap or Supply Relationships Descriptions are held invalid. These are the requirements to (1) list all individuals likely to serve as, nominate, or appoint an officer or director of the acquiring entity (and the accompanying requirements); and (2) for each officer and director identified, list all other entities operating in commercial activities in the same NAICS codes reported by the target for which the individual currently serves as an officer or director. The Agencies need the information in the first requirement for the reasons discussed above in sections II.B.1. and VI.D.3.c., and this first requirement would not be affected by invalidation of the Overlap or Supply Relationships Descriptions. With respect to the second requirement, the Commission has long required reporting of NAICS code information, and the reporting of NAICS code information stands independent of, and can operate separately from, the Overlap or Supply Relationships Descriptions. The changes the Commission has finalized here are modest and do not significantly alter the existing requirement to report certain NAICS code information. Accordingly, the Commission believes that the requirement to report certain officer and director information in any identified NAICS code overlap would stand even if either (1) the Overlap or Supply Relationships Descriptions were held invalid, or (2) any of the final rule's changes regarding NAICS code reporting were invalidated.

Prior Acquisitions

Filers (both acquired and acquiring persons) are required to report certain information regarding prior acquisitions that (1) derived revenue in an identified NAICS code overlap or (2) provided or produced an overlap product or service as described in the Overlap Description. If the Overlap Description is invalidated, the Commission does not view the second part of the Prior Acquisitions reporting requirement as severable from that reporting requirement. However, the first requirement regarding derived revenue in an identified NAICS code overlap would remain in place, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

Defense or Intelligence Contracts

Filers are required to identify (1) proposals submitted to the U.S. Department of Defense or any member of the U.S. intelligence community, and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, valued at $100 million or more, that (A) are or will be the source of revenues in any identified NAICS code overlap or (B) involve or will involve an overlapping product or service identified in the Overlap Description or the Supply Relationships Description. If the Overlap or Supply Relationships Descriptions are invalidated, the Commission does not view the portion of the Defense or Intelligence Contracts reporting requirement referring to the Overlap or the Supply Relationships Descriptions as severable from those reporting requirements. However, the portion requiring the reporting of certain information in any identified NAICS code overlap would remain in place, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

Annual Reports and Audit Reports for Acquiring Entities

The final rule requires the acquiring entities whose revenues contribute to a NAICS code overlap or any overlap identified in the Overlap Description to provide the most recent annual report or audit report and CIK number if annual reports are filed with the SEC. If the Overlap Description is invalidated, the Commission does not view the portion of the Annual Reports and Audit Reports requirement referring to the Overlap Description as severable from the requirement to provide an Overlap Description. However, the portion requiring annual reports or audit reports relating to NAICS code overlap would stand, for the same reasons discussed previously in connection with the

severability of the Officers and Directors requirement.

Author Information for Business Documents

For Business Documents, if (1) a NAICS code overlap has been identified, (2) an overlap within the Overlap Description has been identified, or (3) a supply relationship within the Supply Relationships Description has been identified, filers must provide certain information about the author of the documents. If the Overlap or Supply Relationships Descriptions are invalidated, the Commission does not view the portions of the Author Information requirement referring to those descriptions as severable from the Overlap and Supply Relationships Descriptions requirements. However, the portion requiring the reporting of author information if a NAICS ode overlap has been identified would stand, for the same reasons discussed previously in connection with the severability of the Officers and Directors requirement.

The Commission views all remaining provisions, parts of provisions, and applications of the final rule not specifically identified as non-severable above to be severable. These reporting requirements would have been adopted individually regardless of whether the other reporting requirements were adopted and could function effectively without the other provisions. If a reviewing court were to stay or invalidate any reporting requirement (or part or application thereof) not identified as non-severable above, the Commission states its intent to have adopted the remainder of the final rule.

VIII. Paperwork Reduction Act

On June 29, 2023, the Commission published its intention to submit the proposed rule and the associated Supporting Statement to OMB for review under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.*[398] The Commission emphasized that some of the proposed changes were intended to reduce the burden of filing [399] and that other proposed changes offered clarifications to the current rules and were unlikely to change the burden on filers.[400] Further, the Commission highlighted proposed changes that would require a filer to collect and report information kept in the filer's ordinary course of business records, minimizing the burden of new collection requirements.[401] The Commission noted that many of the proposed changes would increase the burden on all filers; [402] the Commission also noted that some of the proposed changes would significantly increase the burden on only certain filers.[403]

In conducting the PRA analysis for the proposed rule, in order to estimate the projected change in burden due to the proposed changes and to provide a baseline for public comment, PNO staff consulted current Agency staff attorneys who had previously prepared HSR filings for clients while in private practice. These experienced attorneys provided estimates of how many hours the proposed changes would require, depending on the complexity of the filing at issue. To estimate an average number of additional hours, the Commission conservatively assumed that 45% of HSR filings would be highly complex and 55% would be less complex. The Commission next multiplied the average estimate of additional hours per filing (107 hours) by the 7,096 non-index HSR filings that the Commission projected it would receive in FY 2023.[404] Finally, the Commission multiplied the total hours by an estimate of the hourly rate for executive and attorney compensation ($460/hour).

The Commission received numerous public comments referencing the NPRM's PRA burden analysis. One commenter supported the analysis, noting that the increase in the estimated time required to prepare an HSR filing is ''inconsequential,'' even ''trivial'' considering that these reporting requirements only apply to transactions valued at more than the reporting threshold. This commenter further asserted that it is appropriate to shift costs from the Agencies to the merging parties.

Some commenters, however, criticized the Commission's analysis for significantly underestimating the extent of the burden, and many raised concerns about the methodology employed by the Commission to calculate such burden. For instance, they raised concerns that the estimates are not based on empirical data or discussions with current practitioners; and that the Commission's methodology is non-verifiable, and thus not subject to empirical validation. They also argued that Agency staff's prior experience in preparing HSR filings is not relevant given the wholly different and new information requested under the proposed rule. One commenter called the Commission's approach biased and inaccurate, stating that there is no indication that Agency staff relied on any data when trying to create an estimate based on memories from past private practice. Additionally, several commenters also criticized the Commission's explanation of its PRA analysis. With respect to the survey of Agency staff, one commenter stated that the Commission failed to provide basic information, such as the number of staff surveyed, who these staff are, their level of experience in preparing HSR filings, when they last prepared HSR filings, and the results of the survey. Another commenter stated that it had no context for what the median might be for filings to better understand whether the low and high ends are outliers or the anticipated typical experience.

The Commission carefully reviewed the comments asserting that its analysis underestimated the extent of the cost and delay that would be imposed if the Commission adopted the proposed rule. The Commission was persuaded by commenters who asserted that the PRA analysis in the NPRM underestimated the time and expense associated with the proposed rule. To address commenters' concerns and recognizing the changes from the proposal discussed above in section II, the estimates are revised as reflected below.

As outlined in section I and discussed more fully in sections IV to VI above, the Commission has not adopted certain requirements in the proposed rule in an effort to reduce compliance costs, and has also modified other proposed requirements in a manner that reduces the burden in certain respects. Specifically, the Commission is not adopting proposals that would have required a timeline of key dates for closing the proposed transaction; organization charts; certain information about other interest holders; drafts of

[398] 88 FR 42178, 42207–08 (June 29, 2023).

[399] *Id.* at 42,207 (*e.g.,* the proposal to report NAICS codes in ranges rather than by specific dollar amount).

[400] *Id.* (*e.g.,* the proposal to eliminate references to paper and DVD filings).

[401] *Id.* (*e.g.,* the proposal to require the reporting of minority investors in additional entities related to the filed transaction).

[402] *Id.* (*e.g.,* the proposal to require narratives regarding transaction rationale).

[403] *Id.* (*e.g.,* filers whose businesses have existing horizontal, non-horizontal, or labor market overlaps or relationships).

[404] In January 2023, the Commission requested a three-year extension of its PRA clearance for information collection requirements related to the existing HSR rules, which was approved by OMB on February 23, 2023, through February 28, 2026 (OMB Control Number 3084–0005). *See* 88 FR 3413, 3414 (Jan. 19, 2023). At that time, FTC staff projected an average of 7,096 non-index filings per year for fiscal years 2023–2025. This estimate of 7,096 non-index filings was based on the fact that the FTC received 6,518 non-index filings in fiscal year 2022 and had experienced an average annual increase in filings of 4.3% in the pre-COVID fiscal years 2017–2019. Actual non-index filings in FY 2023 totaled 3,515. *See* Fed. Trade Comm'n & Dep't Just., Hart-Scott-Rodino Annual Report, Fiscal Year 2023 appendix A (FY 2023).

submitted documents; information about employees; information about board observers; geolocation information; prior acquisitions involving entities with less than $10 million in sales or revenues or consummated more than 5 years prior to filing; and information about steps taken to preserve documents or use of messaging systems. These items were frequently cited by commenters as unduly burdensome. While this information is relevant to the Agencies' premerger assessment, the Commission has determined it can forgo requiring this information at this time. The Commission also has modified, in some instances substantially, many other proposed information requirements, which will reduce the burden on filers to collect and report this information. As a result, the information requirements contained in the final rule are significantly less burdensome than those reflected in the proposed rule, and the costs imposed on filers are thus reduced as compared to the proposed rule.

Before finalizing the changes adopted in the final rule, the Commission undertook a new survey of Agency staff that responds to comments critiquing the estimate in the NPRM and implemented several improvements to its methodology, as explained below. The Commission believes that in light of these improvements, the estimates of the incremental costs associated with the final rule are reliable and consistent with survey techniques used by others to calculate the burden of filling out a form.[405]

The new survey included 15 current FTC and DOJ attorneys who have recent experience preparing HSR filings in private practice. The Commission asked each survey participant to estimate, based on their own experience with preparing HSR Filings, the incremental change in hours that would be required to respond to each of the new and updated items in the final rule. They were also asked to estimate how much time would be saved by no longer having to provide information for current requirements that are not included in the final rule. The survey participants were provided with (1) the current HSR Form and Instructions; (2) the HSR Form and Instructions for both acquiring and acquired persons for the final rule; (3) a spreadsheet listing each of the new, updated, and eliminated items for three categories of transactions; and (4) instructions regarding how to input their responses.

The survey participants provided estimates for the amount of time required to collect and submit information responsive to each of the new and updated items in the final rule, separately for acquiring and acquired persons, and separately for three types of HSR-reportable transactions that reflect varying levels of complexity and antitrust risk: (1) the new category of select 801.30 transactions; (2) transactions with no reportable competitive overlaps (*e.g.,* where an investment fund is buying or selling a portfolio company with no NAICS or competitive overlap or supply relationship); and (3) transactions where the parties report at least one NAICS code overlap or have an existing overlap or supply relationship (referred to below as ''overlap'' filings). They were asked to estimate the incremental change in costs of complying with each new and adjusted information requirement contained in the final rule in each of the categories and for each type of filer. Also, for each item, the survey participants were asked to indicate what percentage of the additional time required would be time spent by company personnel as compared to a law firm hired to prepare the HSR Filing or any third parties that would need to be hired to complete the HSR Form (*e.g.,* data vendors).

In generating their estimates, the survey participants were asked to consider all time spent to complete the HSR Form,[406] including time spent reviewing the HSR Instructions; generating and compiling the materials necessary for collection; acquiring, installing, and utilizing any necessary technology or systems; and completing and reviewing the collected information, among other tasks. They were also asked to consider whether filers would need to incur additional costs not necessarily measured in hours, *e.g.,* the costs associated with new IT investments, long-lived facilities or equipment, related one-time expenditures, and other non-labor expenditures, such as attorney training or general HSR resources.

The Commission took several steps to increase the reliability of its survey. First, to reduce sampling bias as much as possible, the Commission relied on Agency staff who have not been involved in this rulemaking and thus have no more familiarity with the changes to the HSR Form and Instructions than an attorney in private practice would have. As exclusion criteria, the Commission did not survey any staff from the FTC's Premerger Notification Office, nor any staff at either Agency who were part of the core team responsible for drafting the final rule.

Second, the survey participants were asked to provide details about their experience preparing HSR filings in private practice, both in terms of how many years they were in private practice and the number and types of transactions involved. Collectively, the survey participants had experience with each of the three types of HSR-reportable transactions described above. Based on the information provided, the survey participants with the most experience tended to generate a lower estimated number of hours than the average.

The Commission believes that, with these controls, the individuals who provided estimates for the PRA burden assessment had sufficient experience with the current HSR reporting requirements and enough understanding of the HSR Rules and practice to make their estimates of incremental costs reliable.

Based on the survey responses, the Commission finds that the average number of additional hours required to prepare an HSR filing with the changes outlined in the final rule is 68 hours, with an average low of 10 hours for select 801.30 transaction filings by the acquired person and an average high of 121 hours for filings from acquiring person in a transaction with overlaps or supply relationships. As noted, however, the estimate varies significantly based the type of filings, with filings that are more likely to raise antitrust risk requiring higher hours.

To calculate the average number of additional hours, the averages of the estimates provided by respondents were calculated separately for each change for both the acquiring and acquired person within each category of transaction. These averages were then summed by category of transaction and then divided by two to provide category-specific estimated averages for an individual filer to comply with all changes. The overall average estimate for an

[405] This same survey technique, asking experienced HSR practitioners to estimate the time required to comply with the new information requirements in addition to other costs, was used in the Kothari Report, discussed below.

[406] The Commission notes that parties to acquisitions, whether HSR-reportable or not, may hire antitrust counsel to assess whether the transaction would violate any of the antitrust laws. This is a different task from evaluating whether a transaction requires notification pursuant to the HSR Act, and if so, how to comply with the Form and Instructions. The final rule does not require any information from attorneys or any other advisors to assess the antitrust risk of the transaction. As a result, any cost related to the assessment of the potential for a substantive antitrust risk, rather than compliance with the information requirements of the Form and Instructions, are not costs attributable to the final rule and are not included in this PRA analysis.

individual filer was calculated as a weighted average of these category-specific estimates for an average filer, using as weights the Agencies' estimate of the fraction of filings that fall into each of the three categories. Specifically, the Commission estimates that 8 percent of filings will meet the definition of a select 801.30 transaction,[407] 45 percent will have a NAICS code overlap or an overlap or supply relationship identified in the Competition Descriptions section, and 47 percent of filings will have no overlaps or supply relationship.

One commenter commissioned a report (the Kothari Report, referenced in section III.C.2.) to estimate the additional monetary costs of the proposed rule and relied on a survey of company and private counsel to estimate the time required to comply with the new requirements of the proposed rule as compared to the current rules.[408] From the responses to this survey, the Kothari Report estimated that the proposed rule as published in the NPRM would have added 101.6 hours of internal personnel time and 140.3 hours of outside counsel time above the current requirements for a total incremental increase of 241.9 hours. Although this estimate is substantially higher than the estimate based on the Commission's new survey, the Kothari Report estimated costs for the proposed rule, and may have included costs related to advocacy about whether a transaction violates an antitrust law, rather than only costs related to collection and submission of information required by the Form and Instruction, as indicated by its inclusion of costs of economic experts. In contrast, the Commission has estimated the additional time attributable to the less burdensome requirements of the final rule and has included in its estimates only that time that is required to complete an HSR Filing that is fully compliant with the Act and the Rules. Given the significant modifications from the proposed rule to the final rule that lessen the estimated burden, the Commission finds the results of its new survey to be generally consistent with the survey relied on in the Kothari Report.

Several commenters also questioned the hourly rate that the Commission relied on to calculate the estimated cost of compliance. One commenter stated that the Commission's estimate of $460 per hour may underestimate the blended hourly rate applicable to most HSR filings, particularly given attorney billing rates and that such filings often require senior executive participation. Another noted that the rate is below the nationwide average hourly rate for M&A attorneys. Others objected to the lack of support for the previously assumed hourly wage and description of how the Commission calculated the assumed hourly wage. One commenter suggested that a more realistic average rate for outside counsel is $936 per hour; however, no law firm that submitted comments specified a different hourly rate that should be applied.

The Commission has carefully reviewed and considered the comments submitted regarding the hourly rate and has determined to apply a blended hourly rate of $583. To reach this number, the Commission consulted additional resources regarding the rates for outside counsel and in-house personnel. In an effort to make as few assumptions as possible, the Commission used current data from reliable, publicly available sources. Although the actual rates charged by HSR practitioners (and attorneys generally) are not typically publicly available (and no commenter provided actual rates), the Commission reviewed public media and industry reports to determine a range of approximate values that would realistically reflect the costs to prepare an HSR filing.

The ELM Solutions 2023 Real Rate Report published by Wolters Kluwer reports data regarding the 2023 hourly rates charged by corporate M&A attorneys.[409] According to the report, at firms with more than 1,000 lawyers, the nationwide mean rate charged by partners in 2023 was $1,254 per hour and the nationwide mean rate charged by associates in 2023 was $781 per hour. At firms with 501 to 1,000 lawyers, the nationwide mean rate charged by partners was $1,213 per hour and for associates it was $801 per hour. At firms with 201 to 500 lawyers, the nationwide mean rates were $786 per hour for partners and $519 per hour for associates.

The Commission notes that HSR filings are not typically prepared exclusively by M&A law firm partners or exclusively by M&A associate attorneys. As a result, relying on one mean rate or the other would be inappropriate. The WK 2023 Real Rate Report indicates that with regard to corporate M&A matters from 2020–2023 that resulted in 40–100 total billed hours, approximately 45% of the hours billed were at the partner hourly rate, and approximately 49% of the hours billed were at the associate hourly rate.[410] The report further notes that approximately 7% of the hours billed were at a lower paralegal hourly rate.[411]

The Commission further notes that HSR filings are not prepared exclusively by the largest law firms, nor is it necessary for filers to engage such counsel. To account for filings prepared by small to mid-sized firms, the Commission calculated blended rates for both partners and associates by weighting the nationwide mean rates for firms with more than 1,000 lawyers (67%) and firms with 201 to 500 lawyers (33%). Applying the billing percentages in the WK 2023 Real Rate Report to those blended rates, the Commission calculated a blended rate for outside counsel of approximately $878 per hour.

To generate an overall blended rate, the Commission also accounted for the cost of client time spent preparing the filing, which could include a range of employees depending on the type of business and may include in-house counsel. The Commission has factored in an hourly rate for in-house personnel of approximately $140 per hour, which reflects current wage data reported by the Bureau of Labor Statistics.[412] Additionally, the Commission believes that 60% of the time required to prepare

[407] Estimated based upon a review of HSR Filings from fiscal years 2018 through 2022.

[408] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684. The Kothari Report reflects the results of a survey of antitrust practitioners conducted by the Chamber of Commerce seeking input on the proposed rule as well as the Agencies' draft merger guidelines. *See* U.S. Chamber of Com., ''U.S. Chamber HSR/Merger Guides Practitioner Survey'' (Sept. 19, 2023), *https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.* The Kothari Report was prepared by Professor S.J. Kothari and is appended to its comment at 54–85.

[409] Wolters Kluwer's ELM Solutions, 2023 Real Rate Report (2023). *See also* Ctr. Ethics & L. Prof. at Geo. L. & Thomson Reuters Inst. 2024 Report on the State of the US Legal Market 11–12 (Jan. 8, 2024) (discussing rise in law firm worked rates over the past five years as well as the counterinfluence of billing realization practices); Andrew Maloney, ''Where Are Partner Billing Rates Surging the Most in Big Law?,'' Am. L. (May 24, 2023) (noting a 2023 median hourly rate for M&A partners of $955 per hour).

[410] Wolters Kluwer's ELM Solutions, *supra* note 410, at 214.

[411] Instead of separately estimating a paralegal hourly rate, the Commission conservatively estimated that the remaining 7% assigned to paralegals in the WK 2023 Real Rate Report would be work performed at the associate's hourly rate.

[412] This assumed hourly rate is based on the median wage for lawyers, which according to the Bureau of Labor Statistics was $70.08 in 2023. See *https://www.bls.gov/ooh/legal/lawyers.htm.* The Commission doubles this number to reflect the lost productivity of the worker. The Commission notes that a company's top executives may also participate in preparing or reviewing the filing; however, since the median wage for top executives was $49.92 in 2023, to be conservative the Commission values top executive time at the same rate as lawyer time. *See https://www.bls.gov/ooh/management/top-executives.htm.*

the HSR filing is time spent by outside counsel and 40% is time spent by the client. These percentages are supported by survey results from Agency staff and are also consistent with the survey results in the Kothari Report. By weighting the hourly rates for outside counsel and in-house personnel accordingly, the Commission calculates an overall blended rate of $583 per hour. This adjusted hourly rate generally reflects publicly available information; however, it does not reflect real-world factors that would likely drive down the overall cost of preparing an HSR filing under the final rule (*e.g.,* client-negotiated rates, discounts, write-offs, alternative fee agreements, and work shifted to paralegals and other support staff at substantially lower rates).

Multiple commenters cited to the Kothari Report as providing a better estimate of the additional costs of the proposed changes and concluding that the true cost of the proposed rule may be many times greater than the NPRM suggested. But the Commission has accounted for many of the same costs in its own estimates, such as the time required from outside counsel, in-house counsel, and business personnel. Much of the difference in estimates is attributable to the higher hourly rate applied to the required hours, which the Kothari Report suggests is more likely $936 per hour, and a category of ''other'' costs that is nearly one-third of the total projected costs.[413] These additional costs are attributable to ''other external costs'' that include economic consultants, investment bankers, and data vendors.

The Commission does not believe that there will be this level of additional costs outside of internal personnel and outside counsel. In particular, completing the new requirements contained in the final rule should not require the services of economic consultants or investment bankers. As described above, the Form and Instructions require information from the parties' own records. The Commission specifically is not seeking an analysis or post-hoc rationales developed by external parties. As for data vendors and similar services for the collection and production of the required information, in its new survey of Agency staff, the Commission asked the survey participants to indicate for each item the percentage of time that should be allocated to third parties that they did not otherwise attribute to time spent by outside counsel. Only a few of the survey participants indicated any need for third-party involvement—and even for those few, they estimated only a small percentage of time for a limited set of items (*e.g.,* for translations). As a result, there is no basis to further adjust the Commission's estimates to account for ''other'' external costs.

Commenters also objected that the Commission failed to consider the indirect costs to the economy that would result when parties are discouraged from pursuing clearly nonproblematic deals. The PRA does not require the Commission to consider potential indirect costs to the economy presented by the changes described in the proposed rule. Under the PRA, the term ''burden'' means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency, including the resources expended for (A) reviewing instructions; (B) acquiring, installing, and utilizing technology and systems; (C) adjusting the existing ways to comply with any previously applicable instructions and requirements; (D) searching data sources; (E) completing and reviewing the collection of information; and (F) transmitting, or otherwise disclosing the information.[414] Comments related to indirect costs attributable to the final rule are discussed in section III.C.

Despite these points of disagreement, the Commission notes that its estimate for the increase in the average number of hours required to prepare an HSR filing is generally consistent with the estimates put forth by commenters, including in the Kothari Report, which were based on the proposed rule but not the final rule. The Commission believes that the differences in projected total costs are mainly attributable to (1) the significant modifications that were made to the final rule as compared to the proposed rule; (2) the difference in the hourly rates ($583 versus $936); (3) a category of ''other'' costs that unduly increased total costs by one-third; and (4) use of projected filings for FY 2023 (7,096), which the Commission now replaces in its calculation with the actual number of filings for FY 2023 (3,515). The Commission's PRA assessment for the final rule addresses concerns raised by the commenters related to the methodology used in the NPRM.

Net Effect

The changes outlined in the final rule only affect non-index filings which, for FY 2023, totaled 3,515. As described above, the Commission estimates that the amendments to the HSR Rules and Notification and Report Form contained in the final rule could increase the time required to prepare responses for non-index filings, with an estimated average increase of 68 hours per filing. Thus, the annual estimated additional hours burden is 239,020 (3,515 non-index filings multiplied by 68 additional hours per filing). Applying the revised estimated hours, 239,020, to the updated hourly rate of $583 for executive and attorney compensation yields approximately $139.3 million in total additional annual costs for a year with that number of filings. The additional per filing cost is estimated at $39,644 (68 hours multiplied by $583 per hour). However, the Commission believes that this PRA cost estimate may overestimate the actual PRA burden. For a variety of reasons, costs for any particular transaction are likely to be different from these estimates. The final rule will result in higher costs for those transactions that present the most antitrust risk, and the PRA estimates do not take account of the substantial benefits to the Agencies, the parties, and third parties generated from a more efficient premerger review process that shifts some of the burden of information collection and reporting away from third parties to the merging parties and allows the Agencies to obtain critical business facts earlier in the initial waiting period, which in turn helps mitigate avoidable costs associated with Second Requests that might have been avoided or that were not tailored to areas of competitive concern due to insufficient information in the HSR Filing. In addition, the annual costs associated with the final rule will be directly related to the number of reportable transactions. See section III.C. Finally, any estimated additional hours burden is expected to decline over time as filers become more familiar with the HSR Form and Instructions.

The amendments are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes.

[413] Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 74–75 (other costs estimated at $102,917, added to external costs of $234,259 for a total of $313,828, with other costs 33% of total).

[414] 44 U.S.C. 3502(2); *see also* 5 CFR 1320.3(b) (defining burden); U.S. General Services Administration & Office of Management and Budget, ''A Guide to the Paperwork Reduction Act: Estimating Burden,'' *https://pra.digital.gov/burden/* .

The Commission believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of Federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions.

Basis for OMB Assessment

Finally, one commenter stated that the proposed rule provides an insufficient basis for the Office of Management and Budget (OMB) to conduct the informed and accurate assessment required by the PRA. The OMB typically defers its substantive review until the final rule stage and did not provide substantive feedback on the NPRM. However, the Commission disagrees with the commenter and believes that it has provided a sufficient basis for OMB to conduct an informed and accurate PRA assessment. Based on comments it received, the Commission narrowed the information requirements in the final rule, conducted a new survey to estimate costs, and revised its PRA analysis accordingly. The Commission believes that its revised assessment provides a sufficient basis for OMB review under the PRA.

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 through 612, requires that an agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on ''small entities,'' unless the agency certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[415] Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Commission certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

The Commission finds that the final rule will not affect a substantial number of small entities, because small entities will be affected only when they are party to a transaction that exceeds the HSR Act thresholds, and less than 0.02% of the nation's small entities file premerger notifications in any given year. Furthermore, the economic impact on the very few small entities that are required to file is not significant, because smaller businesses generally have fewer employees, generate fewer documents related to a transaction, and are involved in less complex transactions, all of which will minimize their costs of complying with the final rule. Further, these costs will generally account for a small fraction (less than 0.5%) of the value of the transaction. This document serves as the required notice of this certification to the SBA's Chief Counsel for Advocacy.[416]

The Commission also certified in the NPRM that the changes in the proposed rule would not, if adopted, have a significant economic impact on a substantial number of small entities. Commenters objected to the Commission's reliance on this certification and stated that the Commission failed to use the proper definition of small business or to discuss the proposed rule's impact on them.[417] The Commission responds by providing an assessment of how many small businesses are subject to the reporting requirements of the HSR Act and therefore would be impacted by the final rule. The Commission also notes that the final rule does not change which entities (including which small entities) are required to submit HSR Filings.

Under the RFA, ''small entities'' are defined as small businesses, not-for-profit organizations that are independently owned and operated and not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[418] The term ''small business'' has the same meaning as the term ''small business concern'' under section 3 of the Small Business Act, meaning that it must be independently owned and operated and not dominant in its field of operation.[419] The Small Business Act permits the Small Business Administration (SBA) to specify size standards by which a business may be determined to be a ''small business concern.''[420] The SBA publishes these standards at 13 CFR 121.201.

To determine whether a regulatory action will impact a ''substantial number'' of small entities, SBA Guidance encourages agencies to examine the number of small businesses affected by a given rule relative to the total number of small businesses in the regulated industry. The regulated industry may include the ''entire universe of small businesses'' where a rule's reach is economy wide.[421] That is the case here, as the HSR Rules apply broadly to the entire economy, and all persons involved in reportable transactions are required to file an HSR Form, irrespective of industry.

The SBA estimates that, as of March 2023, there were approximately 33.2 million small businesses in the United States.[422] As explained below, due to the filing thresholds Congress established in the HSR Act, the small businesses that would have to report a transaction under the HSR Act represent a tiny fraction of this number. Even under the counterfactual and extreme assumption that all of 6,288 HSR filings received in FY2022 were made by small businesses,[423] less than 0.02% (6,288 divided by 33.2 million) of all small businesses would need to file an HSR Form. Such a de minimis number of small businesses does not qualify as a ''substantial number'' of small entities under the SBA's Guidance.[424] In an abundance of caution, however, as detailed below, the Commission analyzed a randomized sample of the filings received in FY2022 and further estimates that the final rule will apply to less than 0.0007% of small businesses. Therefore, the final rule will

[415] 5 U.S.C. 605(b).

[416] *Id.*

[417] One commentor suggested that the increased information requirements will, on the margin, lead to less investment by private equity in small businesses. Such indirect effects are not the proper subject of RFA analyses. *See, e.g., Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 868 (D.C. Cir. 2001) (rejecting the contention that the RFA applies to small businesses indirectly affected by the regulation of other entities).

[418] 5 U.S.C. 601.

[419] *See id.* at 601(3) (cross-referencing 15 U.S.C. 632).

[420] 15 U.S.C. 632(a)(2)(A). The Commission does not expect that the final rule will impact other types of ''small entities'' (not-for-profit organizations that are independently owned and operated and not dominant in their fields and governmental jurisdictions with populations of less than 50,000). In the Agencies' experience, governmental jurisdictions are typically not parties to transactions that would be subject to the HSR Act. As a result, the Commission has focused its analysis on small businesses as defined by the SBA.

[421] U.S. Small Bus. Admin., Office of Advocacy, ''How to Comply with the Regulatory Flexibility Act'' 21 (Aug. 31, 2017), *https://advocacy.sba.gov/2017/08/31/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/* (''Depending on the rule, the substantiality of the number of small businesses affected should be determined on an industry-specific basis and/or on the number of small businesses overall. For example, the Internal Revenue Service, when changing the tax deposit rules, would examine the entire universe of small businesses to see how many would be affected.'').

[422] U.S. Small Bus. Admin., Office of Advocacy, ''Frequently Asked Questions'' (Mar. 2023), *https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.*

[423] Federal Trade Commission, Hart-Scott-Rodino Annual Report Fiscal Year 2022, appendix A.

[424] U.S. Small Bus. Admin., Office of Advocacy, *supra* note 424, at 21 (''The interpretation of the term 'substantial number' is not likely to be five small firms in an industry with more than 1,000 small firms.'').

not apply to a substantial number of small businesses.

The SBA regulations define ''small business'' primarily based on firm revenue or total number of employees, depending on the industry.[425] For industries where the SBA uses revenue to define ''small business,'' the revenue thresholds vary from $2.25 million to $47 million. In other industries, the SBA definition of small is based upon the number of employees. These thresholds range from 100 to 1,500 employees. Finally, certain finance-related industries are defined as small if they have less than $850 million in assets. Each NAICS code has a corresponding SBA threshold to determine whether a business generating revenue in that code is ''small.'' [426] In addition to these thresholds, businesses must also be independently owned and operated and not dominant in their fields on a national basis and satisfy additional criteria to be considered ''small.'' [427] The calculation of the size of a business must also give present effect to agreements to mergers and acquisitions, including agreements in principle.[428]

To estimate how many small entities so defined might be required to make an HSR filing, the Commission analyzed a randomly selected, statistically significant 10% sample of the filings submitted in FY 2022. Of that sample, the Commission first eliminated filings made by individuals in their individual capacity, and not as the ultimate parent entity of a business, such as for filings resulting from executive compensation. Second, the Commission used NAICS code information and financials reported by the acquiring or acquired person to determine if they qualified as a small business by revenue or assets, as applicable. For NAICS codes with thresholds based upon the number of employees, the Commission used public information or documents submitted by the filing parties to determine if they qualified as a small business based on the number of employees. For transactions in which the acquiring person filed for control of the acquired entities, the Commission analyzed the acquiring person and acquired entities after giving effect to the change of control.[429] Additionally, because a small business must be independently owned and operated, all filings where an investment group was the ultimate parent entity of the acquiring or acquired person were coded as not small businesses. The Commission does not have information sufficient to determine whether other filers are independently owned and operated, but where the Commission lacked sufficient information to exclude a business on this basis, they were counted as a small business even if they may not truly qualify as one. As a result, the estimates below are likely over-inclusive; that is, it is likely that fewer filers were small than were coded as small in the sample.

Table 6: Estimated Number of Small Business HSR Filers in Fiscal Year 2022

Estimated # of	FY 2022 (Sample x 10)	As % of Small Businesses*	As % of M&A Parties**	As % of # of HSR Filings***
Small Buyers that May Remain Small After Consummation of the Transaction	40	0.00012%	0.13%	0.64%
Small Targets that May Remain Small After Consummation of the Transaction	180	0.00054%	0.57%	2.86%
Total # of Filers That May Remain Small After Consummation of the Transaction	220	0.00066%	0.70%	3.50%

* Small Businesses in 2022 = 33,200,000

** M&A Parties in 2022 = 31,468 (15,734 x 2)

*** Number of Filings FY2022 = 6,288

As shown above in Table 6,[430] the Commission estimates that in FY 2022, it received up to 220 filings from businesses that meet the definition of small (22 found in the 10% sample). Of these, approximately 180 (18 found in the 10% sample) were the targets of the transaction, and 40 (4 found in the 10% sample) were the buyers. As a result, the Commission estimates than less than 0.0007% of small businesses will be affected by the final rule.[431]

This is consistent with the structure of the HSR Act, which focuses on larger mergers, as defined by dollar value.[432] The framework of the Act established three tests that together serve to limit the applicability of the Act for small businesses: (1) the Commerce Test; (2) the Size of the Transaction Test; and (3) the Size of the Person Test.[433]

[425] 13 CFR 121.201.

[426] *Id.*

[427] 15 U.S.C. 632.

[428] 13 CFR 121.103(d)(1).

[429] The Commission notes that filers must attest (1) to their good faith intent to consummate a transaction, and (2) in all transactions to which 16 CFR 801.30 does not apply, that a contract, agreement in principle or letter of intent to merge or acquire has been executed. *See* 16 CFR 803.5.

[430] *See* Table 1 (showing 15,734 acquisitions in 2022).

[431] Though the SBA regulations give effect to agreements, including agreements in principle, when determining size, the Commission also analyzed whether the sample of filers might meet the thresholds if agreements resulting in a change of control were not considered. Here too, the Commission finds that the final rule does not affect a substantial number of small entities. It estimates that in FY2022 approximately 850 filers may have met the definition of small if the effect of agreements is not considered, representing less than 0.003% of small businesses in the United States, approximately 2.70% of the estimated number of M&A parties, and 13.52% of FY 2022 HSR filers.

[432] The Commission now provides this information to give context about the reach of the Act and does not rely upon any of the HSR reporting thresholds in this certification, since it has conducted an analysis of the filing parties using the SBA's definitions of small, as described above. Therefore, the Commission does not address comments related to the RFA analysis provided in the NPRM that drew different conclusions from the statutory thresholds.

[433] 15 U.S.C. 18a(a).

Table 7: Current HSR Form Filing Thresholds

	Size of Transaction (SOT) (as adjusted, as of March 6, 2024)		
	SOT ≤ $119.5 M	$119.5 M > SOT ≤ $478 M	SOT > $478 M
HSR Filing required?	No	No, unless the Size of Person Test is met.	Yes

The Commerce Test is met if either party is engaged in commerce or any activity affecting commerce.

Under the Size of the Transaction Test, no filing is required if the transaction is valued at $119.5 million [434] or less. Transactions valued between $119.5 million and $478 million only must be reported if the acquiring and acquired person also meet the Size of the Person Test. Transactions valued at more than $478 million are reportable regardless of the Size of the Person Test.

Where the Size of the Person Test applies, premerger notification is required only if (1) the acquiring person has total assets or annual net sales of $23.9 million (2024 adjusted value) and the acquired person has total assets or annual net sales of $239 million (2024 adjusted value); or (2) the acquiring person has total assets or annual net sales of $239 million (2024 adjusted value) and the acquired person has total assets (or, if it is ''engaged in manufacturing,'' annual net sales) of $23.9 million (2024 adjusted value). If these size thresholds are not met, no filing is required. For example, in 2024, if the size of a transaction were $475 million and the acquiring person had $1 billion in assets and revenue, but the acquired person was not engaged in manufacturing and had $220 million in revenue but only $20 million in assets, no filing would be required.

The final rule also will not have a significant economic impact on small entities that are required to file. An HSR filing is not an ongoing cost for small businesses. Instead, the costs are incurred only when a small business is a party to a reportable transaction. Therefore, the Commission does not expect that the costs of complying with the final rule will cause a significant impact on affected small businesses.

For the less than 0.0007% of American businesses that will remain small after engaging in an HSR reportable transaction, the impact will be minimal. Even in a case of a complex transaction between two small businesses where the size of the transaction was at the threshold (currently $119.5 million), the Commission estimates that the additional cost imposed by the final rule would be approximately 0.12% of the value of the transaction.[435] For the majority of transactions involving small businesses, actual costs are likely much lower and would represent an even smaller percentage of the proceeds from the transaction. For example, based upon the Commission's review of the sample of FY 2022 transactions, in some transactions involving a presumptively small business, the size of transaction value exceeded $1 billion, resulting in the additional cost of the final rule representing less than 0.015% of the transaction value for even a complex transaction.[436]

Finally, the Commission has no reason to believe that the final rule will have a significant economic impact on any entity, let alone entities that have assets or revenues substantial enough to meet the HSR Act's reporting thresholds but that nevertheless qualify as small businesses. As detailed in the final rule, the Commission estimates that the changes would result in approximately 10 to 121 additional hours per filing, depending on the complexity of the filing at issue. In the Commission's experience, smaller businesses have fewer lines of business and fewer employees, generate fewer documents related to a transaction and maintain fewer ordinary course documents, and are involved in less complex transactions, all of which will minimize their costs of responding to the document requests contained within the final rule, to the extent their compliance is even triggered under the HSR Act's thresholds.

Accordingly, the Commission hereby certifies that the final rule will not have a significant impact on a substantial number of small entities.

X. Congressional Review Act

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

List of Subjects

16 CFR Parts 801

Antitrust.

16 CFR Part 803

Antitrust, Fees, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801 and 803 as set forth below:

PART 801—COVERAGE RULES

■ 1. The authority citation for part 801 is revised as follows:

Authority: 15 U.S.C. 18a(d); 15 U.S.C. 18b.

■ 2. Amend § 801.1 by revising examples 1, 4, 5, and 6 in paragraph (d)(2) and by adding paragraph (r) to read as follows:

§ 801.1 Definitions

* * * * *

(d) * * *

(2) * * *

Examples: 1. ABC Investment Group has organized a number of investment partnerships. Each of the partnerships is its own ultimate parent, but ABC makes the investment decisions for all of the partnerships. One of the partnerships intends to make a reportable acquisition. For purposes of the Notification and Report Form, each of the other investment partnerships, and

[434] When Congress passed the HSR Act, it created minimum dollar thresholds for mandatory premerger reporting. In 2000, Congress amended the HSR Act to require an annual adjustment of these thresholds based on the change in gross national product. As a result, reportability under the Act changes from year to year as the statutory thresholds adjust. The most recent adjustment became effective March 6, 2024.

[435] Estimated cost for acquiring and acquired persons combined in transactions with overlaps using highest average cost (242 hours × $583) divided by the $119,500,000 threshold.

[436] Estimated cost for acquiring and acquired persons combined in transactions with overlaps using highest average cost (242 hours × $583) divided by $1,000,000,000.

ABC Investment Group itself, are associates of the partnership that is the acquiring person. In the Minority-Held Entity Overlaps section of the Notification and Report Form, the acquiring person will disclose any of its 5 percent or greater minority holdings that generate revenues in any of the same NAICS codes as the acquired entity(s) in the reportable transaction. In this same section, the acquiring person would also report any 5 percent or greater minority holdings of its associates in the acquired entity(s) and in any entities that generate revenues in any of the same NAICS codes as the acquired entity(s). In the Controlled Entity Geographic Overlaps section of the Notification and Report Form, the acquiring person will indicate whether there are any NAICS code overlaps between the acquired entity(s) in the reportable transaction, on the one hand, and the acquiring person and all of its associates, on the other.

* * * * *

4. CORP1 controls GP1 and GP2, the sole general partners of private equity funds LP1 and LP2 respectively. LP1 controls GP3, the sole general partner of MLP1, a newly formed master limited partnership which is its own ultimate parent entity. LP2 controls GP4, the sole general partner of MLP2, another master limited partnership that is its own ultimate parent entity and which owns and operates a natural gas pipeline. In addition, GP4 holds 25 percent of the voting securities of CORP2, which also owns and operates a natural gas pipeline.

MLP1 is acquiring 100 percent of the membership interests of LLC1, also the owner and operator of a natural gas pipeline. MLP2, CORP2 and LLC1 all derive revenues in the same NAICS code (Pipeline Transportation of Natural Gas). All of the entities under common investment management of CORP1, including GP4 and MLP2, are associates of MLP1, the acquiring person.

In the Controlled Entity Geographic Overlaps section of the Notification and Report Form, MLP1 would identify MLP2 as an associate that has an overlap in pipeline transportation of natural gas with LLC1, the acquired person. Because GP4 does not control CORP2 it would not be listed in this section, however, GP4 would be listed in the Minority-Held Entity Overlaps section of the Notification and Report Form as an associate that holds 25 percent of the voting securities of CORP2. In this example, even though there is no direct overlap between the acquiring person (MLP1) and the acquired person (LLC1), there is an overlap reported for an associate (MLP2) of the acquiring person in the Controlled Entity Geographic Overlaps section of the Notification and Report Form.

5. LLC is the investment manager for and ultimate parent entity of general partnerships GP1 and GP2. GP1 is the general partner of LP1, a limited partnership that holds 30 percent of the voting securities of CORP1. GP2 is the general partner of LP2, which holds 55 percent of the voting securities of CORP1. GP2 also directly holds 2 percent of the voting securities of CORP1. LP1 is acquiring 100 percent of the voting securities of CORP2. CORP1 and CORP2 both derive revenues in the same NAICS code (Industrial Gas Manufacturing).

All the entities under common investment management of the managing entity LLC, including GP1, GP2, LP2 and CORP1 are associates of LP1. In Minority-Held Entity Overlaps section of the Notification and Report Form, LP1 would report its own holding of 30 percent of the voting securities of CORP1. It would not report the 55 percent holding of LP2 in Minority-Held Entity Overlaps section of the Notification and Report Form because it is greater than 50 percent. It also would not report GP2's 2 percent holding because it is less than 5 percent. In the Controlled Entity Geographic Overlaps section, LP1 would identify both LP2 and CORP1 as associates that derive revenues in the same NAICS code as CORP2.

6. LLC is the investment manager for GP1 and GP2 which are the general partners of limited partnerships LP1 and LP2, respectively. LLC holds no equity interests in either general partnership but manages their investments and the investments of the limited partnerships by contract. LP1 is newly formed and its own ultimate parent entity. It plans to acquire 100 percent of the voting securities of CORP1, which derives revenues in the NAICS code for Consumer Lending. LP2 controls CORP2, which derives revenues in the same NAICS code. All of the entities under the common management of LLC, including LP2 and CORP2, are associates of LP1. For purposes of the Controlled Entity Geographic Overlaps section of the Notification and Report Form, LP1 would report LP2 and CORP2 as associates that derive revenues in the NAICS code that overlaps with CORP1. Even though the investment manager (LLC) holds no equity interest in GP1 or GP2, the contractual arrangement with them makes them associates of LP1 through common management.

* * * * *

(r)(1) *Foreign entity or government of concern.* The term *foreign entity or government of concern* means:

(i) An entity that is a foreign entity of concern as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)); or

(ii) A government, or an agency thereof, of a foreign country that is a covered nation as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)(C)).

(2) *Subsidy.* The term *subsidy* has the meaning given to the term in part IV of title VII of the Tariff Act of 1930 (19 U.S.C. 1677(5)(B)).

PART 803—TRANSMITTAL RULES

■ 3. The authority citation for part 803 is revised to read as follows:

Authority: 15 U.S.C. 18a(d); 15 U.S.C. 18b.

■ 4. Amend § 803.2 by:
■ a. Revising paragraph (a);
■ b. Removing paragraph (b) and the undesignated example following paragraph (b);
■ c. Redesignating paragraphs (c), (d), (e), and (f) as paragraphs (b), (c), (d), and (e), respectively; and
■ d. Revising newly redesignated paragraphs (b), (d), and (e). The revisions read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

(a)(1) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding §§ 801.1(c)(2) and 801.2 of this chapter, only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example 1 to paragraph (a)(1). Jane Doe, her husband, and minor child collectively hold more than 50 percent of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the ''ultimate parent entity'' of a ''person'' composed to herself (or her husband or minor child) and F; see § 801.1(a)(3), (b), and (c)(2) of of this chapter. If corporation F is to

acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband, and minor child collectively.

(2) Persons that are both acquiring and acquired persons shall submit separate forms, one as the acquiring person and one as the acquired person, following the appropriate instructions for each.

(b) In response to the Revenue and Overlaps section of the Notification and Report Form, information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

* * * * *

(d) For annual reports and audit reports required by the Notification and Report Form, a person filing the notification may, instead of submitting a document, provide a cite to an operative internet address directly linking to the document, if the linked document is complete and payment is not required to access the document. If an internet address becomes inoperative during the waiting period, or the document is otherwise rendered inaccessible or incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make the document available to the agencies by either referencing an operative internet address where the complete document may be accessed or by providing electronic copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. Eastern Time on the next regular business day. Failure to make the document available, by the internet or by providing electronic copies, by 5 p.m. Eastern Time on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

(e) Filings must comply with all format requirements set forth at the Premerger Notification Office pages at *https://www.ftc.gov*. The use of any format not specified as acceptable, or any other failure to comply with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

■ 5. Amend § 803.5 by redesignating the paragraph (a)(1) heading as the paragraph (a) heading and republishing it and revising paragraphs (a)(1) introductory text, (a)(3), and (b) to read as follows:

§ 803.5 Affidavits required.

(a) *Section 801.30 acquisitions.* (1) For acquisitions to which § 801.30 of this chapter applies, the notification required by the act from each acquiring person shall contain an affidavit attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received written notice delivered to an officer (or a person exercising similar functions in the case of an entity without officers) by email, certified or registered mail, wire, or hand delivery, at its principal executive offices, of:

* * * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 of this chapter does not apply, the notification required by the act shall contain an affidavit attesting that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction. If the executed agreement is not the definitive agreement, the affidavit must attest that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has also been submitted.

■ 6. Revise § 803.8 to read as follows:

§ 803.8 Foreign language documents.

Documentary materials or information in a foreign language required to be submitted at the time of filing a Notification and Report Form and in response to a request for additional information or documentary material must be submitted with verbatim English language translations. All verbatim translations must be accurate and complete.

■ 7. Amend § 803.9 by revising paragraph (c) to read as follows:

§ 803.9 Filing fee.

* * * * *

(c) For a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate parent entities would be the same for the NAICS Codes section of the Notification and Report Form, only one filing fee is required in connection with the transaction.

* * * * *

■ 8. Amend § 803.10 by revising paragraphs (c)(1)(i) and (ii) and redesignating the example following paragraph (c)(1)(ii) as Example 1 to paragraph (c)(1).

The revisions read as follows:

§ 803.10 Running of time.

* * * * *

(c) * * *

(1) * * *

(i) The date of receipt shall be the date of electronic submission if such date is not a Saturday, Sunday, a legal public holiday (as defined in 5 U.S.C. 6103(a)), or a legal public holiday's observed date, and the submission is completed by 5 p.m. Eastern Time. In the event electronic submission is unavailable, the FTC and DOJ may designate procedures for the submission of the filing. Notification of the alternate delivery procedures will normally be made through a press release and, if possible, on the *https://www.ftc.gov* website.

(ii) Delivery effected after 5 p.m. Eastern Time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If submission of all required filings is not effected on the same date, the date of receipt shall be the latest of the dates on which submission is effected.

* * * * *

■ 9. Amend § 803.12 by revising paragraph (c)(1)(iii) to read as follows:

§ 803.12 Withdraw and refile notification.

* * * * *

(c) * * *

(1) * * *

(iii) The resubmitted notification is recertified, and the submission, as it relates to Transaction-Specific Agreements, Transaction-Related Documents, and Subsidies from Foreign Entities of Concern sections of the Notification and Report Form, is updated to the date of the resubmission;

* * * * *

■ 10. Revise appendices A and B to part 803 to read as follows:

Appendix A to Part 803—*Notification and Report Form for Certain Mergers and Acquisitions*

BILLING CODE 6750–01–P

16 C.F.R. Part 803 – Appendix

Notification and Report Form for Certain Mergers and Acquisitions

Acquiring Person

FEE INFORMATION

Total Filing Fee: Select Filing Fee. **Paid By:** ☐ Acquiring Person ☐ Acquired Person ☐ Both

Name of Payer	Amount Paid	Check Number	EWT Institution & Confirmation Number

GENERAL INFORMATION

Post-Consummation Filing? ☐ Yes ☐ No
Cash Tender Offer? ☐ Yes ☐ No
Bankruptcy? ☐ Yes ☐ No

Do you request early termination of the waiting period? ☐ Yes ☐ No
(Grants of early termination are published in the Federal Register and on the FTC website.)

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► **UPE Details**

Name: _____

Headquarters Address: _____ **Address Line 2:** _____

City: _____ **State:** _____ **Zip Code:** _____ **Country:** _____

Website: _____

Entity Type: The UPE of the acquiring person is a(n)?

☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other (Specify): _____

FILING MADE ON BEHALF OF THE UPE	Name and address of filing notification entity, if different than UPE (Name, Address, City, State, Zip Code, and Country)
☐ Not Applicable. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a). ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.	

	PRIMARY HSR REPORT CONTACT	SECONDARY HSR REPORT CONTACT	SECOND REQUEST CONTACT
Name:			
Firm/Company:			
Address:			
City, State, Zip Code:			
Country:			
Telephone Number:			
E-Mail Address:			

Name of Acquiring Person UPE:	Date:

UPE Annual Reports and Financial Information	
Central Index Key (CIK) Number	
Annual/Audit Report Document # or Link	
Date of Annual/Audit Report	

Does the person filing notification stipulate that the acquiring person meets the size of person test? See 15 U.S.C. § 18a(a).

☐ Yes, the lower size of person test ☐ Yes, the higher size of person test ☐ N/A

Minority Shareholders or Interest Holders ☐ None

Entity	Minority Holder & D/B/A Name	HQ Address	Percent Held

► Acquiring Person Structure

Entities Within the Acquiring Person

Company or Operating Business d/b/a Name(s):				
Entity Name	**City**	**State**	**Zip Code**	**Country**
Company or Operating Business d/b/a Name(s):				
Entity Name	**City**	**State**	**Zip Code**	**Country**
Company or Operating Business d/b/a Name(s):				
Entity Name	**City**	**State**	**Zip Code**	**Country**

Annual Reports and Audit Reports

Acquiring Entity or Overlapping Entity	Central Index Key (CIK) Number	Annual/Audit Report File Name or Link	Date of Annual/Audit Report

Name of Acquiring Person UPE:	Date:

► **Additional Acquiring Person Information**

OWNERSHIP STRUCTURE

Description of the ownership structure of the acquiring entity	
Document # of organizational chart for fund or MLP (or N/A)	

OFFICERS AND DIRECTORS

Name of Entity Within Acquiring Person	Name of Officer or Director	Title	List of Other Entities

TRANSACTION INFORMATION

► **Parties**

ACQUIRING UPE(S)	ACQUIRED UPE(S)
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:
ACQUIRING ENTITY(IES) – *(Tab to add additional "Acquiring Entity" entries.)*	**TARGET** – *(Tab to add additional "Target" entries.)*
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:

► **Transaction Details** Is this transaction subject to § 801.30? ☐ Yes, Specify Type(s) ☐ No

TRANSACTION TYPE

Check all that apply:

☐ Acquisition of voting securities
☐ Acquisition of non-corporate interests
☐ Acquisition of assets
☐ Merger (see § 801.2)
☐ Consolidation (see § 801.2)
☐ Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50)
☐ Acquisition subject to § 801.31
☐ Secondary acquisition subject to § 801.4
☐ Acquisition subject to § 801.2(e)
☐ Other, specify _____

Name of Acquiring Person UPE:	Date:

ACQUISITION DETAILS

Percentage of voting securities already held %	Percentage of non-corporate interests already held %		
Value of voting securities already held ($MM) $	Value of non-corporate interests already held ($MM) $		
Total percentage of voting securities to be held as a result of the acquisition %	Total percentage of non-corporate to be held as a result of the acquisition %		
Total value of voting securities to be held as a result of the acquisition ($MM) $	Total value of non-corporate securities to be held as a result of the acquisition ($MM) $	Total value of assets to be held as a result of the acquisition ($MM) $	**Aggregate total value ($MM)** **$ 0.00**

NOTIFICATION THRESHOLD

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% ☐ 50% ☐ N/A

► Transaction Description

BUSINESS OF THE ACQUIRING PERSON	
BUSINESS OF THE TARGET	
NON-REPORTABLE UPE(S)	
TRANSACTION DESCRIPTION	

RELATED TRANSACTIONS

Does the transaction that is the subject of this filing have related filings? ☐ Yes ☐ No ☐ Unknown

If the transaction has related filings, indicate whether the related filing(s) (choose all that apply):

☐ Is a principal transaction that triggers one or more shareholder backside transactions
☐ Is a shareholder backside transaction
☐ Has more than one acquiring UPE
☐ Has more than one acquired UPE
☐ Has more than one reportable step
☐ Is a joint venture
☐ Is a consolidation
☐ Is an exchange of assets
☐ Has one or more filings in the alternative
☐ Other, explain:_____

Party Names or Transaction Numbers for Related Transactions:

► Transactions Subject to International Antitrust Notification

Has (or will) a non-U.S. antitrust or competition authority been (or be) notified of the transaction? ☐ No ☐ Yes (provide details below)

Jurisdiction	Date Notified

Name of Acquiring Person UPE:	Date:

► Additional Transaction Information

TRANSACTION RATIONALE ☐ Not applicable, select 801.30 transaction	
DOCUMENT NUMBERS RELATED TO TRANSACTION RATIONALE	
DOCUMENT # FOR TRANSACTION DIAGRAM ☐ Not applicable, select 801.30 transaction	

► Joint Ventures

Complete only if acquisition is the formation of a joint venture corporation or unincorporated entity ☐ Not Applicable

CONTRIBUTIONS TO BE MADE	
DESCRIPTION OF CONSIDERATION	
DESCRIPTION OF THE BUSINESS OF THE JOINT VENTURE	

JOINT VENTURE NAICS CODES

6-Digit Code	Code Description

► Business Documents

TRANSACTION RELATED DOCUMENTS

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

PLANS AND REPORTS ☐ Not Applicable, Select 801.30 Transaction

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

Privilege Log Document # _____

Name of Acquiring Person UPE:	Date:

► Agreements

TRANSACTION-SPECIFIC AGREEMENTS ☐ Not Applicable, 801.30 or Bankruptcy

Document #	Document Title

OTHER AGREEMENTS BETWEEN THE ACQUIRING PERSON AND TARGET

Does the acquiring person have (or within one year of filing, had) any agreements with the target?

☐ No ☐ Yes (provide details below)

Has Type of Agreement		Type
☐ Yes	☐ No	Agreement with non-compete or non-solicitation terms between the acquiring person and target
☐ Yes	☐ No	Lease
☐ Yes	☐ No	Licensing Agreement
☐ Yes	☐ No	Master Service Agreement
☐ Yes	☐ No	Operating Agreement
☐ Yes	☐ No	Supply Agreement
☐ Yes	☐ No	Other

COMPETITION DESCRIPTIONS

☐ Not Applicable, Select 801.30 Transaction

► Overlap Description

Briefly describe the acquiring person's principal categories of products or services.

List and briefly describe current and known planned products or services that compete (or could compete) with the target. (See Instructions)

Name of Acquiring Person UPE:	Date:

Competing Product or Service Details ☐ None

Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:
Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:
Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:

► Supply Relationships Description

RELATED SALES

List and briefly describe the acquiring person's products, services, or assets that are supplied to the target or a business that competes with the target. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	Sales to Target ($): Sales to Target's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Target ($): Sales to Target's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Target ($): Sales to Target's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:

Name of Acquiring Person UPE:	Date:

RELATED PURCHASES

List and briefly describe the products, services, or assets that are purchased by the acquiring person from the target or a business that competes with the target. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	**Purchases from Target ($):** **Purchases from Target's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**
Product, Service, or Asset:	**Purchases from Target ($):** **Purchases from Target's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**
Product, Service, or Asset:	**Purchases from Target ($):** **Purchases from Target's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**

REVENUE AND OVERLAPS

Does the acquiring person have US revenue? ☐ Yes ☐ No, explain: _____

► NAICS Codes

6-Digit Code	Code Description	Operating Business	Revenue Range				Overlap
			<$10MM	$10MM - $100MM	$100MM - $1B	>$1B	
							☐
							☐
							☐
							☐
							☐

► Controlled Entity Geographic Overlaps

STATE LEVEL REPORTING ☐ None

NAICS Code	Code Description	Operating Business and D/B/A Name(s)	Person or Associate?	States and Total Number

Name of Acquiring Person UPE:	Date:

STREET LEVEL REPORTING ☐ None

NAICS Code and Description:					
Operating Business and D/B/A Name(s)	Person or Associate	State	County	ZIP Code	Street Address

NAICS Code and Description:					
Operating Business and D/B/A Name(s)	Person or Associate	State	County	ZIP Code	Street Address

NAICS Code and Description:					
Operating Business and D/B/A Name(s)	Person or Associate	State	County	Zip Code	Street Address

► Minority-Held Entity Overlaps

☐ None

Entity Held and D/B/A Name(s)	Percentage Held	Held By	Person or Associate?	NAICS Code or Industry Overlap with Target

► Prior Acquisitions

☐ None

Overlapping 6-Digit NAICS Code and Description or Overlap Product or Service Description	Acquired Entity and Former HQ Address	Transaction Type	Consummation Date

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

SUBSIDIES ☐ None ☐ Yes (provide details below)

Entity or Government	Description

Name of Acquiring Person UPE:	Date:

COUNTERVAILING DUTIES IMPOSED ☐ None ☐ Yes (provide details below)

Product	Duty Imposed	Jurisdiction

COUNTERVAILING DUTY INVESTIGATIONS ☐ None ☐ Yes (provide details below)

Product	Jurisdiction Conducting Investigation

► Defense or Intelligence Contracts

☐ None ☐ Not Applicable, Select 801.30 Transaction

Entity Within Acquiring Person	Contracting Office	Contracting Office ID	Award ID	NAICS Codes

► Voluntary Waivers

INTERNATIONAL COMPETITION AUTHORITIES (VOLUNTARY)

The acquiring person agrees to waive the disclosure exemption in the HSR Act for the following competition authorities: ☐ None

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

STATE ATTORNEYS GENERAL (VOLUNTARY)

The acquiring person agrees to waive the disclosure exemption in the HSR Act for the following states: ☐ None

State	Permit Disclosure of	
	Fact of Notification and Waiting Period	Information and Documents
	☐	☐
	☐	☐
	☐	☐

► End Notes

☐ None

Number	Note

Name of Acquiring Person UPE:	Date:

CERTIFICATION

PENALTIES FOR FALSE STATEMENTS

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

Name (Please Print or Type)	**Title**
Signature	**Date**

☐ **Sworn under penalty of perjury**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature	**Executed Date**

☐ **Notarized**

Subscribed and sworn to before me at the: Seal:

_____

City of: _____

State of: _____

This _____ day of _____ the year _____

Signature: _____

My commission expires: _____

Name of Acquiring Person UPE:	Date:

16 C.F.R. Part 803 – Appendix NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS	Approved by OMB 3084-0005

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person that, by reason of a merger, consolidation, or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18a, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The rules may be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. § 18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. § 18a. The maximum daily civil penalty amount is listed in 16 C.F.R. § 1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated at 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th St. SW
Washington, DC 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, 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. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. § 1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

16 C.F.R. Part 803 – Appendix

Notification and Report Form for Certain Mergers and Acquisitions

Acquired Person

FEE INFORMATION

Total Filing Fee: Select Filing Fee. **Paid By:** ☐ Acquiring Person ☐ Acquired Person ☐ Both

Name of Payer	Amount Paid	Check Number	EWT Institution & Confirmation Number

GENERAL INFORMATION

Post-Consummation Filing? ☐ Yes ☐ No
Cash Tender Offer? ☐ Yes ☐ No
Bankruptcy? ☐ Yes ☐ No

Do you request early termination of the waiting period? ☐ Yes ☐ No
(Grants of early termination are published in the Federal Register and on the FTC website.)

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► **UPE Details**

Name: _____

Headquarters Address: _____ **Address Line 2:** _____

City: _____ **State:** _____ **Zip Code:** _____ **Country:** _____

Website: _____

Entity Type: The UPE of the acquired person is a(n)?

☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other (Specify): _____

FILING MADE ON BEHALF OF THE UPE	Name and address of filing notification entity, if different than UPE (Name, Address, City, State, Zip Code, and Country)
☐ Not Applicable. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a). ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4.	

	PRIMARY HSR REPORT CONTACT	SECONDARY HSR REPORT CONTACT	SECOND REQUEST CONTACT
Name:			
Firm/Company:			
Address:			
City, State, Zip Code:			
Country:			
Telephone Number:			
E-Mail Address:			

Name of Acquired Person UPE:	Date:

UPE Annual Reports and Financial Information	
Central Index Key (CIK) Number	
Annual/Audit Report Document # or Link	
Date of Annual/Audit Report	

Does the person filing notification stipulate that the acquired person meets the size of person test? See 15 U.S.C. § 18a(a).

☐ Yes, the lower size of person test ☐ Yes, the higher size of person test ☐ N/A

Minority Shareholders or Interest Holders ☐ None

Entity	Minority Holder & D/B/A Name	HQ Address	Percent Held

► Acquired Entity Structure

Entities Within the Acquired Entity(ies)

Company or Operating Business d/b/a Name(s):				
Entity Name	City	State	Zip Code	Country
Company or Operating Business d/b/a Name(s):				
Entity Name	City	State	Zip Code	Country
Company or Operating Business d/b/a Name(s):				
Entity Name	City	State	Zip Code	Country

Annual Reports and Audit Reports

Acquired Entity	Central Index Key (CIK) Number	Annual/Audit Report File Name or Link	Date of Annual/Audit Report

Name of Acquired Person UPE:	Date:

TRANSACTION INFORMATION

► Parties

ACQUIRING UPE(S)	ACQUIRED UPE(S)
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:
ACQUIRING ENTITY(IES) – *(Tab to add additional "Acquiring Entity" entries.)*	**TARGET(S)** – *(Tab to add additional "Target" entries.)*
Name:	Name:
Address:	Address:
Address Line 2:	Address Line 2:
City, State, Zip Code:	City, State, Zip Code:
Country:	Country:
Website:	Website:

► Transaction Details

Is this transaction subject to § 801.30? ☐ Yes, Specify Type(s) _____ ☐ No

TRANSACTION TYPE

Check all that apply:

☐ Acquisition of voting securities
☐ Acquisition of non-corporate interests
☐ Acquisition of assets
☐ Merger (see § 801.2)
☐ Consolidation (see § 801.2)
☐ Acquisition subject to § 801.31
☐ Secondary acquisition subject to § 801.4
☐ Acquisition subject to § 801.2(e)
☐ Other, specify _____

ACQUISITION DETAILS

Percentage of voting securities already held %	Percentage of non-corporate interests already held %		
Value of voting securities already held ($MM) $	Value of non-corporate interests already held ($MM) $		
Total percentage of voting securities to be held as a result of the acquisition %	Total percentage of non-corporate to be held as a result of the acquisition %		
Total value of voting securities to be held as a result of the acquisition ($MM) $	Total value of non-corporate securities to be held as a result of the acquisition ($MM) $	Total value of assets to be held as a result of the acquisition ($MM) $	**Aggregate total value ($MM)** **$ 0.00**

Name of Acquired Person UPE:	Date:

► Transaction Description

BUSINESS OF THE TARGET	
NON-REPORTABLE UPE(S)	
TRANSACTION DESCRIPTION	

RELATED TRANSACTIONS

Does the transaction that is the subject of this filing have related filings? ☐ Yes ☐ No ☐ Unknown

If the transaction has related filings, indicate whether the related filing(s) (choose all that apply):

☐ Is a principal transaction that triggers one or more shareholder backside transactions
☐ Is a shareholder backside transaction
☐ Has more than one acquiring UPE
☐ Has more than one acquired UPE
☐ Has more than one reportable step
☐ Is a joint venture
☐ Is a consolidation
☐ Is an exchange of assets
☐ Has one or more filings in the alternative
☐ Other, explain:_____

Party Names or Transaction Numbers for Related Transactions:

► Additional Transaction Information

TRANSACTION RATIONALE ☐ Not applicable, select 801.30 transaction	
DOCUMENT NUMBERS RELATED TO TRANSACTION RATIONALE	

► Business Documents

TRANSACTION RELATED DOCUMENTS

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

PLANS AND REPORTS ☐ Not Applicable, Select 801.30 Transaction

Privileged	Document #	Document Title	Estimated Date	Author/Title
☐				
☐				
☐				

Privilege Log Document # _____

Name of Acquired Person UPE:	Date:

► Agreements

TRANSACTION-SPECIFIC AGREEMENTS ☐ Not Applicable, 801.30 or Bankruptcy

Document #	Document Title

COMPETITION DESCRIPTIONS

☐ Not Applicable, Select 801.30 Transaction

► Overlap Description

Briefly describe the target's principal categories of products or services.

List and briefly describe current and known planned products or services that compete (or could compete) with the acquiring person. (See Instructions)

Name of Acquired Person UPE:	Date:

Competing Product or Service ☐ None

Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:
Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:
Product or Service:	Sales ($): Categories of Customers: Top 10 Customers Overall: Top 10 Customers by Category:

► Supply Relationships Description

RELATED SALES

List and briefly describe the target's products, services, or assets that are supplied to the acquiring person or a business that competes with acquiring person. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	Sales to Target ($): Sales to Target's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Acquiring Person ($): Sales to Acquiring Person's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:
Product, Service, or Asset:	Sales to Acquiring Person ($): Sales to Acquiring Person's Competitors ($): Top 10 Customers: Description of Supply or Licensing Agreement:

Name of Acquired Person UPE:	Date:

RELATED PURCHASES

List and briefly describe the products, services, or assets that are purchased by the target from the acquiring person or a business that competes with the acquiring person. (See Instructions)

Product, Service, or Asset Details ☐ None

Product, Service, or Asset:	**Purchases from Acquiring Person ($):** **Purchases from Acquiring Person's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**
Product, Service, or Asset:	**Purchases from Acquiring Person ($):** **Purchases from Acquiring Person's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**
Product, Service, or Asset:	**Purchases from Acquiring Person ($):** **Purchases from Acquiring Person's Competitors ($):** **Top 10 Suppliers:** **Description of Purchase or Licensing Agreement:**

REVENUE AND OVERLAPS

Does the target have US revenue? ☐ Yes ☐ No, explain: _____

► NAICS Codes

6-Digit Code	Code Description	Operating Business	Revenue Range				Overlap
			<$10MM	$10MM - $100MM	$100MM - $1B	>$1B	
							☐
							☐
							☐
							☐
							☐

► Controlled Entity Geographic Overlaps

STATE LEVEL REPORTING ☐ None

NAICS Code	Code Description	Operating Business and D/B/A Name(s)	States and Total Number

Name of Acquired Person UPE:	Date:

STREET LEVEL REPORTING ☐ None

NAICS Code and Description:				
Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

NAICS Code and Description:				
Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

NAICS Code and Description:				
Operating Business and D/B/A Name(s)	State	County	ZIP Code	Street Address

► Minority-Held Entity Overlaps

☐ None

Entity Held and D/B/A Name(s)	Percentage Held	Held By	NAICS Code or Industry Overlap with Acquiring Person

► Prior Acquisitions

☐ None

Overlapping 6-Digit NAICS Code and Description or Overlap Product or Service Description	Acquired Entity and Former HQ Address	Transaction Type	Consummation Date

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

SUBSIDIES ☐ None ☐ Yes (provide details below)

Entity or Government	Description

Name of Acquired Person UPE:	Date:

COUNTERVAILING DUTIES IMPOSED ☐ None ☐ Yes (provide details below)

Product	Duty Imposed	Jurisdiction

COUNTERVAILING DUTY INVESTIGATIONS ☐ None ☐ Yes (provide details below)

Product	Jurisdiction Conducting Investigation

► Defense or Intelligence Contracts

☐ None ☐ Not Applicable, Select 801.30 Transaction

Entity Within Target	DOD/IC Contracting Office	Contracting Office ID	Award ID	NAICS Codes

► Voluntary Waivers

INTERNATIONAL COMPETITION AUTHORITIES (VOLUNTARY)

The acquired person agrees to waive the disclosure exemption in the HSR Act for the following competition authorities: ☐ None

1. _____ 4. _____
2. _____ 5. _____
3. _____ 6. _____

STATE ATTORNEYS GENERAL (VOLUNTARY)

The acquired person agrees to waive the disclosure exemption in the HSR Act for the following states: ☐ None

State	Permit Disclosure of	
	Fact of Notification and Waiting Period	Information and Documents
	☐	☐
	☐	☐
	☐	☐

► End Notes

☐ None

Number	Note

Name of Acquired Person UPE:	Date:

CERTIFICATION

PENALTIES FOR FALSE STATEMENTS

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

Name (Please Print or Type)	**Title**
Signature	**Date**

☐ **Sworn under penalty of perjury**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature	**Executed Date**

☐ **Notarized**

Subscribed and sworn to before me at the: Seal:

_____

City of: _____

State of: _____

This _____ day of _____ the year _____

Signature: _____

My commission expires: _____

Name of Acquired Person UPE:	**Date:**

16 C.F.R. Part 803 – Appendix **NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS**	Approved by OMB 3084-0005

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person that, by reason of a merger, consolidation, or acquisition, is subject to § 7A of the Clayton Act, 15 U.S.C. § 18a, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The rules may be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. § 18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. § 18a. The maximum daily civil penalty amount is listed in 16 C.F.R. § 1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated at 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th St. SW
Washington, DC 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, 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. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. § 1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

Appendix B to Part 803—Instructions to the Notification and Report Form for Certain Mergers and Acquisitions

Antitrust Improvements Act
Notification for Certain Mergers and Acquisitions — **Acquiring Person Instructions**

GENERAL INSTRUCTIONS AND INFORMATION

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). Submitted materials must be provided to the Federal Trade Commission ("FTC") and to the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies").

► Information

The central office for information and assistance concerning the Rules is:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov for Rules questions
Premerger@ftc.gov for filing information

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), the Rules, FTC final rules (including their Statements of Basis and Purpose) published in the Federal Register, as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office ("PNO") website.

► Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values
All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Fee Information
The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. § 18a note, based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). Filing fees increase annually by the percentage increase, if any, in the consumer price index ("CPI") over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. § 18a note. For current fee information, see the PNO website.

North American Industry Classification System (NAICS) Data
When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System - United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at https://www.census.gov/naics/. This website also provides guidance in choosing the proper code(s).

Notification Thresholds
Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). See § 801.1(h). The current threshold values can be found at Current Thresholds.

Person Filing and Filing Person
The terms "person filing" or "filing person" mean the ultimate parent entity ("UPE"). See § 801.1(a)(3). The terms are used herein interchangeably.

Select 801.30 Transaction
A transaction to which § 801.30 applies **and** where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.

Supervisory Deal Team Lead
The individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.

Target
The target includes all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction.

Year
All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recently completed calendar or fiscal year for which the requested information is available.

► Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

► Responses

Documents, including the Form, should be produced as (1) a searchable PDF from which text can be copied or (2) an Excel file.

For Business Documents (see below), check the box to indicate whether any part of the document is privileged and then provide the document number, title, and estimated date. If the acquiring person has identified (1) a NAICS overlap, (2) an overlap within the Overlap Description, or (3) a supply relationship within the Supply Relationships Description, also provide the following:

1. Author(s) (and job title(s)) for documents created by the acquiring person; or
2. Recipient(s) or supervisor(s) (and job title(s)) of documents created by third parties as part of an engagement with the acquiring person.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. Similarly, if the acquiring person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the acquiring person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the acquiring person, only the name of the third party is required.

If the acquiring person submits documents in addition to what is required, such documents should be identified as "Voluntary". See § 803.1(b).

Submit only one copy of identical responsive documents.

► Privilege

See § 803.3(d). For privileged documents, the filing person must also provide the following in a log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

► Translations

Materials or information in a language other than English must be translated into English, with the English translation attached to the original version. See § 803.8.

► Non-Compliance

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

► Limited Response

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

FEE INFORMATION

Total Expected Filing Fee
Indicate the value of the total required fee for the transaction.

Parties Paying the Fee
Indicate which filing person(s) is paying the filing fee and, if applicable, whether the fee is being paid by multiple entities. For each entity within the acquiring person paying a portion of the fee, provide the name of the payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT
In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the Filing Fee Information page.

Note on Paying by Check
The FTC strongly discourages check payments because handling a physical check will create a delay in processing the Form. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to:

Federal Trade Commission
Financial Operations Division
600 Pennsylvania Ave, Drop H-790
Washington, DC 20580

Please note that the waiting period may be delayed until the fee has been confirmed.

GENERAL INFORMATION

Special Filing Types
Indicate whether the filing is a post-consummation filing, or whether the transaction is a cash tender offer or bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination
Indicate whether the acquiring person requests early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18a(b)(2), and on the PNO website. Note that if either person in any transaction requests early termination, it may be granted and published.

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► **UPE Details**

Name
Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE of the acquiring person. See § 801.1(a)(3).

Entity Type
Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Filing Made on Behalf of the UPE
If the filing is being made on behalf of the UPE by another entity within the acquiring person authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a) or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information
Provide the name, firm/company name, address, telephone number, and e-mail address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Additionally, provide the name, firm/company name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

UPE Annual Reports and Financial Information

- **Central Index Key**
  If the UPE of the acquiring person files annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission (SEC), provide the Central Index Key (CIK) number.

- **Annual Reports and Audit Reports**
  Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquiring person.

  Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should leave this section blank and instead provide the most recent reports for the highest-level entity(ies) that controls the acquiring entity under "UPE Structure."

  The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

- **Date of Report(s)**
  Provide the date of the most recent annual report(s) and/or audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquiring person.

- **Size of Person**
  If applicable, indicate whether the person filing notification stipulates that the acquiring person meets either the higher or lower size of person test. See 15 U.S.C. § 18a(a), § 801.11.

Minority Shareholders or Interest Holders
This section requires the acquiring person to report the name, headquarters mailing address, and approximate percentage held by certain minority holders of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction (each a "covered entity").

If a covered entity is not a limited partnership, provide the required information for each individual or entity that currently holds, or will hold as a result of the transaction, 5% or more but less than 50% of the voting securities or non-corporate interests of any covered entity, starting with the UPE.

If a covered entity is a limited partnership, provide the required information for its (a) general partner, regardless of the percentage it holds, and (b) limited partners that (i) currently hold, or will hold as a result of the transaction, 5% or more but less than 50% of the non-corporate interests of the covered entity, and (ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of any covered entity, or of the general partner or management company of a covered entity.

If a minority holder is related to a master limited partnership, fund, investment group, or similar entity that does business under a common name, the d/b/a or "street name" of such group should also be listed, if known to the acquiring person.

If the identity of minority investors or percentages to be held of a covered entity is not finalized at the time of filing, provide good faith estimates and explain in an endnote.

► Acquiring Person Structure

Entities Within the Acquiring Person
List the name, city, state, zip code, and country of all U.S. entities, and all foreign entities that have sales in or into the United States, that are included within the acquiring person. Entities with total assets of less than $10 million may be omitted. Alternatively, the acquiring person may report all entities within it. The acquiring person must also list all names under which the entities do business (e.g., d/b/a names).

The list of entities should be organized by operating company or operating business ("top-level entity"), if applicable. Filings for select 801.30 transactions need not include d/b/a names and the list of entities can be organized as kept in the ordinary course of business.

Annual Reports and Audit Reports
For the acquiring entity(ies) and any entity controlled by the acquiring person whose revenues contribute to a NAICS overlap or any overlap identified in the Overlap Description, provide the CIK number(s) if annual reports (Form 10-K or Form 20-F) are filed with the SEC, and the most recent annual or audit report(s).

Natural person UPEs must also provide the most recent annual report or audit report and CIK number for the highest-level entity that controls the acquiring entity.

► Additional Acquiring Person Information

Ownership Structure
Describe the ownership structure of the acquiring entity.

For transactions where a fund or master limited partnership is the UPE, provide any existing organizational chart that shows the relationship of any entities that are affiliates or associates. If such an organizational chart does not exist, there is no requirement to create one.

Officers and Directors
For all entities within the acquiring person responsible for the development, marketing, or sale of products or services that are identified as overlaps within the Overlap Description or as supply relationships within the Supply Relationships Description:

- List all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) and those who have served in one of these positions within the three months before filing that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. For each, provide the name of all such entities. If NAICS codes are unavailable, list all such entities that have operations in the same industry, based on the knowledge or belief of the acquiring person or the identified individual.

For the acquiring entity, entities the acquiring entity directly or indirectly controls, entities that directly or indirectly control the acquiring entity, and entities within the acquiring person that have been or will be created as a result of or as contemplated by the transaction:

- List all current officers and directors (or in the case of unincorporated entities, individuals exercising similar functions) as well as those who are likely to serve in one of these positions that also serve as an officer or director of another entity that derives revenue in the same NAICS codes reported by the target. For each, provide the name of all such entities. If NAICS codes are unavailable, list all such entities that have operations in the same industry, based on the knowledge or belief of the acquiring person or the identified individual. If the identities of the prospective officers or directors are unknown, briefly describe in an endnote who will have the authority to select them.

No filer is required to disclose any individual's role as an officer, director, or member of any non-profit entity organized for a religious or political purpose, even if that entity carries on substantial commerce. Organize the response by entity and include entities that are not yet created but are expected to be created as a result of or as contemplated by the transaction.

TRANSACTION INFORMATION

► Parties

List the name and mailing address of each acquiring and acquired person and each acquiring and acquired entity. Do not list entities controlled by an acquired entity.

Acquiring UPE
Provide the name, headquarters address, and website of the acquiring person.

Acquiring Entity(ies)
If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE
Provide the name, headquarters address, and website of the acquired person.

Target(s)
If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

► Transaction Details

801.30 Transaction
Indicate whether the transaction is subject to § 801.30 and if so, what type(s), including select 801.30.

Transaction Type
Indicate whether the transaction is any of the following (select all that apply):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);
- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); or
- Other (specify)

Acquisition Details
Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests is being acquired and allocation is not possible, note such information in an endnote.

For determining the percentage of voting securities, evaluate total voting power per § 801.12. For determining the percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

To complete this item:

- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

Notification Threshold
This item should only be completed when voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Indicate the highest applicable threshold for which notification is being filed. See § 801.1(h).

- $50 million (as adjusted);
- $100 million (as adjusted);
- $500 million (as adjusted);
- 25% (if the value of voting securities to be held is greater than $1 billion, as adjusted);
- 50%; or
- N/A.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

► Transaction Description

Business of the Acquiring Person
Describe the business operation(s) of the acquiring person.

Business of the Target
Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise an operating business.

Non-Reportable UPE(s)
Provide the names of any UPE that does not have a reporting obligation.

Transaction Description
Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are being acquired. Indicate what consideration will be received by each person and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the code names.

Related Transactions
If the transaction that is the subject of this filing has related filings, indicate whether the related filing(s) (choose all that apply):

- Is a principal transaction that triggers one or more shareholder backside transactions;
- Is a shareholder backside transaction;
- Has more than one acquiring UPE;
- Has more than one acquired UPE;
- Has more than one reportable step;
- Is a joint venture;
- Is a consolidation;
- Is an exchange of assets;
- Has one or more filings in the alternative; or
- Has other circumstances that require more than one filing and if so, explain.

Provide all additional details regarding the related filings(s), including party names and transaction numbers, necessary to identify and connect all related filings.

► Transactions Subject to International Antitrust Notification

Indicate whether, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the transaction.

If yes, list the name of each such authority. Identify, to the knowledge or belief of the filing person at the time of filing, any jurisdiction where (1) a merger notification has been filed, (2) a merger notification is being prepared for filing, or (3) the parties have a good faith belief that a merger notification will be made, along with the dates of the filing or planned filing.

► Additional Transaction Information

Transaction Rationale

Except for select 801.30 transactions, identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees. If the rationale of acquiring entity is different from the UPE, submit an explanation for each. Identify each document produced in the filing that confirms or discusses the stated rationale(s). If documents produced in the filing are referenced, identify the specific page(s) that discusses the stated rationale(s).

Transaction Diagram

Except for select 801.30 transactions, submit a diagram of the transaction, if one exists. If such a diagram does not exist, there is no requirement to create one.

► Joint Ventures

Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity. See §§ 801.40 and 801.50.

Contributions

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Consideration

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Business Description

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

NAICS Codes

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues.

► Business Documents

Transaction-Related Documents

- **Competition Documents**
  Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

- **Confidential Information Memoranda**
  Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or of the acquiring entity(s) that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Third-Party Studies, Surveys, Analyses, and Reports**
  Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring person or of the acquiring entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Synergies and Efficiencies**
  Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Plans and Reports
Except for select 801.30 transactions, provide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Except for select 801.30 transactions, provide all plans and reports that were provided to the Board of Directors of the acquiring entity or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the acquiring person also produced, sold, or known to be under development by the target, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

► Agreements

Transaction-Specific Agreements
Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.

Documents that constitute the agreement(s) (e.g., Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version.

If the executed agreement is not the definitive agreement, submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, or term sheet, or the most recent draft agreement. See § 803.5. Such document should include information regarding some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

Other Agreements Between the Acquiring Person and Target
Indicate whether the acquiring person has, or had within one year of filing, any contractual agreement(s) with the target. If so, indicate which type(s). If an agreement has terms that apply to more than one category, indicate each category that applies.

COMPETITION DESCRIPTIONS

This section is not applicable to select 801.30 transactions.

► Overlap Description

Briefly describe each of the principal categories of products and services (as reflected in documents created in the ordinary course of business) of the acquiring person.

In addition, list and briefly describe each of the current or known planned products or services of the acquiring person that competes with (or could compete with) a current or known planned product or service of the target, based on documents created in the ordinary course of business. Current or known planned products or services include those that the acquiring person or target researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. Known planned products or services may be limited to those referenced in any submitted Business Document and should reflect the acquiring person's existing knowledge of the target's business. The acquiring and acquired person should not exchange information for the purpose of answering this item.

For each such product or service listed, provide:

1. The sales (in dollars) for the most recent year. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the acquiring person measures performance (e.g., daily users, new signups).

2. A description of all categories of customers of the acquiring person that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional). If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.

3. The top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified.

► Supply Relationships Description

Related Sales

List and briefly describe each product, service, or asset (including data) that the acquiring person has sold, licensed, or otherwise supplied, and which represented at least $10 million in revenue (including internal transfers) in the most recent year (1) to the target, or (2) to any other business that, to the acquiring person's knowledge or belief, uses the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services. Responses to this item should reflect the acquiring person's existing knowledge of the target's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The sales (in dollars) to (1) the target and (2) any other business that, to the acquiring person's knowledge or belief, uses the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services.

2. The top 10 customers (as measured in dollars) of the acquiring person that use the acquiring person's product, service, or asset to compete with the target's products or services, or as an input for a product or service that competes or is intended to compete with the target's products or services. For each such customer, describe the acquiring person's supply or licensing agreement (or other comparable terms of supply).

Related Purchases

List and briefly describe each product, service, or asset (including data) that the acquiring person incorporates as an input into any product or service and that the acquiring person has purchased, licensed, or otherwise obtained, and which represented at least $10 million in revenue (including internal transfers), in the most recent year (1) from the target or (2) from any other business that, to the acquiring person's knowledge or belief, competes with the target to provide a substantially similar product, service, or asset. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The purchased amount (in dollars) for (1) the target and (2) any other business that, to the acquiring person's knowledge or belief, competes with the target to provide a substantially similar product, service, or asset.

2. The top 10 suppliers (as measured in dollars) for the associated input product, service, or asset, and a description of the acquiring person's purchase or licensing agreement (or other comparable terms of purchase).

REVENUES AND OVERLAPS

► NAICS Codes

This item requests information regarding the industry categories for the acquiring person's products and services that derived revenue in the most recent year.

No Revenue
If there is no revenue to report, explain why.

NAICS Codes Describing U.S. Operations with Estimates of Revenue
Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquiring person, inclusive of all entities included within the acquiring person at the time the filing is made.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating business(es) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more but less than $1 billion; or $1 billion or more.

Identify each 6-digit NAICS industry code in which both the acquiring person and target derive revenue by checking the overlap box.

For products and services that derived revenue in the most recent year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the target derived revenue from U.S. operations.

► Controlled Entity Geographic Overlaps

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate of the acquiring person (see § 801.1(d)(2)), derived any amount of dollar revenues in the most recent year from operations:

1. In industries within any 6-digit NAICS industry code in which the target also derived any amount of dollar revenues in the most recent year; or
2. In which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the target is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

NAICS Overlaps of Controlled Entities
List each overlapping NAICS code and description. For each, list the name of each operating business within the acquiring person or associate of the acquiring person that has U.S. operations in the same NAICS code as the target and the name(s) under which the operating business does business, whether the listed entity is controlled by the acquiring person or an associate of the acquiring person, and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code in ascending order.

Geographic Market Information
For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

- **State-Level Reporting**
  - Manufacturing Industries
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the acquiring person or associate of the acquiring person are sold without a significant change in their form (whether they are sold by the acquiring person or associate of the acquiring person or by others to whom such products have been sold or resold).

    31** through 33**** Manufacturing**, *except*:
    3115** Dairy Product Manufacturing
    311611 Animal (except Poultry) Slaughtering
    311613 Rendering and Meat Byproduct Processing
    311615 Poultry Processing
    31181* Bread and Bakery Product Manufacturing
    321*** Wood Product Manufacturing
    32221* Paperboard Container Manufacturing
    324*** Petroleum and Coal Products Manufacturing
    3251** Basic Chemical Manufacturing

325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing

- Wholesale Trade
For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of the acquiring person or associate of the acquiring person are located.

42** **Wholesale Trade**, *except*:
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers

- Insurance Carriers
For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the acquiring person or associate of the acquiring person is licensed to write insurance.

5241 Insurance Carriers**

- Other NAICS Sectors
For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the acquiring person or associate of the acquiring person conducts such operations.

11** **Agriculture, Forestry, Fishing, and Hunting**, *except*:
113*** Forestry and Logging

21** **Mining, Quarrying, and Oil and Gas Extraction**, *except:*
2123** Nonmetallic Mineral Mining and Quarrying

2213 Water, Sewage, and Other Systems**

23** **Construction**

44912* Home Furnishing Retailers
4492 Electronics and Appliance Retailers**

48** and 49**** Transportation and Warehousing**, *except*:
493*** Warehousing and Storage

51** **Information**, *except*:
512*** Motion Picture and Sound Recording Industries

5222 Nondepository Credit Intermediation**
523* Securities, Commodity Contracts, and Other Financial Investments and Related Activities**
5242 Agencies, Brokerages, and Other Insurance Related Activities**
525* Funds, Trusts, and Other Financial Vehicles**

531* Real Estate**
533* Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)**

54** Professional, Scientific and Technical Services**, *except*:
54138* Testing Laboratories and Services
54194* Veterinary Services

55** Management of Companies and Enterprises**

561* Administrative and Support Services**

61** Educational Services**

71** Arts, Entertainment, and Recreation**, *except*:
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

7212 RV (Recreational Vehicle) Parks and Recreational Camps**
7213 Rooming and Boarding Houses, Dormitories, and Workers' Camps**
8114 Personal and Household Goods Repair and Maintenance**
813* Religious, Grantmaking, Civic, Professional, and Similar Organizations**
814* Private Households**

- **Street-Level Reporting**
  For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, zip code, county and city or town of each establishment from which dollar revenues were derived (either directly by the acquiring person or associate of the acquiring person or by a franchisee) in the most recent year.

113* Forestry and Logging**
2123 Nonmetallic Mineral Mining and Quarrying**

22** Utilities**, *except*:
2213** Water, Sewage and Other Systems

3115 Dairy Product Manufacturing**
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321* Wood Product Manufacturing**
32221* Paperboard Container Manufacturing
324* Petroleum and Coal Products Manufacturing**
3251 Basic Chemical Manufacturing**
325521 Plastics Materials and Resin Manufacturing
3271 Clay Product and Refractory Manufacturing**
3272 Glass and Glass Product Manufacturing**
3273 Cement and Concrete Product Manufacturing**
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239 Miscellaneous Durable Goods Merchant Wholesalers**
4241 Paper and Paper Product Merchant Wholesalers**
4242 Drug and Druggists' Sundries Merchant Wholesalers**
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers

4247** **Petroleum and Petroleum Products Merchant Wholesalers**
4248** **Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers**
42491* **Farm Supplies Merchant Wholesalers**
42495* **Paint, Varnish, and Supplies Merchant Wholesalers**

44** and 45**** Retail Trade**, *except*:
44912* Home Furnishings Retailers
4492** Electronics and Appliance Retailers

493*** **Warehousing and Storage**
512*** **Motion Picture and Sound Recording Industries**
521*** **Monetary Authorities-Central Bank**
5221** **Depository Credit Intermediation**
5223** **Activities Related to Credit Intermediation**
532*** **Rental and Leasing Services**
54138* **Testing Laboratories and Services**
54194* **Veterinary Services**
562*** **Waste Management and Remediation Services**
62**** **Health Care and Social Assistance**
7132** **Gambling Industries**
71394* **Fitness and Recreational Sports Centers**

72**** **Accommodation and Food Services**, *except*:
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps

811*** **Repair and Maintenance**, except
8114** Personal and Household Goods Repair and Maintenance

812*** **Personal and Laundry Services**

► Minority-Held Entity Overlaps

This section requires the disclosure of holdings of the acquiring person and its associates (see § 801.1(d)(2)) of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the target. If NAICS codes are unavailable, holdings in entities that have operations in the same industry as the target, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of Acquiring Person and Its Associates
If the acquiring person holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the target, list the name of such entity and d/b/a names (if known), the percentage held, the entity within the acquiring person that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Additionally, based on the knowledge or belief of the acquiring person, for each associate of the acquiring person holding:
1. 5% or more but less than 50% of the voting securities or non-corporate interests of an acquired entity; and/or
2. 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the target also derived dollar revenues in the most recent year,

list the name of such entity and d/b/a names (if known), percentage held, the associate of the acquiring person that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Responses should be organized alphabetically by the name of the entity in which minority interests are held.
The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, provided the financials are no more than three months old.

► Prior Acquisitions

This item pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. by the acquiring person that in the most recent year (1) derived revenue in an identified 6-digit NAICS industry code overlap, **or** (2) provided or produced a competitive overlap product or service as described in the Overlap Description.

For each such overlap, list all acquisitions of entities or assets deriving dollar revenues in an overlapping 6-digit NAICS industry code or overlapping product or service made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer, 50% or more of non-corporate interests of an unincorporated entity, or all or substantially all the assets of an operating business if the entity or business had annual net sales or total assets greater than $10 million in the year prior to the acquisition and any acquisitions of assets that did not constitute all or substantially all of an operating business valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

1. the overlapping 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity or assets derived dollar revenues, or the competitive overlap product(s) or service(s) in the Overlap Description;
2. the name of the entity from which the assets, voting securities, or non-corporate interests were acquired;
3. the headquarters address of that entity prior to the acquisition;
4. whether assets, voting securities, or non-corporate interests were acquired; and
5. the consummation date of the acquisition.

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

Indicate whether, to the knowledge or belief of the filing person, within the two years prior to filing, the acquiring person has received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r)). If yes, list each entity or government from which such subsidy was received (or which has made the commitment) and provide a brief description of the subsidy.

Indicate whether, for products the acquiring person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is subject to countervailing duties imposed by any jurisdiction. If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

Indicate whether, to the knowledge or belief of the filing person, for products the acquiring person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is the subject of a current investigation for countervailing duties in any jurisdiction. If yes, list each product and the jurisdiction conducting the investigation.

► Defense or Intelligence Contracts

Except for select 801.30 transactions, identify (1) pending requests for proposals from the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) for which the acquiring person has submitted a proposal and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) valued at $100 million or more if such pending requests for proposals or such awarded procurement contracts (a) are or will be the source of revenues in any identified 6-digit NAICS industry code overlap; or (b) involve or will involve an overlap product or service as described in the Overlap Description or the Supply Relationships Description. Limit the response to the acquiring entity and any entity within the acquiring person that directly or indirectly controls the acquiring entity. Include (1) the name of the entity within the filing person (2) the contracting office, as defined by 48 C.F.R. § 2.101(b); (3) the Contracting Office ID; (4) the Award ID; and (5) the NAICS code(s), if any, listed in the System for Award Management database. Do not include classified information but note that responsive information was withheld on that basis.

► Voluntary Waivers

- **HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)**
  Indicate whether the acquiring person agrees to waive the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h), to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquiring person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquiring person should list the jurisdictions to which the waiver applies. This item is voluntary.

- **HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)**
  Indicate whether the acquiring person agrees to waive any part of the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h). If yes, list the applicable State Attorneys General and whether the acquiring person permits the DOJ and FTC to disclose (1) the fact that a notification was filed and the waiting period associated with the notification, (2) information and documents filed with the notification, or (3) both (1) and (2). This waiver will not cover materials provided in response to a request for additional information

issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquiring person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquiring person should list the jurisdictions to which the waiver applies. This item is voluntary.

CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. The Form includes the following language:

Penalties for False Statements
Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION
This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

AFFIDAVITS

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring person, the affidavit must still attest to the good faith intent of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that an agreement to merge or acquire has been executed, and if the executed agreement is not the definitive agreement, that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. See § 803.5(b).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:
1. That the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
2. In the case of a tender offer, that the intention to make the tender offer has been publicly announced; and
3. The good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are also required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:
1. The identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
2. The specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
3. The fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
4. The anticipated date of receipt of such notification by the Agencies; and
5. The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. See § 803.5(a).

PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

DISCLOSURE NOTICE

Public reporting burden for this report is estimated to average 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, 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 operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

Antitrust Improvements Act
Notification for Certain Mergers and Acquisitions

Acquired Person Instructions

GENERAL INSTRUCTIONS AND INFORMATION

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). Submitted materials must be provided to the Federal Trade Commission ("FTC") and to the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies").

► Information

The central office for information and assistance concerning the Rules is:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024
Phone: (202) 326-3100
E-mail: HSRhelp@ftc.gov for Rules questions
Premerger@ftc.gov for filing information

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act"), the Rules, FTC final rules (including their Statements of Basis and Purpose) published in the Federal Register, as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office ("PNO") website.

► Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values
All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Fee Information
The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. § 18a note, based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). Filing fees increase annually by the percentage increase, if any, in the consumer price index ("CPI") over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. § 18a note. For current fee information, see the PNO website.

North American Industry Classification System (NAICS) Data
When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System - United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at https://www.census.gov/naics/. This website also provides guidance in choosing the proper code(s).

Notification Thresholds
Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). See § 801.1(h). The current threshold values can be found at Current Thresholds.

Person Filing and Filing Person
The terms "person filing" or "filing person" mean the ultimate parent entity ("UPE"). See § 801.1(a)(3). The terms are used herein interchangeably.

Select 801.30 Transaction
A transaction to which § 801.30 applies **and** where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.

Supervisory Deal Team Lead
The individual who has primary responsibility for supervising the strategic assessment of the deal, and who would not otherwise qualify as a director or officer.

Target
The target includes all entities and assets to be acquired by the acquiring person from the acquired person in the reported transaction.

Year
All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recently completed calendar or fiscal year for which the requested information is available.

► Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

► Responses

Documents, including the Form, should be produced as (1) a searchable PDF format from which text can be copied or (2) an Excel file.

For Business Documents (see below), check the box to indicate whether any part of the document is privileged and then provide the document number, title, and estimated date. If the acquired person has identified (1) a NAICS overlap, (2) an overlap within the Overlap Description, or (3) a supply relationship within the Supply Relationships Description, also provide the following:

1. Author(s) (and job title(s)) for documents created by the acquired person; or
2. Recipient(s) or supervisor(s) (and job title(s)) of documents created by third parties as part of an engagement with the acquired person.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. Similarly, if the acquired person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the acquired person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the acquired person, only the name of the third party is required.

If the acquired person submits documents in addition to what is required, such documents should be identified as "Voluntary". See § 803.1(b).

Submit only one copy of identical responsive documents.

► Privilege

See § 803.3(d). For privileged documents, the filing person must also provide the following in a log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

► Translations

Materials or information in a language other than English must be translated into English, with the English translation attached to the original version. See § 803.8.

► Non-Compliance

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

► Limited Response

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

FEE INFORMATION

Total Expected Filing Fee
Indicate the value of the total required fee for the transaction.

Parties Paying the Fee
Indicate which filing person(s) is paying the filing fee and, if applicable, whether the fee is being paid by multiple entities. For each entity within the acquired person paying a portion of the fee, provide the name of the payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT
In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the Filing Fee Information page.

Note on Paying by Check
The FTC strongly discourages check payments because handling a physical check will create a delay in processing the Form. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to:

Federal Trade Commission
Financial Operations Division
600 Pennsylvania Ave, Drop H-790
Washington, DC 20580

Please note that the waiting period may be delayed until the fee has been confirmed.

GENERAL INFORMATION

Special Filing Types
Indicate whether the filing is a post-consummation filing, or whether the transaction is a cash tender offer or bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

Early Termination
Indicate whether the acquired person requests early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18a(b)(2), and on the PNO website. Note that if either person in any transaction requests early termination, it may be granted and published.

ULTIMATE PARENT ENTITY (UPE) INFORMATION

► UPE Details

Name
Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE of the acquired person. See § 801.1(a)(3).

Entity Type
Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Filing Made on Behalf of the UPE
If the filing is being made on behalf of the UPE by another entity within the acquired person authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a) or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information
Provide the name, firm/company name, address, telephone number, and e-mail address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Additionally, provide the name, firm/company name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

UPE Annual Reports and Financial Information

- **Central Index Key**
  If the UPE of the acquired person files annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission (SEC), provide the Central Index Key (CIK) number.

- **Annual Reports and Audit Reports**
  Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquired person.

  Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should leave this section blank and instead provide the most recent reports for the highest-level entity(ies) that controls the target under "UPE Structure."

  The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

- **Date of Report(s)**
  Provide the date of the most recent annual report(s) and/or audit reports (or, if audited is unavailable, unaudited) of the UPE of the acquired person.

- **Size of Person**
  If applicable, indicate whether the person filing notification stipulates that the acquired person meets either the higher or lower size of person test. See 15 U.S.C. § 18a(a), § 801.11.

Minority Shareholders or Interest Holders
This section requires the acquired person to report the name, headquarters mailing address, and approximate percentage held by certain minority holders of (1) the acquired entity and (2) any entity directly or indirectly controlled by the acquired entity, but only if such minority holder will continue to hold an interest (whether voting securities or non-corporate interests) in such entity(ies) or will acquire an interest in any entity within the acquiring person as a result of the transaction.

If the acquired entity or an entity directly or indirectly controlled by the acquired entity is not a limited partnership, provide the required information for each individual or entity that currently holds 5% or more but less than 50% of the voting securities or non-corporate interests of any such entity, starting with the acquired entity.

If the acquired entity or an entity directly or indirectly controlled by the acquired entity is a limited partnership, provide the required information for its (a) its general partner, regardless of the percentage it holds, and (b) its limited partners that (i) currently hold 5% or more

but less than 50% of the non-corporate interests of such limited partnership and (ii) have or will have the right to serve as, nominate, appoint, veto, or approve board members, or individuals with similar responsibilities, of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction (each a "covered entity"), or of the general partner or management company of a covered entity.

► Acquired Entity Structure

If the acquisition includes only assets that do not comprise substantially all the assets of an operating business, the acquired person should not complete the questions in this section. Otherwise, the acquired person must complete these questions for the portion of the transaction related to the voting securities, non-corporate interests, and assets that comprise substantially all the assets of an operating business.

Acquired Entity(ies)
List the name, city, state, zip code, and country of the acquired entity(ies) and all U.S. entities, and all foreign entities that have sales in or into the United States that are included within the acquired entity. Entities with total assets of less than $10 million may be omitted. Alternatively, the acquired entity may report all entities within it. Also list all names under which the entities do business (e.g., d/b/a names).

The list of entities should be organized by operating company or operating business ("top-level entity"), if applicable. Filings for select 801.30 transactions need not include d/b/a names and the list of entities can be organized as kept in the ordinary course of business.

Annual Reports and Audit Reports
Provide the CIK number(s), if the acquired entity(ies) file(s) annual reports (Form 10-K or Form 20-F) with the SEC, and the most recent annual or audit report(s) of the acquired entity(ies).

Natural person UPEs must also provide the most recent annual report or audit report and CIK number for the highest-level entity that controls the acquired entity.

TRANSACTION INFORMATION

► Parties

List the name and mailing address of each acquiring and acquired person and each acquiring and acquired entity. Do not list entities controlled by an acquired entity.

Acquiring UPE
Provide the name, headquarters address, and website of the acquiring person.

Acquiring Entity(ies)
If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE
Provide the name, headquarters address, and website of the acquired person.

Target(s)
If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

► Transaction Details

801.30 Transaction
Indicate whether the transaction is subject to § 801.30 and if so, what type(s), including select 801.30.

Transaction Type
Indicate whether the transaction is any of the following (select all that apply):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);

- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); or
- Other (specify)

Acquisition Details
Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests is being acquired and allocation is not possible, note such information in an endnote.

For determining the percentage of voting securities, evaluate total voting power per § 801.12. For determining the percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

To complete this item:
- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

► Transaction Description

Business of the Target
Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise an operating business.

Non-Reportable UPE(s)
Provide the names of any UPE that does not have a reporting obligation.

Transaction Description
Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are being acquired. Indicate what consideration will be received by each person and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the code names.

Related Transactions
If the transaction that is the subject of this filing has related filings, indicate whether the related filing(s) (choose all that apply):
- Is a principal transaction that triggers one or more shareholder backside transactions;
- Is a shareholder backside transaction;
- Has more than one acquiring UPE;
- Has more than one acquired UPE;
- Has more than one reportable step;
- Is a joint venture;
- Is a consolidation;
- Is an exchange of assets;
- Has one or more filings in the alternative; or
- Has other circumstances that require more than one filing and if so, explain.

Provide all additional details regarding the related filings(s), including party names and transaction numbers, necessary to identify and connect all related filings.

► Additional Transaction Information

Transaction Rationale

Except for select 801.30 transactions, identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person or any of its officers, directors, or employees. If the rationale of the target is different from the UPE, submit an explanation for each. Identify each document produced in the filing that confirms or discusses the stated rationale(s). If documents produced in the filing are referenced, identify the specific page(s) that discusses the stated rationale(s).

► Business Documents

Transaction-Related Documents

- **Competition Documents**
  Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

- **Confidential Information Memoranda**
  Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquired person or of the target that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists.
  Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Third-Party Studies, Surveys, Analyses, and Reports**
  Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors ("third-party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquired person or of the target for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

- **Synergies and Efficiencies**
  Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Plans and Reports

Except for select 801.30 transactions, provide all regularly prepared plans and reports that were provided to the Chief Executive Officer (CEO) of the target or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the target also produced, sold, or known to be under development by the acquiring person, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Except for select 801.30 transactions, provide all plans and reports that were provided to the Board of Directors of the target or any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service of the target also produced, sold, or known to be under development by the acquiring person, as identified in the Overlap Description. Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

► Agreements

Transaction-Specific Agreements

Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements.

Documents that constitute the agreement(s) (e.g., Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version.

If the executed agreement is not the definitive agreement, submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, or term sheet, or the most recent draft agreement. See § 803.5. Such document should include information regarding some combination of the following terms: the identity of the parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

COMPETITION DESCRIPTIONS

This section is not applicable to select 801.30 transactions.

► Overlap Description

Briefly describe each of the principal categories of products and services (as reflected in documents created in the ordinary course of business) of the target.

In addition, list and briefly describe each of the current or known planned products or services of the target that competes with (or could compete with) a current or known planned product or service of the acquiring person, based on documents created in the ordinary course of business. Current or known planned products or services include those that the acquiring person or target researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. Known planned products or services may be limited to those referenced in any submitted Business Document and should reflect the acquired person's existing knowledge of the acquiring person's business. The acquiring and acquired person should not exchange information for the purpose of answering this item.

For each such product or service listed, provide:

1. The sales (in dollars) for the most recent year. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the target measures performance (e.g., daily users, new signups).
2. A description of all categories of customers of the target that purchase or use the product or service (e.g., retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional). If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.
3. The top 10 customers in the most recent year (as measured in dollars), and the top 10 customers for each customer category identified.

► Supply Relationships Description

Related Sales

List and briefly describe each product, service, or asset (including data) that the target has sold, licensed, or otherwise supplied, and which represented at least $10 million in revenue (including internal transfers) in the most recent year (1) to the acquiring person, or (2) to any other business that, to the acquired person's knowledge or belief, uses the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The sales (in dollars) to (1) the acquiring person and (2) any other business that, to the acquired person's knowledge or belief, uses the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services.

2. The top 10 customers (as measured in dollars) of the target that use the target's product, service, or asset to compete with the acquiring person's products or services, or as an input for a product or service that competes or is intended to compete with the acquiring person's products or services. For each such customer, describe the target's supply or licensing agreement (or other comparable terms of supply).

Related Purchases
List and briefly describe each product, service, or asset (including data) that the target incorporates as an input into any product or service and that the target has purchased, licensed, or otherwise obtained and which represented at least $10 million in revenue (including internal transfers), in the most recent year (1) from the acquiring person or (2) from any other business that, to the acquired person's knowledge or belief, competes with acquiring person to provide a substantially similar product, service, or asset. Responses to this item should reflect the acquired person's existing knowledge of the acquiring person's business; the acquiring and acquired person should not exchange information for the purpose of answering this item.

For each product, service, or asset listed, for the most recent year, provide:

1. The purchased amount (in dollars) for (1) the acquiring person and (2) any other business that, to the acquired person's knowledge or belief, competes with the acquiring person to provide a substantially similar product, service, or asset.
2. The top 10 suppliers (as measured in dollars) for the associated input product, service, or asset, and a description of the target's purchase or licensing agreement (or other comparable terms of purchase).

REVENUES AND OVERLAPS

► NAICS Codes

This item requests information regarding the industry categories for the target's products and services that derived revenue in the most recent year.

No Revenue
If there is no revenue to report, explain why.

NAICS Codes Describing U.S. Operations with Estimates of Revenue
Identify all 6-digit NAICS industry codes that describe the U.S. operations of the target, inclusive of all entities and assets anticipated to be included within the target at the time the transaction will be consummated.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating business(es) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more, but less than $1 billion; or $1 billion or more.

Identify each 6-digit NAICS industry code in which both the acquiring person and target derive revenue by checking the overlap box.

For products and services that derived revenue in the most recent year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquiring person derived revenue from U.S. operations.

► Controlled Entity Geographic Overlaps

If, to the knowledge or belief of the person filing notification, the target, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquiring person also derived any amount of dollar revenues in the most recent year, then for each such 6-digit NAICS industry code follow the instructions below for this section.

NAICS Overlaps of Controlled Entities
List each overlapping NAICS code and description. For each, list the name of each operating business within the target that has U.S. operations in the same NAICS code as the acquiring person and the name(s) under which the operating business does business, and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code in ascending order.

Geographic Market Information
For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

- **State-Level Reporting**
  - Manufacturing Industries
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the target are sold without a significant change in their form (whether they are sold by the target or by others to whom such products have been sold or resold).

    31** through 33**** Manufacturing**, *except*:
    3115** Dairy Product Manufacturing
    311611 Animal (except Poultry) Slaughtering
    311613 Rendering and Meat Byproduct Processing
    311615 Poultry Processing
    31181* Bread and Bakery Product Manufacturing
    321*** Wood Product Manufacturing
    32221* Paperboard Container Manufacturing
    324*** Petroleum and Coal Products Manufacturing
    3251** Basic Chemical Manufacturing
    325521 Plastics Materials and Resin Manufacturing
    3271** Clay Product and Refractory Manufacturing
    3272** Glass and Glass Product Manufacturing
    3273** Cement and Concrete Product Manufacturing

  - Wholesale Trade
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of target are located.

    42** Wholesale Trade**, *except*:
    42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
    42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
    42344* Other Commercial Equipment Merchant Wholesalers
    42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
    42346* Ophthalmic Goods Merchant Wholesalers
    42349* Other Professional Equipment and Supplies Merchant Wholesalers
    4239** Miscellaneous Durable Goods Merchant Wholesalers
    4241** Paper and Paper Product Merchant Wholesalers
    4242** Drug and Druggists' Sundries Merchant Wholesalers
    42441* General Line Grocery Merchant Wholesalers
    42442* Packaged Frozen Food Merchant Wholesalers
    42451* Grain and Field Bean Merchant Wholesalers
    42452* Livestock Merchant Wholesalers
    4247** Petroleum and Petroleum Products Merchant Wholesalers
    4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
    42491* Farm Supplies Merchant Wholesalers
    42495* Paint, Varnish, and Supplies Merchant Wholesalers

  - Insurance Carriers
    For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the target is licensed to write insurance.

    5241 Insurance Carriers**

  - Other NAICS Sectors
    For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the target conducts such operations.

    11** Agriculture, Forestry, Fishing, and Hunting**, *except*:
    113*** Forestry and Logging

21**** **Mining, Quarrying, and Oil and Gas Extraction**, *except:*
2123** Nonmetallic Mineral Mining and Quarrying

2213** **Water, Sewage, and Other Systems**

23**** **Construction**

44912* **Home Furnishing Retailers**
4492** **Electronics and Appliance Retailers**

48**** **and 49****** **Transportation and Warehousing**, *except:*
493*** Warehousing and Storage

51**** **Information**, *except:*
512*** Motion Picture and Sound Recording Industries

5222** **Nondepository Credit Intermediation**
523*** **Securities, Commodity Contracts, and Other Financial Investments and Related Activities**
5242** **Agencies, Brokerages, and Other Insurance Related Activities**
525*** **Funds, Trusts, and Other Financial Vehicles**
531*** **Real Estate**
533*** **Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)**

54**** **Professional, Scientific and Technical Services**, *except:*
54138* Testing Laboratories and Services
54194* Veterinary Services

55**** **Management of Companies and Enterprises**

561*** **Administrative and Support Services**

61**** **Educational Services**

71**** **Arts, Entertainment, and Recreation**, *except:*
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

7212** **RV (Recreational Vehicle) Parks and Recreational Camps**
7213** **Rooming and Boarding Houses, Dormitories, and Workers' Camps**
8114** **Personal and Household Goods Repair and Maintenance**
813*** **Religious, Grantmaking, Civic, Professional, and Similar Organizations**
814*** **Private Households**

- **Street-Level Reporting**
  For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, zip code, county, and city or town, of each establishment from which dollar revenues were derived (either directly by the target or by a franchisee) in the most recent year.

113*** **Forestry and Logging**
2123** **Nonmetallic Mineral Mining and Quarrying**

22**** **Utilities**, *except:*
2213** Water, Sewage and Other Systems

3115** **Dairy Product Manufacturing**
311611 **Animal (except Poultry) Slaughtering**
311613 **Rendering and Meat Byproduct Processing**
311615 **Poultry Processing**
31181* **Bread and Bakery Product Manufacturing**

321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
3251** Basic Chemical Manufacturing
325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers

44**** and 45**** Retail Trade, *except*:
44912* Home Furnishings Retailers
4492** Electronics and Appliance Retailers

493*** Warehousing and Storage
512*** Motion Picture and Sound Recording Industries
521*** Monetary Authorities-Central Bank
5221** Depository Credit Intermediation
5223** Activities Related to Credit Intermediation
532*** Rental and Leasing Services
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
62**** Health Care and Social Assistance
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

72**** Accommodation and Food Services, *except:*
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps

811*** Repair and Maintenance, except
8114** Personal and Household Goods Repair and Maintenance

812*** Personal and Laundry Services

► Minority-Held Entity Overlaps

This section requires the disclosure of holdings of the target of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the acquiring person. If NAICS codes are unavailable, holdings in entities that have operations in the same industry as the acquiring person, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of the Target
If the target holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the acquiring person, list the name of such entity and d/b/a names (if known), the percentage held, the entity within the target that holds the minority interests, and the overlapping 6-digit NAICS code(s) or industry(ies).

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

► Prior Acquisitions

This item should be completed for the target and pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. that in the most recent year (1) derived revenue in an identified 6-digit NAICS industry code overlap, or (2) provided or produced a competitive overlap product or service as described in the Overlap Description.

For each such overlap, list all acquisitions of entities or assets deriving dollar revenues in an overlapping 6-digit NAICS industry code or overlapping product or service made by the target in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer, 50% or more of non-corporate interests of an unincorporated entity, or all or substantially all the assets of an operating business if the entity or business had annual net sales or total assets greater than $10 million in the year prior to the acquisition and any acquisitions of assets that did not constitute all or substantially all of an operating business valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:
1. the overlapping 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity or assets derived dollar revenues, or the competitive overlap product(s) or service(s) in the Overlap Description;
2. the name of the entity from which the assets, voting securities, or non-corporate interests were acquired;
3. the headquarters address of that entity prior to the acquisition;
4. whether assets, voting securities, or non-corporate interests were acquired; and
5. the consummation date of the acquisition.

ADDITIONAL INFORMATION

► Subsidies from Foreign Entities or Governments of Concern

Indicate whether, to the knowledge or belief of the filing person, within the two years prior to filing, the acquired person has received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r)). If yes, list each entity or government from which such subsidy was received (or which has made the commitment) and provide a brief description of the subsidy.

Indicate whether, for products the acquired person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is subject to countervailing duties imposed by any jurisdiction. If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

Indicate whether, to the knowledge or belief of the filing person, for products the acquired person produced in whole or in part in a country that is a covered nation under 42 U.S.C. § 18741(a)(5)(C), any product is the subject of a current investigation for countervailing duties in any jurisdiction. If yes, list each product and the jurisdiction conducting the investigation.

► Defense or Intelligence Contracts

Except for select 801.30 transactions, identify (1) pending requests for proposals from the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4) for which the target has submitted a proposal and (2) awarded procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. § 101(a)(6) or 50 U.S.C. § 3003(4); valued at $100 million or more if such pending requests for proposals or such awarded procurement contracts (a) are or will be the source of revenues in any identified 6-digit NAICS industry code overlap; or (b) involve or will involve an overlap product or service as described in the Overlap Description or the Supply Relationships Description. Limit the response to the target. Include (1) the name of the entity within the filing person; (2) the contracting office, as defined by 48 C.F.R. § 2.101(b); (3) the Contracting Office ID; (4) the Award ID; and (5) the NAICS code(s), if any, listed in the System for Award Management database. Do not include classified information but note that responsive information was withheld on that basis.

► Voluntary Waivers

- **HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)**
  Indicate whether the acquired person agrees to waive the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h), to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquired person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquired person should list the jurisdictions to which the waiver applies. This item is voluntary.

- **HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)**
  Indicate whether the acquired person agrees to waive any part of the disclosure exemption contained in the Act, 15 U.S.C. § 18a(h). If yes, list the applicable State Attorneys General and whether the acquired person permits the DOJ and FTC to disclose (1) the fact that a notification was filed and the waiting period associated with the notification, (2) information and documents filed with the notification, or (3) both (1) and (2). This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. § 18a(e) and does not preclude the acquired person from providing a full waiver as provided for under FTC and DOJ practice as reflected in the Model Waiver. The acquired person should list the jurisdictions to which the waiver applies. This item is voluntary.

CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. The Form includes the following language:

Penalties for False Statements
Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, e.g., Sections 371, 1001, and 1505 of Title 18, United States Code).

CERTIFICATION
This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. § 18a, require the submission of additional information or documentary material relevant to the proposed transaction.

AFFIDAVITS

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquired person, the affidavit must still attest to the good faith intent of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that an agreement to merge or acquire has been executed, and if the executed agreement is not the definitive agreement, that a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. See § 803.5(b).

In § 801.30 transactions, the acquired person is not required to submit an affidavit.

PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

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Public reporting burden for this report is estimated to average 105 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office
Federal Trade Commission
400 7th Street, S.W.
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, D.C. 20503

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BILLING CODE 6750–01–C

By the direction of the Commission.

April J. Tabor,

Secretary.

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

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya

The Federal Trade Commission, with the collaboration and concurrence of the Assistant Attorney General of the Department of Justice's Antitrust Division, has voted unanimously to issue a Final Rule to amend the Hart-Scott-Rodino (''HSR'') Form and Instructions. This marks the first time in 46 years that the agencies have undertaken a top-to-bottom review of the form (''HSR Form'') that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act.[1] Alongside this Final Rule, the

[1] Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form.*

Commission voted to submit to Congress its FY2023 Annual Report regarding the Federal Trade Commission and Department of Justice's administration of the HSR Act. This Annual Report highlights the agencies' work investigating and challenging illegal mergers.[2]

Much has changed in the 48 years since the HSR Act was passed. Changes in the economy, corporate structure, and investment strategies have reshaped how businesses compete in today's marketplace. The number of transactions reported to the agencies surged during fiscal years 2021 and 2022 and remains high.[3] And deal valuations have soared. In FY2019, only 13.3% of transactions reported to the agencies exceeded $1 billion.[4] Those high-value transactions now represent nearly a quarter (24%) of all transactions that come before the agencies.[5] Transactions have also become increasingly complex in both structure and potential competitive impact.[6]

The HSR Form, meanwhile, has largely stayed the same. Against the backdrop of vast changes in the structure of business associations and corporate transactions, the information currently collected by the HSR Form is insufficient for our teams to determine, in the initial 30 days provided by the HSR Act, whether a proposed deal may violate the antitrust laws and hence warrant an in-depth investigation. The antitrust agencies are put in the position of expending significant time and effort to develop even a basic understanding of key facts. They must often rely on information provided in third-party interviews that can be challenging to obtain in 30 days. Much of the key information, moreover, is known only to the firms proposing the merger, such as the breadth of their business operations, including any existing relationship with the other party, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave critical gaps that allow unlawful deals to go undetected.

By reflecting modern day commercial realities, the HSR Form updates in the Final Rule will provide the antitrust agencies with information that is more probative as to whether a proposed deal risks violating the antitrust laws. Several aspects of the Final Rule bear particular mention:

• *Shed light on complex and opaque entities, including private equity and minority holders.* The existing HSR Form did not require information about the entities between the ultimate parent entity and the acquiring entity. Nor did it allow the agencies to determine whether the acquiring person may have competitively relevant premerger entanglements with the target's industry or whether minority holders have significant rights to direct the acquiring entity's actions. To close this gap, the Final Rule requires parties to provide information about the entities and individuals involved in the deal that will have the ability to influence decision-making post-merger.

• *Report vertical and other non-horizontal relationships.* The existing HSR Form failed to provide agencies with meaningful information about non-horizontal relationships. After a decades-long focus primarily on mergers between direct competitors, the antitrust agencies in recent years have reinvigorated merger enforcement against non-horizontal deals that violate the antitrust laws. Since 2021, the FTC has brought six enforcement actions against mergers involving a vertical combination—more than the total number of vertical cases pursued in the last decade overall.[7] The FTC's efforts have already resulted in the government's first litigated victory against a vertical merger in over 50 years.[8] As we continue building on this work, ensuring that the agencies receive information on non-horizontal components of deals is vital. Accordingly, the Final Rule requires filers to report supply relationships to reveal whether the transaction may undermine competition, including through limiting rivals' access to key products or services they need to compete. The Final Rule also contains new document requirements that are intended to reveal any existing or future non-horizontal business relationships that could give rise to competitive risks.

• *Reveal areas of future competition and emerging rivals.* As section 7 instructs us to arrest anticompetitive tendencies in their incipiency, the agencies must scrutinize acquisitions that may eliminate emerging rivals or threaten competition in lines of products that are still in development.[9] The existing HSR form has been particularly ill-suited to this task, as it gives no insight into merging parties' ongoing product development efforts or pipeline projects that could implicate future areas of competition. The Final Rule fixes this problem by requesting key information about products and services under development that are not yet generating revenues. In recent years the FTC pursued an enforcement action involving a pipeline product still in early-stage development, as well as successfully litigated a case involving the market for research and development.[10] The new HSR Form will further bolster these efforts.

• *Identify a greater range of prior acquisitions.* Another notable trend has been the rise of serial acquirers, firms that engage in numerous strategic acquisitions in the same industry and sometimes ''roll up'' many small competitors in the same or adjacent

[2] Press Release, Fed. Trade Comm'n, FTC, DOJ Issue Fiscal Year 2023 Hart-Scott-Rodino Notification Report and Announce Corrected Fiscal Year 2022 Report (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-doj-issue-fiscal-year-2023-hsr-report-and-announce-corrected-2022-report.* On July 1, 2024, the Commission and DOJ Antitrust Division submitted to Congress a summary of this Report.

[3] Fed. Trade Comm'n & Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2023 (2024) [hereinafter *FY23 Report*] at 20.

[4] Fed. Trade Comm'n & Dept. of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2019 (2020) at Ex. A, Table I, *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.*

[5] FY2023 Report at Ex. A, Table I.

[6] *See* Remarks by Chair Lina M. Khan, Private Capital, Public Impact Workshop on Private Equity in Healthcare (March 5, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024.03.05-chair-khan-remarks-at-the-private-capital-public-impact-workshop-on-private-equity-in-healthcare.pdf*; Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter & Comm'r Alvaro Bedoya in the Matter of EQT Corporation (Aug. 16, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya-4.*

[7] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023); *FTC* v. *IQVIA et al,* 710 F.Supp.3d 329 (S.D.N.Y. 2024); *FTC* v. *Tempur Sealy Intern'l, Inc.,* 4:24–cv–02508 (S.D. Tex. July 2, 2024); *In re Lockheed Martin Corp.,* Docket No. 9405 (2022), *https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0052-lockheedaerojet-matter* (alleging that the merger would enable missile systems manufacturer to use control over missile propulsion systems to harm rival defense prime contractors) (transaction abandoned); *In re Nvidia Corp.,* Docket No. 9404 (2021), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter* (alleging that the merger would give chip manufacturer the ability and incentive to use control over microprocessor design technology to undermine competitors) (transaction abandoned); *In re Intercontinental Exchange, Inc. & Black Knight, Inc.,* Docket No. 9413, *https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0142-intercontinental-exchange-incblack-knight-inc-matter* (2023).

[8] *Illumina, Inc.,* 88 F.4th 1036.

[9] *See Illumina, Inc.* v. *FTC,* 88 F.4th 1036, 1049–51 (2023) (stating that antitrust markets are not limited to products that exist but may include those that are anticipated or expected or encompass research, development and commercialization of products in development); *FTC* v. *PPG Indus., Inc.,* 798 F.2d 1500, 1504 (D.C. Cir. 1986) (noting that merging firms competed in evolving high technology market at the request-for-proposal stage of product development).

[10] *In re Sanofi/Maze Therapeutics,* Docket No. 9422 (2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2310091-sanofimaze-therapeutics-inc-matter; Illumina, Inc.,* 88 F.4th 1036.

markets. This strategy can consolidate a market through a series of smaller deals that fly below the radar of antitrust enforcers. Private equity firms and other investors have deployed roll-up strategies across a range of industries, from healthcare to housing—with potentially major ramifications for the public.[11] Indeed, the FTC's lawsuit against U.S. Anesthesia Partners charges the entity with acquiring over a dozen anesthesiology providers across Texas in the span of eight years, a reduction in competition that cost consumers and businesses tens of millions of dollars.[12] The Commission's investigations into acquisitions of veterinary clinics have also revealed roll-up plays.[13] To understand whether a proposed transaction is part of an anticompetitive roll-up scheme, the agencies need insight into what prior acquisitions the entity has made within the same lines of business. While the existing Form required some reporting of these acquisitions, the Final Rule provides a more complete picture of the merging parties' overarching acquisition strategies by requiring that both entities provide information on certain prior acquisitions that closed within the previous five years.

The notice of proposed rulemaking included a requirement that would have aided the agencies' assessment of whether the proposed deal would risk threatening competition in labor markets. This proposal fit within a wider effort at the agencies to correct for antitrust enforcers' decades-long neglect of promoting fair competition in labor markets. As Commissioner Bedoya rightly notes, when antitrust enforcers did pay attention to workers, it usually involved weaponizing antitrust against them.[14] This disposition had no basis in the law—and, as Commissioner Bedoya notes, directly contravenes the goals Congress sought to advance in passing the antitrust laws. No antitrust law gives primacy to some market participants over others or states that some are entitled to greater protection from unlawful monopolization or mergers; to the contrary, the Clayton Act prohibits mergers that may substantially lessen competition ''in any line of commerce.'' [15] I am pleased that in recent years the FTC has reoriented towards a more faithful application of the law, including—for the first time in our 110-year history—through challenging a transaction on the grounds that it risks undermining competition in labor markets.[16]

While the Final Rule pares back some of the labor market requirements, I believe that the information required by other provisions of the Final Rule will position the agencies to identify transactions that threaten competition in labor markets. In particular, the newly-mandated information on overlap and supply relationship descriptions, as well as new high-level business and transaction-related documents, will enable the agencies to identify whether a proposed deal risks undermining competition for workers. And partnerships with the National Labor Relations Board and the Department of Labor will allow the FTC to continue deepening its expertise in how competition works in labor markets.[17]

The FTC also announced today that, following the Final Rule coming into effect, we will lift the categorical suspension on early termination of filings made under the HSR Act. When the antitrust agencies grant early termination, merging parties can consummate their deal without waiting for the full 30-day period ordinarily required under the law. The Commission initially suspended early termination due to a historic volume of filings amidst the COVID–19 pandemic.[18] But a revisiting of the FTC's early termination policy was overdue. Data reveal that permissively granting early termination led to the consummation of some deals that resulted in significant harm.[19] Moreover, the law makes clear that the granting of early termination is purely a discretionary function.[20] Merging

[11] *See, e.g.,* Richard M. Scheffler et al., Am. Antitrust Inst., Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk 8–16 (2021), *https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf*; Atul Gupta, et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes* (Becker Friedman Inst., Working Paper No. 2021–20, 2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537612.* The Commission recently hosted a public workshop to discuss the growing body of economic research examining the role of private equity investment in health care markets. Fed. Trade Comm'n, Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care (Mar. 5, 2024), *https://www.ftc.gov/news-events/events/2024/03/private-capital-public-impact-ftc-workshop-private-equity-health-care.*

[12] Complaint, *FTC* v. *U.S. Anesthesia Partners, Inc., et al.,* No. 4:23–cv–03560 (S.D. Tex. Sept. 21, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2010031-us-anesthesia-partners-inc-ftc-v.*

[13] *In re JAB Consumer Partners, et al.,* Docket Nos. C–4766 & C–4770 (2022), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter.*

[14] Statement of Comm'r Alvaro M. Bedoya Joined by Comm'r Rebecca Kelly Slaughter & Chair Lina M. Khan in the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule (Oct. 10, 2024).

[15] 15 U.S.C. 18. See also, Statement of Comm'r Alvaro M. Bedoya, *id.*

[16] Press Release, Fed. Trade Comm'n, FTC Challenges Kroger's Acquisition of Albertsons (Feb. 26, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons*; *see also,* Statement of Comm'r Rebecca Kelly Slaughter & Chair Lina M. Khan Regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England Health System* (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.*

[17] Press Release, Fed. Trade Comm'n, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices*, Press Release, Fed. Trade Comm'n, FTC, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.*

[18] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination,'' Federal Trade Commission (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[19] *See* Premerger Notification; Reporting and Waiting Period Requirements, 16 CFR parts 801, 803 (2024) at 17 (The consequences of inadequate detection are revealed in a recent analysis of hospital mergers that were reported to the Agencies for premerger review co-authored by two economists from the Commission's Bureau of Economics. Keith Brand et al., ''In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,'' 66 J. L. Econ. 639 (2023). The paper examined a set of consummated hospital mergers and measured the effect of each merger on prices. The study concluded that mergers not reportable under the HSR Act did not result in larger price increases than reportable mergers. In contrast, the authors found different outcomes among mergers that were subject to premerger review based on how much review the transaction received. Of the mergers reported to the Agencies, the largest average percentage price increase occurred for those mergers that received early termination of the initial waiting period. This suggests that the HSR Filings failed to provide sufficient information to trigger additional investigations that could have blocked these harmful mergers before they were consummated; instead, the filings resulted in early termination of the waiting period. While the study was not designed to test the impact of this rulemaking, the study supports the Commission's belief that there are information deficiencies with the current HSR Rules that prevent the Agencies from identifying mergers that may violate the antitrust laws.'').

[20] Both the Clayton Act and the HSR Act provide for an exception to the waiting period by empowering the FTC and DOJ to grant early terminations ''in their discretion.''16 CFR 803.11(c) (HSR Act: ''The Federal Trade Commission and the Assistant Attorney General may, in their discretion, terminate a waiting period upon the written request of any person filing notification or . . . sua sponte.''); 15 U.S.C.A. 18a(2) (Clayton Act: ''The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the **Federal Register**

parties are not entitled to early termination, and I question the wisdom of using agency resources on a discretionary function while resource constraints impede our ability to fully execute on our mandatory functions. Because the Final Rule will provide the agencies with additional information necessary to probe the competitive risk that a transaction may pose, we will be better positioned to determine the right set of policies and procedures around early termination, including which subset of deals may receive it and under what circumstances.

The new HSR Form marks a generational upgrade that will sharpen the antitrust agencies' investigations and allow us to more effectively protect against mergers that may substantially lessen competition or tend to create a monopoly. But it is not the only part of the HSR regime that requires upgrading. As I've noted in past years, the HSR Act must be modernized for today's economy.[21] In particular, the statutory timelines laid out in the HSR Act have not kept pace with the surge in deal volume, the complexity of transactions, and the increased burden associated with proving in court a violation of section 7. The HSR Act gives the agencies 30 days to determine whether a deal warrants close investigation, and then another 30 days after parties certify they have ''substantially complied'' with the inquiry. These timelines were set in an era when document productions were measured in the number of boxes and not the number of terabytes—and when lawmakers expected the agencies would receive around 150 merger notifications per year, rather than 150 notifications per month (as the agencies now routinely receive).[22] While the new HSR Form will bolster the antitrust agencies' ability to adequately screen proposed deals during the initial waiting period, Congress should revisit HSR and appropriately extend these timelines to match today's realities.[23]

Faithfully discharging the Commission's statutory obligations also requires adequate funding. The HSR Annual Report summarizes the agencies' merger enforcement work over FY2023.[24] During that period the FTC's work resulted in challenges to 15 transactions that risked threatening competition.[25] Ten of these challenges resulted in parties abandoning the transactions, nearly double the average annual number of abandonments from the preceding 10 years. Our efforts to keep building on this efficacy, however, will run into major resource constraints. The FTC's enacted budget for fiscal year 2024 represented a one percent reduction from the previous year. Alongside a statutorily mandated five percent pay raise and higher non-pay costs resulting from inflation, the result of this reduction has been significantly fewer resources to support the FTC's mission. While our teams work diligently to faithfully enforce the antitrust laws, resource constraints have meant the FTC has been forced to make difficult triage decisions and forgo meritorious investigations—likely resulting in the public bearing the cost of illegal mergers. Additional resources would better equip the Commission to fully pursue its mandate and protect the public.

Finally, the FTC today is launching a new online portal so that members of the public can directly submit comments on mergers that may threaten competition.[26] This portal is part of the FTC's broader work to ensure we are opening our doors to hear from people across the country on issues of public concern.[27] Whether the antitrust agencies do or do not take action against a merger can be of enormous consequence—determining how much people pay for essential goods and services, how much workers earn on a job, whether independent businesses can keep serving their communities, whether an entrepreneur can bring a breakthrough innovation to market, and whether our supply chains are brittle or resilient. Ensuring the antitrust agencies are positioned to make these high-stakes decision with a full understanding of what may follow from a merger is vital. Well-resourced businesses know how best to inform the agencies' investigations, but one shouldn't need to hire a lawyer to provide public enforcers with relevant information on a merger. This new portal will allow the FTC to systematize the regular gathering of public input on mergers and continue broadening the types of expertise and experience that inform our work.

The Final Rule, HSR Report, and new merger portal reflect tremendous work by teams across the FTC, in particular from the Premerger Notification Office, the Office of Policy and Coordination, and the Office of Policy Planning, as well as from throughout the Bureau of

a notice that neither intends to take any action within such period with respect to such acquisition.'').

[21] Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY2022 HSR Annual Report to Congress (Dec. 21, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter-commissioner-alvaro-m-bedoya-5*.

[22] *See id.*

[23] Presently, FTC staff are routinely at the mercy of merging parties granting extensions of the statutory deadline so that staff has the necessary time to review the transaction. But it should not be merging parties that get to determine the amount of time FTC staff has to review mergers and do the work required by law.

[24] Commissioners Holyoak and Ferguson dissent from the issuance of the HSR Annual Report. In particular, Commissioner Holyoak disagrees with the longstanding practice to count abandonments and deals where parties were not required to make an HSR filing. Dissenting Statement of Commissioner Melissa Holyoak, Hart-Scott-Rodino Annual Report, Fiscal Year 2023 (Oct. 10, 2024) at 2. For over a decade, the Report has been clear that it includes certain non-HSR reportable matters. FY23 Report at n.28 (''The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.''); *see also Fed. Trade Comm'n, FY 2010 Hart Scott Rodino Annual Report* (2011) at n.18. A proposed merger may be anticompetitive even if it falls below the threshold that would require an HSR filing. As a result, FTC staff may raise concerns regarding certain transactions even where such a filing has not been made. Those matters are part of the FTC's merger enforcement work and including them faithfully represents the Commission's work to Congress. The HSR Annual Report also states plainly that it references certain deals where ''the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation,'' *id.* at 2, and Commissioner Holyoak does not identify any inconsistency or explain any insufficiency in how the numbers are tabulated here versus how the Commission has historically done so. Commissioner Ferguson notes in his dissent that the precise timing of HSR reports is not mandated by Congress and has varied in past years, but neglects to mention that timing under prior administrations also varied significantly. Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the FY2023 HSR Annual Report to Congress (Oct. 10, 2024) at 1–2. *See, e.g.,* Fed. Trade Comm'n, Annual Competition Reports (last visited Oct. 9. 2024), *https://www.ftc.gov/policy/reports/annual-competition-reports* (for example, the FY19 Annual HSR Report was released in July of 2020, the FY18 Annual HSR Report was released Sept 2019, the FY17 Annual HSR Report was released Apr. 11, 2018, the FY16 Annual HSR Report was released Oct. 4, 2017. Strangely, Commissioner Ferguson also suggests that the decision to issue this year's report in October is part of some political scheme related to giving the Democratic ticket an advantage in the forthcoming presidential election. I am unaware of any reports, research, or evidence suggesting that the HSR Report has any bearing on voting patterns or electoral outcomes.

[25] One transaction challenged in FY2023 remains in litigation.

[26] *See* Press Release, Fed. Trade Comm'n, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form*.

[27] When the FTC in recent years has invited public input, we have received thousands—and sometimes tens of thousands—of comments, including on issues relating to merger enforcement. *See, e.g.,* Public Docket FTC–2023–0043, Draft Merger Guidelines for Public Comment, *Regulations.gov* (Jul. 19, 2023); Public Docket FTC–2024–0028, FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U.S. Economy, *Regulations.gov* (May 23, 2024).

Competition, the Office of General Counsel, and the Bureau of Economics. I am grateful to this team for their diligent efforts, as well as to the FTC's partners at DOJ for their collaboration, and to my fellow Commissioners for their thoughtful engagement.

Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter

My colleagues Commissioners Ferguson and Holyoak write at some length in support of the Commission's decision not to adopt, at this time, a set of proposed requests for employment information (''the labor screen'') that was included in the original notice of proposed rulemaking.[1] Rather than litigating the merits of the labor screen, I write to respond to one of the ideas underlying my colleagues' arguments against it.

The Sherman Act was passed in 1890; the Clayton Act and the Federal Trade Commission Acts were passed in 1914, creating this Commission and empowering it to enforce this newly expanded set of antitrust laws.[2] Yet it was only in 2021 that a Federal antitrust enforcer first stopped a merger because of its impact on competition in the labor market.[3]

My colleagues cite the absence of such merger challenges as a key reason for dropping the labor screen. Both stress the extensive efforts the antitrust agencies have expended to identify such mergers.[4] They argue that, if enforcers have been working for years to identify mergers that harm competition in labor markets and have not brought more challenges, how can we justify requesting additional data to identify those mergers? In fact, Commissioner Holyoak seems to imply that labor monopsony is rare, going so far as to say that the labor screen ''was a solution in search of a nonexistent problem.'' [5]

History tells a different story. While my colleagues suggest that the absence of labor-based merger challenges exists ''not for a lack of trying,'' [6] a review of the first hundred years of that history finds dreadfully little trying. Indeed, most of the history of antitrust enforcement has been marked by a clear aversion to protecting labor market competition. This arguably has only been reversed in the last decade.

The historical record reveals several reasons for the lack of labor-based merger challenges, none of which suggest that labor monopsony is rare. The first would be early antitrust enforcers' overt hostility to labor organizing specifically and labor organizations more generally—a position that put them in sharp opposition to the legislators who created American antitrust law.

From the first Senate debates over passage of the law that would come to bear his name, Senator John Sherman made clear he was concerned with combinations of companies that could unilaterally set the price of labor. In denouncing the ''trust,'' he explained that:

> ''The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests. . . It dictates the terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is more dangerous than any heretofore invented. . .'' [7]

He wasn't the only legislator who was concerned with labor. The debates in 1890 as well as 1914 were defined by an overriding concern that the laws being considered would be misused to stop labor organizing. Thus, the Sherman Act was amended not once but twice to avoid such a result, ultimately being rewritten nearly in its entirety; sections 6 and 20 of the Clayton Act were enacted for the same reason 24 years later.[8]

Early antitrust enforcers ignored this legislative intent, as did the courts hearing challenges brought under the laws. Prosecutors instead turned the Sherman Act into what Professor Hovenkamp termed a ''savage weapon'' against labor, [9] using it to break the strikes of longshoremen in New Orleans and hungry Pullman Palace Car workers in Illinois.[10] The labor protections in the Clayton Act arguably fared worse. Despite the law's clear prohibition against the use of antitrust laws against labor organizing, courts in the 1920s used it to stop 2,100 strikes.[11]

In short, for the first four decades of their existence, the antitrust laws were used as a cudgel against organized labor, not a tool to detect and block mergers that risked harming labor markets. While the law was there to allow for a challenge to a merger based on its impact on labor market competition,[12] the idea that the DOJ or FTC of that era would try to block such mergers finds no basis in reality.

In his treatise exploring the absence of antitrust enforcement targeted at labor markets, Professor Posner presents two other reasons for the lack of labor-based merger challenges, both of which post-date the heyday of the labor injunction in the first half of the 20th century.[13] He argues that, starting in the 1960s, legal scholars began to prevail upon law enforcers to target antitrust enforcement on conduct and combinations that raised the prices on products and services sold to the public—that is, ''consumer welfare.'' More interestingly, he explains that until very recently, most economists assumed labor markets were more or less competitive, and labor market power—the power of employers to set wages below a competitive level—was thus not an important problem for society.[14]

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[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178, 42197 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803).

[2] 15 U.S.C. 1–38; 15 U.S.C. 12–27; 15 U.S.C. 41–58.

[3] *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 1 (D.D.C. 2022).

[4] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11.

[5] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9.

[6] *Id.; see also* Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11 (''It is not for a lack of effort.'').

[7] 21 Cong. Rec. 2457 (Mar. 21, 1890) (remarks of Sen. John Sherman of Ohio).

[8] *See* Alvaro M. Bedoya & Bryce Tuttle, ''*Aiming at Dollars, Not Men*'': *Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law,*'' 85 Antitrust L.J. 805, 809–812 (2024).

[9] Herbert Hovenkamp, *Labor Conspiracies in American Law,* 1880–1930, 66 Tex. L. Rev. 919, 928 (1988).

[10] *See* Bedoya & Tuttle, *supra* note 8, at 811–812; *see also U.S.* v. *Workingmen's Amalgamated Council of New Orleans,* 54 F. 994, 996 (E.D. La. 1893); Melvin I. Urofsky, *Pullman Strike,* Encyc. Britannica (Sept. 2, 2022), *https://www.britannica.com/event/Pullman-Strike.*

[11] *See* William E. Forbath, *Law and the Shaping of the American Labor Movement* 158 (1991).

[12] In 1926, in line with Senator Sherman's intent, the Supreme Court held that antitrust law could be used affirmatively to protect competition in labor markets, allowing a group of sailors to sue shipowners for wage-fixing. *Anderson* v. *Shipowners Ass'n of the Pac. Coast,* 272 U.S. 359, 365 (1926).

[13] *See generally* Eric A. Posner, *How Antitrust Failed Workers* (2021).

[14] *See id* at 4. Professor Posner cites a popular economics textbook from 2005 which declared that ''[m]ost labor economists believe there are few monopsonized labor markets in the United States.'' *Id. citing* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 108 (2005). *See also* David Card, *Who Set Your Wage?* American Economic Review at 1075 (2022) (''the time has come to recognize that many—or even most—firms have some wage-setting power. Such a shift was made with respect to firm's price-setting power many decades ago[. . .] In the past few years we may have reached a tipping point for a similar transition in labor economics, driven by the combination of new (or at least post-1930) theoretical perspectives, newly available data sources, and accumulating evidence on several

That understanding of labor markets has begun to unravel. New research suggests that the fewer companies in a community competing for workers, the lower the wages.[15] Research also suggests that mergers, specifically, help companies keep wages low.[16] This appears to be a common problem in American society. Professor Posner found it plausible that in many labor markets, workers receive thousands of dollars less than the competitive rate.[17] Two years ago, the Treasury Department estimated that as a result of current employer market concentration as well as how time consuming it is to find, interview for, and accept a job, Americans likely lose out on the equivalent of eight weeks of pay every year. In other words, in a perfectly competitive labor market—in a world where we can easily switch jobs to one of any number of firms, most of us would be about two to four paychecks richer.[18] Few people may know about ''labor monopsony,'' but anyone on a budget knows what they'd do with that money.

In short, my colleagues seem to say that labor monopsony is not a problem even though we've only just started to look for that problem. Then, they wave away tools to help find that problem because we haven't found it yet.[19]

All of this said, a key barrier to any merger challenge, including labor-based challenges, is a lack of time. The changes voted out today will help FTC staff quickly find and focus on the mergers that hurt competition in any market, including labor markets. For this and many other reasons, I am proud to support them.

different fronts.''); *id.* at 1086 (''By insisting that 'markets set wages,' labor economists ceded the field, and had very little to say about questions like the design of online labor markets, or the effects of no-solicitation or no-poaching agreements—other than that they should not matter[. . .] One of the most exciting developments in the field today is the evidence of labor economists taking questions about wage setting seriously[. . .] I also expect this work to lead to some rethinking on policies such as minimum wages, the regulation of trade unions, and anti-Trust'').

[15] See, *e.g.,* Efraim Benmelech, et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages,* 57. J. of Hum. Res. S200, S203 (Supplement) (2022).

[16] See Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals,* 111 Am. Econ. Rev. 397, 397 (2021); Benmelech, supra note 3, at S200 (''instrumenting concentration with merger activity shows that increased concentration decreases wages''); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (unpublished) (Oct. 29, 2021) (''M&As that increase local labor market concentration have negative impacts on worker earnings with the largest impacts in already concentrated markets.''), *available at https://sites.google.com/site/davidhallarnold/research.*

[17] *See* Posner, *supra* note 13, at 28.

[18] The report's review of academic studies ''places the decrease in wages at roughly 20 percent relative to the level in a fully competitive market.'' This is a middle estimate from an estimated range of $0.15 to $0.25 cents of lost wages on every dollar. The ''eight weeks of pay'' figure applies the lower bound of that estimate ($0.15, or 15%) to 52 weeks of pay. *See* U.S. Dep't of Treasury, *The State of Labor Market Competition,* at ii (2022) (''20 percent''); *id.* at 24–25 (''15–25 cents on the dollar'').

[19] Commissioner Holyoak states that ''[t]he agencies have never made a standalone labor challenge to an acquisition,'' and Commissioner Ferguson states that the agencies have never made a challenge ''based on labor market theories that could have been identified by the proposed requirements.'' Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules,* at 9–10; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule,* at 11. I evaluate this new era quite differently. In 2021, our colleagues at the Antitrust Division successfully blocked a proposed merger between two of the nation's largest book publishers based on a labor theory that the elimination of competition between the merging publishers likely would have negatively impacted the advances paid to authors for their work. *See United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1 (D.D.C. 2022). What's more, in addition to Commission staff's challenge of the Kroger/Albertson's merger in part on a labor theory, FTC staff just last month submitted a comment urging the Indiana Department of Health to deny an application that seeks to combine Union Hospital and Terre Haute Regional Hospital, in part because, in staff's view, the proposed merger would likely depress wage growth for hospital employees and exacerbate challenges with recruiting and retaining healthcare professionals. *See* Complaint, *FTC* v. *Kroger Co., and Albertsons Co.,* (D. Or. Feb. 26, 2024); Federal Trade Commission Staff Submission to Indiana Health Department Regarding the Certificate of Public Advantage Application of Union Health and Terra Haute Regional Hospital at 54–63 (Sept. 5, 2024). The Commission unanimously authorized staff to file the comment. Press Release, Fed. Trade Comm'n, *FTC Staff Opposes Proposed Indiana Hospital Merger* (Sept. 5, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-staff-opposes-proposed-indiana-hospital-merger.* Additionally, in 2018, under Republican leadership, the Commission alleged that Grifols S.A.'s proposed acquisition of Biotest U.S. Corporation would likely have enabled the combined firm to decrease fees paid to blood plasma donors and required Grifols to divest certain assets as a condition of the acquisition. *See* Complaint, *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.* (Aug. 1, 2018). Finally, I note that prior to my arrival at the Commission, Chair Khan and Commissioner Slaughter sounded the alarm on labor concerns in the abandoned merger between Lifespan Corporation and Care New England Health System stating that, in addition to allegations contained in staff's complaint, they would have also supported an allegation on labor grounds. See Concurring Statement of Comm'r Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England Health System*, Fed. Trade Comm'n (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespancne_redacted.pdf.*

Statement of Commissioner Melissa Holyoak

I. Introduction

The Commission issued its notice of proposed rulemaking for the Premerger Notification, Reporting and Waiting Period Requirements which implements the Hart-Scott-Rodino Antitrust Improvements Act (''NPRM'') on June 29, 2023.[1] The contents of the NPRM were harrowing and generated (justifiably) substantial outcry from many commentors. Many of the contemplated filing requirements, if implemented, would have been beyond the Commission's legal authority, arbitrary and capricious, unjustifiably burdensome, and just plain bad policy.[2]

The Commission worked together on the monumental task of modifying the NPRM into the Final Rule,[3] ensuring the Final Rule does not suffer from the many legitimate criticisms raised by the commentors. The Final Rule modifies many provisions in the NPRM while taking great care to avoid unduly burdening merging parties or chilling the many procompetitive transactions that happen each year. To be clear, this Final Rule does not align exactly with my preferences. But I have worked to curb the excesses of the NPRM in meaningful ways that would not have happened absent my support. These significant modifications resulted in a Final Rule that is not only consistent with the agencies' statutory grant of authority but will also close certain informational gaps that affect the agencies' ability to conduct effective premerger screening.

Commissioner Ferguson, in section III of his statement, describes in detail the

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (proposed Jun. 29, 2023) (to be codified at 16 CFR parts 801 and 803) (hereinafter NPRM).

[2] Out of the gate, the NPRM made broad assertions about increasing concentration as a justification for the unprecedented and wide-sweeping proposed changes. NPRM, *supra* note 1, at 42179. The concentration literature upon which it relied, *id.* at 42179 n.7, however, has been heavily criticized and debunked. *See, e.g.,* Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions,* 33 J. Econ. Perspectives 23 (2019); Carl Shapiro, *Antitrust in a Time of Populism,* 61 Int'l J. Indus. Org. 714 (2018); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, Antitrust Magazine, Fall 2018. Most notably, the literature cited by the NPRM does not use well-defined antitrust markets in its assessment or conclusions. Further, even if increasing concentration had been a reality, it only has a limited role in analyzing competitive effects. *See infra* note 57.

[3] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 3, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf* (hereinafter Final Rule).

benefits of certain provisions that the Commission included in the Final Rule. These provisions that he describes fill information gaps in the agencies' current ability to fulfill their missions under the HSR Act. I agree with Commissioner's Fergusson's assessments and applaud the Commission's efforts to include these new requests in the Final Rule.

Simultaneous with today's issuance of the Final Rule, the Commission has also announced that it will lift its suspension of early termination when the Final Rule takes full effect. The suspension itself has been in place for more than three-and-a-half years, even though the suspension was supposed to be ''temporary'' and ''brief.'' [4] I have been baffled by this unjustified delay and disappointed that it took the promulgation of this Final Rule to lift the suspension of early termination. One of the virtues of the Final Rule is that certain provisions will allow staff to more quickly identify which mergers should receive early termination, a significant benefit to both staff and merging parties. So I guess late is better than never.

For the remainder of my statement, I write to demonstrate the dramatic differences between this Final Rule and the proposed rule set forth in the NPRM, and also to elaborate on some of the changes, in addition to lifting the early termination suspension, that drove my decision to vote in favor of the Final Rule. My overview of the Final Rule is not a substitute to the text of the Final Rule or the analysis in the Statement of Basis and Purpose (''SBP''),[5] both of which should be consulted by all filers.

Of the twenty-nine primary proposals in the NPRM, ten were rejected entirely, including, among others, the request for labor information, the obligation to produce draft transaction documents, and the requirements to create organizational charts. Of the remaining nineteen proposals, the Final Rule includes just two without modification; we have made meaningful changes to the other seventeen requirements.

TABLE 1—REJECTED PROPOSALS

NPRM provision	Results in final rule
Labor Market/Employee Information	Proposal rejected.
Drafts of Transaction-Related Documents	Proposal rejected.
Organizational Chart of Authors and Recipients	Proposal rejected.
Other Types of Interest Holders that May Exert Influence	Proposal rejected.
Expand Current 4(d)(iii) to Include Financial Projections to Synergies and Efficiencies	Proposal rejected.
Deal Timeline	Proposal rejected.
Provision of Geolocation Information	Proposal rejected.
Identification of Messaging Systems	Proposal rejected.
Litigation Hold Certification Language	Proposal rejected.
Identification of F/K/A Names	Proposal rejected.

For example, the prior acquisition proposal that called for ten years of prior acquisitions without any size threshold was reversed in the Final Rule to request only five years of acquisitions, and reinstated the $10 million threshold—returning to the time period adopted in 1987 [6] and dollar threshold that had existed since the original rules in 1978.[7] The NPRM proposal that would have required the filers to identify and produce all agreements between the merging parties has been modified significantly in the Final Rule to simply require the filers to check boxes to indicate whether they have a few types of agreements between them—nothing has to be produced or described. The Final Rule similarly modifies the NPRM's overlap and supply ''narratives'' to require only ''brief'' descriptions instead. And, among other revisions, the Final Rule's overlap and supply descriptions requirement makes clear that antitrust analysis is not required.

Further, many of the modifications exempt ''Select 801.30 Transactions'' from having to report certain information required by the Final Rule. Select 801.30 Transactions are acquisitions of third parties' voting securities where the acquirer does not gain control, no agreements between the acquiring and acquired person govern the transaction, and the acquiror does not have the ability to appoint or serve on a board.[8] The Final Rule likewise exempts transactions where there is no horizontal overlap or supply relationship from certain information requirements, and sets a *de minimis* threshold to exclude the requirement to describe supply relationships where the sale or purchase of the product, service, or asset represents less than $10 million in revenue in the most recent year. Table 2 highlights some of the main modifications that have been made in the Final Rule (again, this list is not exhaustive and does not substitute for the text of the Final Rule).

[4] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[5] Fed. Trade Comm'n, 16 CFR parts 801 and 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose (Oct. 3, 2024) (hereinafter SBP).

[6] 52 FR 7066 at 7078 (Mar. 6, 1987) (''[The Commission] believes that this change can be made without harming the agencies' ability to conduct a thorough antitrust review since an account of the acquiring person's acquisitions over the past five years will give adequate notice of possible trends toward concentration.'').

[7] 43 FR 33450 at 33534 (July 31, 1978) (''The item permits the omission of prior transactions that did not involve the acquisition of more than 50 percent of the voting securities or assets of a person with preacquisition sales or assets of $10 million, since smaller acquisitions are likely to be less significant from an antitrust standpoint.''). Unlike prior iterations of the rules, the Final Rule does require the acquired entity to also identify prior acquisitions and clarified that an acquisition of ''all or substantially all'' of the assets of a business must be reported.

[8] The Final Rule defines Select 801.30 Transactions as ''[a] transaction to which § 801.30 applies and where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions.'' 16 CFR part 803, appendix B at 1.

TABLE 2—SELECT MODIFIED NPRM PROPOSALS

NPRM provision	Select modification in final rule
Prior Acquisitions [9]	Among others, retain the five-year lookback and $10 million sales/assets threshold that existed in prior iterations of the HSR rules.
Other Agreements Between the Parties [10]	Among others, filers are not required to produce or describe agreements between the parties; instead, they must only, via checkbox, identify types of agreements between them, if any.
Officers, Directors, and Board Observers [11]	Among others, (1) exclude reporting on board observers; (2) limit to acquiring person only; (4) limit to officers/directors of entities in overlap industries as described by the text of the Final Rule.
4(c) Documents by/for Supervisory Deal Team Lead(s) [12]	Limit to only apply to *one* individual (*not* the plural ''leads'' like in the NPRM) supervisory deal team lead, as defined in the text of the Final Rule.
Supply Relationships [13]	Among others, (1) require only ''brief'' descriptions rather than a narrative; (2) exclude ''Select 801.30 Transactions''; (3) impose a *de minimis* threshold and (4) limit descriptions to a business assessment rather than an antitrust analysis (*see* SBP).
Overlap Products and Services [14]	Among others, (1) require only ''brief'' descriptions rather than a narrative; (2) exclude ''Select 801.30 Transactions''; and (3) limit description to a business assessment rather than an antitrust analysis (*see* SBP).
Ordinary Course Documents (Periodic Plans and Reports) [15]	Among others, limit to exclude ''Select 801.30 Transactions'' and limited to only require documents provided to Chief Executive Officers.
Identification of Limited Partners [16]	Among others, limit disclosure requirements for limited partners who do not have management rights.
Description of Entity Structures and Organizational Chart for Funds and MLPs [17].	Among others, eliminate requirement to create an organizational chart.
Transaction Diagram [18]	Among others, exclude ''Select 801.30 Transactions'' and only necessary if diagrams previously existed (*i.e.,* no need to create diagrams).
Mandatory Identification of Foreign Jurisdiction Reporting by Both Parties [19].	Limit to acquiring person.
Requiring a draft agreement or term sheet and transaction specific agreements for filings on non-definitive agreements [20].	Clarify scope and provide more details about the information required.
Transaction Rationale [21]	Among others, exclude ''Select 801.30 Transactions.''
Voluntary Waivers for State AGs and International Enforcers [22]	Allow filers to voluntarily check two separate boxes that would permit certain disclosures.
Defense or Intelligence Contracts [23]	Among others, limit to contracts generating $100 million or more of revenue and only if there is an Overlap or Supply Relationship.
Document Log Requirements [24]	Among others, limit requirement to identify authors to certain and limited circumstances.
Adjustments to NAICS revenue reporting [25]	Modified to limit scope.

Notably, only two of the main proposals in the NPRM were adopted without modification: the requirements to translate foreign-language documents and to report subsidies from foreign entities of concern, which was mandated by the Merger Filing Fee Modernization Act of 2022.[26] All other proposals were rejected or significantly modified. Taken together, the dramatic revisions to the proposed rule set forth in the NPRM result in a Final Rule that I can support. The decisions made to scale back the proposed requirements in the NPRM will limit burden, aligns the Final Rule with the Commission's legal authority under the HSR Act, and is tailored to address information gaps that have hampered the agencies' premerger review.[27]

Sections II through IV of my statement explain why three proposals in the NPRM were especially problematic to me, and why their elimination or substantial revision was critical to my vote on this Final Rule: (II) Labor Market/Employee Information, (III) Drafts of Transaction-Related Documents, and (IV) Ten Years of Prior Acquisitions Without any Size Thresholds. To be clear, by focusing on these three proposals I do not mean to diminish the importance of the other changes reflected in the Final Rule. Each of the many revisions that scaled back the proposed requirements in the NPRM contributed to my vote to issue the Final Rule. Finally, I discuss in section V some additional considerations that led me to support the Final Rule, including important limitations in the Final Rule that ensure

[9] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 14–15.

[10] *See id.* at 9.

[11] *See id.* at 5.

[12] *See id.* at 1.

[13] *See id.* at 10.

[14] *See id.* at 9–10.

[15] *See id.* at 9.

[16] *See id.* at 4–5.

[17] *See id.* at 5.

[18] *See id.* at 8.

[19] *Compare id.* at 7 (requiring disclosure for acquiring person) with Final Rule, *supra* note 3, Acquired Person Instructions (not requiring disclosure of transactions subject to international antitrust notification).

[20] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 9.

[21] *See id.* at 8.

[22] *See id.* at 15–16.

[23] *See id.* at 15.

[24] *See id.* at 2.

[25] *See id.* at 10–11.

[26] *See* 15 U.S.C. 18b (requiring the Commission to promulgate a rule requiring HSR filings to include information on subsidies received from certain foreign governments or entities that are identified as foreign entities of concern); Consolidated Appropriations Act, 2023, Public Law 117–328 (2023) (reflecting the appropriations bill that included the Merger Filing Fee Modernization Act of 2022).

[27] The incremental burden estimated in the NPRM decreased from 107 hours to only 68 hours in the Final Rule, a result that was critical to my decision. NPRM, *supra* note 1, at 42208 (reporting 107 incremental hours); SBP, *supra* note 3, at section VIII, 386 of 406 (reporting 68 incremental hours).

the Final Rule will not result in fishing expeditions.

Before proceeding, I want to discuss the Commission's authority to issue today's Final Rule, an issue that is critical to me as a Commissioner.[28] The HSR Act obligates the Commission, ''with the concurrence of the Assistant Attorney General,'' to issue rules that require information to be submitted in HSR filings that will ''be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [29] While this mandate affords some discretion to the Commission, this discretion is not unbounded. Critically, Congress did not give the Commission authority to promulgate rules to gather information generally, or to merely heap burden upon merging parties in an effort to dissuade acquisitions. Rather, the Act explains that the purpose of HSR filings, and the rules determining the content of filings, is for the agencies ''to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [30] Many proposals in the NPRM—including the three discussed below—have been rejected or substantially modified to ensure the Final Rule includes only new requirements that are consistent with the text and structure of the HSR Act.

II. Labor Market Information

The NPRM contained many problematic proposals. Chief among them was its proposal to collect information from filers about labor markets.[31] As proposed, filers would report three different types of information related to labor:

- ''Largest Employee Classifications[:] Provide the aggregate number of employees . . . for each of the five largest occupational categories'' based upon 6-digit SOC classifications; [32]
- ''Geographic Market Information for Each Overlapping Employee Classification[:] Indicate the five largest 6-digit SOC codes in which both parties . . . employ workers [and also provide] each ERS commuting zone in which both parties employ workers with the 6-digit classification and provide the aggregate number of classified employees in each ERS commuting zone; and'' [33]
- ''Worker and Workplace Safety Information[:] Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters.'' [34]

All three of these requirements (''Labor Proposal'') were completely rejected in the Final Rule. Chair Khan asserts in her statement that ''the Final Rule pares back some of the labor market requirements.'' [35] Despite this confusing statement, the text of the Final Rule makes clear that all (not ''some'') of the labor requirements have been fully removed (not ''pare[d] back''). And for good reason. Despite repeated and extensive efforts to make harm in labor markets a standard component of merger enforcement, no evidence exists to justify including the Labor Proposal in the Final Rule. Accordingly, the Labor Proposal was rightfully excluded from the Final Rule and, absent new evidence, has no place in any future rulemaking that the Commission may contemplate.

To be sure, a merger may theoretically create anticompetitive effects in a relevant labor market.[36] A post-merger entity might, for example, be able to lower wages for workers when the merger eliminates a critical employment option for workers. Such a scenario is more likely when the merger involves specialized workers who may have fewer comparable alternatives than less skilled workers.[37] Theory aside, the Labor Proposal would have asked for information generally unhelpful for determining whether an acquisition violates the antitrust laws.

First, the ''worker and workplace safety information'' would have provided no measurable benefit to the agency in its initial determination of whether the proposed merger violates the antitrust laws. To support burdening all filers with providing this information, the NPRM asserted that ''[i]f a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job.'' [38] No evidence, empirical or otherwise, was presented to support this assertion. And I am not aware of any supportive literature and have never seen a court opinion that suggests such evidence indicates competitive harm from a merger under section 7 of the Clayton Act (or any other antitrust violation under the Sherman Act or otherwise). Instead, this proposal seems like an overt way to harass firms with any workplace failure under the guise of an antitrust investigation. As the Supreme Court observed, ''[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the [F]ederal antitrust laws; those laws do not create a [F]ederal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.' '' [39] We simply do not have authority under the HSR Act to require filers to submit information about workplace safety.

Second, the proposed request for Standard Occupational Classification (''SOC'') codes would have been of—at most—limited value because SOC codes by themselves are not sufficient to define a relevant labor market for antitrust purposes.[40] Phrased differently, they are not tethered to the hypothetical monopolist test which has been applied by the agencies and courts in various iterations of the merger guidelines for decades.[41] Depending on the merger, SOC codes may be too broad

[28] *See, e.g.,* Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule,* Matter Number P201200 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.*

[29] 15 U.S.C. 18a(d).

[30] *Id.* (emphasis added).

[31] NPRM, *supra* note 1, at 42197.

[32] *Id.* at 42215. SOC codes are ''Standard Occupational Classification'' codes used by the Bureau of Labor Statistics of the Department of Labor. *See id.* at 42210.

[33] *Id.* at 42215.

[34] *Id.* Filers also had to provide, ''[f]or each identified penalty or finding . . . (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding.'' *Id.*

[35] Statement of Chair Lina M. Khan, Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300, and Regarding the FY2023 HSR Annual Report to Congress Commission File No. P859910 at 5–6 (Oct. 3, 2024) (hereinafter Statement of Chair Khan).

[36] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets,* 94 Ind. L.J. 1031, 1032 (2019).

[37] *Id.* at 1038.

[38] NPRM, *supra* note 1, at 42198.

[39] *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 225 (1993) (quoting *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945)); *cf. Rambus Inc.* v. *FTC,* 522 F.3d 456, 464 (D.C. Cir. 2008) (''Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim. 'Even an act of pure malice by one business competitor against another does not, without more, state a claim under the [F]ederal antitrust laws,' without proof of 'a dangerous probability that [the defendant] would monopolize a particular market.' '' (alteration in original) (quoting *Brooke Grp.,* 509 U.S. at 225)).

[40] *See Comment of U.S. Chamber of Com.,* Doc. No. FTC–2023–0040–0684 at 34 (hereinafter *U.S. Chamber Comment*) (''The data sought by the proposed rules defines labor markets imprecisely at best.'').

[41] *See Fed. Trade Comm'n* v. *Advoc. Health Care Network,* 841 F.3d 460, 468–70 (7th Cir. 2016) (using the hypothetical monopolist test to inform market definition); *Fed. Trade Comm'n* v. *Hackensack Meridian Health, Inc.,* 30 F.4th 160, 167 (3d Cir. 2022) (similar).

to accurately assess labor competition,[42] limiting their predictive value for assessing competitive harm. The NPRM itself appeared to acknowledge the limited value of SOC codes: ''[t]he use of [SOC] codes as a screening tool is not intended to endorse their use for any other purpose, such as defining a relevant labor market.'' [43] In fact, just a few examples demonstrate the limited value SOC codes would provide to the Commission:

Attorneys working across diverse areas of expertise are broken down into attorneys (23–1011 Lawyers) and . . . well, attorneys, although there is a separate category for Judges, Magistrate Judges, and Magistrates (23–1023), who are likely lawyers, too. To paraphrase Shakespeare (or a character in ''Henry VI, Part 2''), let's kill all the widgets.

To the best of my recollection, the agencies tend to slice the professional salami a little thinner than that when hiring staff.

Physicians fare a little better, although 10 categories of specialist physicians, plus ''family medicine physicians'' and ''physicians, all other'' leave out some specialties (like, say, surgery and ophthalmology) and make no room for subspecialties, which might be of interest if you're hiring a cardiothoracic surgeon to do a quad bypass or an orthopedic surgeon to do a hip replacement (or both, but you care which surgeon does which procedure).[44]

Third, the agencies have not relied upon the Economic Research Service (''ERS'') commuting zones to allege a relevant labor market,[45] and based upon this limited experience, they cannot be considered sufficiently applicable to require all filers to provide the ERS data proposed by the NPRM. Further, the NPRM proposal on ERS commuting zones relied upon data from 2000—yes, 24-year-old data—even though more recent iterations are available.[46] And newer data confirm that the older data fail to reflect current market realities, including the widespread transition to telework.[47] Given that there is no evidence that forcing all filers to provide the proposed labor market information would assist the agencies in determining whether the filed-for acquisition violates the antitrust laws, the Commission lacks authority to request the information under the HSR Act.

Even if one were to assume that the agencies had the authority to request the proposed labor market information, it was nonetheless properly excluded from the Final Rule because it was a solution in search of a nonexistent problem. The agencies have never brought a standalone labor challenge to an acquisition.[48] And this is not for lack of trying. Officials at the Commission,[49] Department of Justice,[50] and State enforcers [51] have stated their desire to focus on harms to the labor market, especially in mergers, since at least 2018, but the expended resources so far have been to no avail.

Granted, the Commission has included tagalong labor claims in addition to traditional theories of harm.[52] And, in a press release, the Commission has taken credit for protecting against harms in the labor market even though the actual complaint being announced by the press release did not allege harm in a labor market.[53] But these few and obscure outliers do not justify the widespread proposal to include labor market information in the Final Rule, especially information (*e.g.,* SOC codes) that has never been used in any of the agencies' filings (litigated or otherwise).

Moreover, the NPRM did not identify any economics literature that justified the request for labor information.[54] As explained by Albrecht *et al.:*

[D]espite growing interest in the use of antitrust law to address labor monopsony, such efforts are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts . . . .

Empirical data concerning the magnitude and impact of labor monopsonies is

[42] *E.g.,* Jose Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* 66 Labor Econ. 101886, 5 (2020). (''[T]he 6-digit SOC is too broad of a market according to the [small significant non-transitory reduction in wage test].'').

[43] NPRM, *supra* note 1, at 42197; *see Comment of International Center for Law & Economics,* Doc. No. FTC–2023–0040–698 at 15 (''Given the systematic misfit between the proposed 'Labor Markets' section and any actual labor markets, given the agencies lack of experience in analyzing the local labor-market effects of proposed mergers, and given the hard questions of when or under what conditions such labor-market effects might be both material and unlikely to covary with product-market effects, we suggest that the screening utility of the new information remains unclear.'').

[44] Daniel J. Gilman, *Antitrust at the Agencies Roundup: Kill all the Widgets Edition,* Truth on the Market (Aug. 4, 2023), *https://truthonthemarket.com/2023/08/04/antitrust-at-the-agencies-roundup-kill-all-the-widgets-edition/* (ellipses in original).

[45] The Commission did not use SOC codes or ERS commuting zones in their complaint allegations that reference concerns in labor markets in its recent litigations. *See* Compl., *In re Tapestry, Inc., & Capri Holdings Ltd.,* No. 9429 (F.T.C. Apr. 22, 2024); *see* Compl., *In re The Kroger Co. & Albertsons Cos., Inc.,* No. D–9428 (F.T.C. Feb. 26, 2024). And the DOJ did not rely upon ERS commuting zones in *United States* v. *Bertelsmann SE & Co. KGaA See* Compl., *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1 (D.D.C. 2022); see also *infra* note 48 (explaining why *Bertelsmann* is not properly considered a case about harm in a labor market, but rather a monopsony input case).

[46] *Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 8.

[47] *Id.*

[48] Some have considered *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 1 (D.D.C. 2022) to be a labor-market case. I disagree. On balance, this was more of a traditional monopsony input case. *Id.* The primary concern was whether there would be sufficient outlets for best-selling books. *Id.* I am also unaware of merger challenges by private parties where the plaintiffs alleged harm in a labor market. *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power,* 132 Harv. L. Rev. 536, 571 (2018) (''[W]e [have not] found a reported case in which a court found that a merger resulted in illegal labor market concentration.''). The Commission, as reflected in the SBP, also classifies *Bertelsmann* as an input monopsony case. SBP, *supra* note 5, at section II.B.2, 32 of 406.

[49] *See* Testimony of Fed. Trade Comm'n Chair Joseph Simons, US Congress, *Oversight of the Enforcement of the Antitrust Laws,* Senate Judiciary Committee, 2018, available at *https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws* (staff instructed to ''look for potential effects on the labor market with every merger they review'').

[50] Assistant Attorney General Makan Delrahim, Remarks at the Public Workshop on Competition in Labor Markets 3 (Sept. 23, 2019), *https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition* (''With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge.''); *Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets* (Oct. 29, 2019), available at *https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house* (''[L]abor competition issues are a high priority for Assistant Attorney General Delrahim and for the Antitrust Division. We have devoted significant resources to enforcement and advocacy in this area recently.''); *id.* (''The Division has also been busy developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Over the last 18 months, the Division has developed important new specifications for Second Requests and Civil Investigative Demands to determine whether a transaction will create or enhance labor monopsony. Moreover, the Division has leveraged improved search and review technology to identify labor competition concerns in merger and non-merger investigations.'').

[51] Testimony of Rahul Rao before Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. Hours of Rep. (Oct. 29, 2019), available at *https://www.govinfo.gov/content/pkg/CHRG-116hhrg45126/html/CHRG-116hhrg45126.htm.* (''Labor is an input, and it is a critical input. It's one that directly affects people's lives in that, when there's a monopoly power, the effect is increase in prices for consumers. When there is monopsony power of a dominant buyer, it decreases wages for workers.'').

[52] *See* Compl., *In re The Kroger Company and Albertsons Companies, Inc.,* No. D–9428 (F.T.C. Feb. 26, 2024).

[53] *See* Press Release, Fed. Trade Comm'n, *FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm* (Jul. 2, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm* (stating that ''[t]his deal isn't about creating efficiencies; it's about crippling the competition, which . . . could lead to layoffs for good paying American manufacturing jobs in nearly a dozen States,'' even though nothing in the complaint suggests any harm in the labor markets); *see also* Compl. *In re* Tapestry, Inc., and Capri Holdings Limited, No. 9429 (F.T.C. Apr. 22, 2024) (discussing labor issues but not alleging violations of the law based upon harm in labor markets).

[54] *See* NPRM, *supra* note 1, at 42197–98.

inconsistent. Evidence on the extent of labor-market power is mixed, with studies reaching divergent conclusions depending on the data, methodology, and markets analyzed.[55]

The NPRM also asserted that alleged increases in concentration justified its proposals, including its proposal for labor information.[56] While concentration levels may have a role in antitrust enforcement (*e.g.,* merger presumptions), general and imprecise observations of increased concentration are a slender reed upon which to base such a significant expansion of HSR authority.[57] These limitations also apply in the labor context. ''Many factors other than concentration can affect wages, such as differences in firm productivity, local labor-market conditions (*e.g.,* urban vs. rural), and institutional factors like unionization rates.'' [58] Further, as explained by Berry *et al.:*

> A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. [S]tudies like this may provide some interesting descriptions of concentration and wages but are not ultimately informative about whether monopsony power has grown and is depressing wages.[59]

In short, the economic literature does not provide any conclusive evidence on the viability or likelihood of merger harms in labor markets that would justify the NPRM's proposals regarding labor information.

Finally, the Commission's HSR rulemaking authority does not extend to heaping burdens upon merging parties as a fishing expedition in the hopes of developing new merger enforcement theories. Instead, if labor market concerns exist, then the Commission should conduct merger retrospectives or utilize its 6(b) authority to investigate the issue. The Commission has done neither, and it cannot rely on the need for general information gathering as a basis for demanding that all merging parties provide this information.

And no doubt, the NPRM's proposal would have come with a substantial and unjustifiable burden upon filers and also the agencies. First, firms do not typically maintain SOC codes in the ordinary course of business.[60] Investing in the expertise to generate and report the codes would have required substantial resources.[61] And smaller businesses who make filings infrequently will be particularly disadvantaged compared to frequent filers. Second, the agencies' staff would have borne the burden of this additional information. Staff have limited experience working with SOC codes, and utilizing the data would have required aid from already extremely overtaxed economist staffers. But shifting resources has an opportunity cost, particularly when Congress has flatlined our budget, significantly limiting staff's capacity to take on new work.[62] Thus it is unclear how the Commission would have found resources to utilize the information. This substantial, unjustified burden to filers and the agencies made it impossible for me to support any rule that included the Labor Proposal.

As a final comment on the Labor Proposal, I recognize that excising it from the Final Rule may not have been the desired outcome for some of my colleagues on the Commission.[63] I

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[55] Brian C. Albrecht et al., Labor Monopsony and Antitrust Enforcement: A Cautionary Tale, ICLE White Paper No. 2024–05–01 at 1 (2024); *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power,* 132 Harv. L. Rev. 536 (2018) (''[W]e have not found a reported case in which a court found that a merger resulted in illegal labor market concentration.''). I also note that a variety of articles sometimes cited to support increased antitrust scrutiny in labor markets fail to justify imposing a request for labor information in HSR filings—nor does the literature necessarily support broader enforcement of antitrust laws in labor markets. *See* Anna Stansbury & Lawrence H. Summers, ''The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy'' at 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), *https://www.nber.org/papers/w27193* (identifying decreased ability to unionize, *not* monopsony power, as the source of declining labor share of income); David Berger et al., *Labor Market Power,* 112 Am. Econ. Rev. 1147 (2022) (at 1 in SSRN version) (''[We] conclude that changes in labor market concentration are unlikely to have contributed to the declining labor share in the United States.''); Chen Yeh at al., *Monopsony in the US Labor Market,* 112 Am. Econ. Rev. 2099, 2099 (2022) (''[T]he growing gap between worker pay and productivity might be more about technological change than about employers' bargaining power—a very different issue than the monopsony problem that antitrust law could (potentially) address.''); *id.* (''[T]he correlation between markdowns and employment concentration is quite modest, both cross-sectionally (across local labor markets) and in the aggregate over time.''); *id.* at 2125 (''[A]t least within manufacturing—cross-sectional and temporal variation in local employment concentration may not necessarily reflect variation in employer market power as measured by markdowns.''); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* at 2 (Oct. 29, 2021) (''The evidence . . . does not support the conclusion that lack of antitrust scrutiny for labor markets has been a major contributor to labor market trends such as the falling labor share or stagnant wage growth. Most mergers do not generate large shifts in concentration and I find no evidence that the number of anticompetitive mergers in labor markets has been increasing over time.''); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals,* 111 Am. Econ. Rev. 397, 397 (2021) (''For unskilled workers, we do not find evidence of differences in wage growth post-merger, irrespective of the change in employer concentration induced by the merger.'').

[56] NPRM, *supra* note 1, at 42179 (''This concentration may reflect decreased competition, which can result in higher prices for consumers, decreased innovation, reduction in output, and *lower wages for workers.*'' (emphasis added))

[57] *See* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets,* 33 J. Econ. Persp. 69, 75–76 (2019) (increased concentration ''does not prove that competition in that market has declined.''); Carl Shapiro, *Antitrust in a Time of Populism,* 61 Int'l J. Indus. Org. 714, 722–23 (2018) (''Sheer size and market power are just not the same thing.''); Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 268 (4th ed. 2005) (''[P]erhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct.''); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy,* 12 Geo. Mason L. Rev. 1, 10 (2003) (''The [structural] paradigm was overturned because its empirical support evaporated.''); Fiona Scott Morton, *Modern U.S. Antitrust Theory and Evidence Amid Rising Concerns of Market Power and Its Effects,* Wash. Ctr. for Equitable Growth at 24 (May 29, 2019) (''[I]t is widely understood that either vigorous competition could cause concentration to increase or increased concentration could reduce competition.''); Cristina Caffarra & Serge Moresi, *Issues and Significance Beyond U.S. Enforcement,* Mlex Magazine, Apr.–June 2010, at 41, 42–43 (''Most economists would agree that market shares and the HHI often are poor indicators of market power.''); Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics,* 101 Boston Univ. L. Rev. 489 (2021) (''The pursuit of business concentration or bigness for its own sake will injure consumers far more than it benefits small business, the intended beneficiaries.''); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets,* 99 J. Pol. Econ. 977, 978 (1991) (''[O]nce a market has between three and five firms, the next entrant has little effect on competitive conduct . . . . These data show that prices fall when the second and third firms enter and then level off.''); Albrecht et al, *supra* note 55 at 17 n.76 (providing additional supporting citations).

[58] Albrecht et al., *supra* note 55 at 17.

[59] *Id.* at 18 (quoting Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization,* 33 J. Econ. Persp. 44, 57 (2019)).

[60] *See, e.g., Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 8.

[61] Comment of *American Bar Association's Antitrust Law Section,* Doc. No. FTC–2023–0040–0723 at 10–12.

[62] Given current budgetary constraints at the Commission and reduced hiring, this is unlikely to change either. Fed. Trade Comm'n, *FTC Appropriation and Full-Time Equivalent (FTE) History,* available at *https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation* (demonstrating that the FTC budget went down from 2023 to 2024); Caroline Nihill, *FTC Modernization, Enforcement Efforts Jeopardized by Cuts, Officials Say,* FedScoop (Jul. 10, 2024) (''Commissioner Rebecca Slaughter noted that proposed fiscal year 2025 budget cuts would result in the agency passing 'up important investigations and enforcement matters' in addition to considering furloughs and workforce reductions.''); *see also* Statement of Chair Khan, *supra* note 35, at 5–6.

[63] *See* Statement of Chair Khan, *supra* note 35, at 3–4; *see generally* Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter,

nonetheless commend them for agreeing to this unanimous outcome, and I am equally pleased that the Chair rescinded the most recent Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations.[64] These efforts reflect an evolution in thinking by the Commission toward evidence over rhetoric.[65]

III. Drafts of Transaction-Related Documents

Historically, filers have not been required to provide drafts of transaction-related documents with their filings.[66] The production and review of drafts typically occurs during a full-phase investigation, usually after the reviewing agency issues a second request.[67] The NPRM proposed abandoning this practice and requiring that drafts of responsive documents be produced as well.[68] The NPRM explained that requiring the production of drafts would allow staff to have ''documents that reflect pre-transaction assessments of business realities, as opposed to 'sanitized' versions.'' [69] Many commentors on the NPRM opposed this requirement.[70] The Commission ultimately rejected this proposal, which was critical to my vote.

Simply put, the likely burden of producing drafts would have outweighed any perceived benefit. Depending upon the practice of the individuals drafting the documents, and how many people are involved in preparing different sections of the documents, there may be ''dozens or even hundreds of iterative drafts.'' [71] No question, filings would be much larger under the proposal.[72] Forensic collections, that is a full collection of an individual's emails or documents, are incredibly burdensome. They not only require resources from a technical team to collect the materials; they also require time from the individual businesspeople and then, in most cases, counsel, to review the collected materials, identify responsive documents, conduct privilege reviews, prepare more expansive privilege logs, and prepare the documents for production. The status quo for HSR filings, where generally only final versions are produced, typically does not require a forensic collection. But if all drafts became a requirement for all transactions, then forensic collections, with all their costs, would become standard practice for almost all HSR filings.[73] The use of online collaborative workspaces further complicates the issue—and adds burden—because when multiple parties simultaneously revise the same document, it becomes difficult to know which versions constitute drafts.[74]

To defend the proposal, the NPRM argued drafts are more likely to contain a ''smoking gun.'' [75] As evidence to support this claim, the NPRM observed the drafts produced during a second request have more salacious content.[76] But receiving all drafts amounts to building a haystack around a needle. Even if some drafts contain some interesting content, that content does not support the NPRM's proposed expansive production obligations for two reasons. First, earlier drafts of transaction documents sometimes contain information that may not have been finalized, may occasionally reflect incorrect assumptions, and in some situations may be based on iterations of the transaction that were not part of the final, executed agreement.[77] Not every change to a draft document is nefarious. Many of the drafts, compared to the final version, would consist of minor or inconsequential edits, excessive repetition, or incomplete thoughts that will require much effort for staff to review.[78] The dramatic increase in the number of documents associated with each filing would have been sufficiently onerous that staff would be simply unable to scrutinize the differences among drafts as they triage dozens of filings each week.

Second, for each of the alleged ''smoking gun'' drafts identified in a second request by staff, other information contained in the HSR filings already prompted the staff to issue a second request. Phrased differently, the agencies already had enough information, without the drafts, to decide to issue a second request in each of those cases. And beyond bald assertions, the NPRM did not provide any evidence demonstrating the drafts would have made a difference in the decision whether to issue a second request.

In summary, the extensive burden resulting from the production and review by staff of drafts would have outweighed any benefits of the requirement. I struggle to imagine any circumstance in which all draft documents would become a ''necessary and appropriate'' input for the agencies' initial review of proposed mergers, and therefore believe the inclusion of this requirement in any future revision would exceed the Commission's rulemaking authority. I would not have supported a Final Rule that required drafts and am heartened by the removal of this provision.

IV. Prior Acquisitions

The NPRM proposed radical changes to the prior acquisition request in the 2011 Rule. The proposed changes included: (1) expanding the lookback period for reporting prior acquisitions from five years to ten years; (2) eliminating the prior *de minimis* exception that required reporting only for prior acquisitions that ''had annual net sales or total assets greater than $10 million''; (3) requiring the acquired entity to also report prior acquisitions; and (4) requiring that acquisitions of substantially all of the assets of a business be treated the same as acquisitions of securities or non-corporate interests.[79] My vote was conditioned on the Commission eliminating the first two of these proposed changes. I write to explain why I believe it was proper to remove those requirements from the Final Rule

Regarding Amendments to the Hart-Scott-Rodino Rules and Premerger Notification Form and Instructions (Oct. 10, 2024).

[64] Press Release, Fed. Trade Comm'n, FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations (Aug. 28, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-doj-partner-labor-agencies-enhance-antitrust-review-labor-issues-merger-investigations* (discussing Chair Khan's unilateral decision to enter a memorandum of understanding with the Department of Labor, National Labor Relations Board, and the Department of Justice); Press Release, Fed. Trade Comm'n, Statement on Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations (Sep. 27, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/09/statement-memorandum-understanding-related-antitrust-review-labor-issues-merger-investigations* (rescinding the same memorandum of understanding).

[65] Chair Khan and Commissioner Bedoya each write to express continued support for the now jettisoned Labor Proposal. I respect their enthusiasm for the idea. But between the decision to reject the Labor Proposal and rescind the memorandum of understanding, the public should rely more on revealed versus expressed preferences.

[66] NPRM, *supra* note 1, at 42194. One exception has been when a draft was sent to the board of directors. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See, e.g., U.S. Chamber Comment, supra* note 40, at 21–22.

[71] Comment of Foley & Lardner LLP, Doc. No. FTC–2023–0040–0653 at 11 (hereinafter *Foley Comment*).

[72] *Id.* (''The proposed instruction could potentially increase the size of at least some HSR filings by a factor of ten or twenty.'').

[73] *U.S. Chamber Comment, supra* note 40, at 21–22.

[74] *Id.*

[75] NPRM, *supra* note 1, at 42194.

[76] *Id.*

[77] *See Comment of Wachtell, Lipton, Rosen & Katz,* Doc. No. FTC–2023–0040–0670 at 11–12; *Foley Comment, supra* note 71, at 11–13.

[78] *Id.* at 12.

[79] NPRM, *supra* note 1, at 42203.

and why the Commission should not revisit these proposals in future revisions to the HSR rules.

Prior acquisitions may, in limited circumstances, be relevant to analyzing the filed-for transaction, but consideration of these prior transactions comes with risk of government overreach. A prior acquisition may be relevant to analyzing a filed-for transaction when the competitive effects of the prior acquisition have not yet manifested. For example, if a firm acquired a rival and integration was ongoing or existing contractual terms prevent the effects of the merger from being fully realized, a prior acquisition may help the agencies better understand the dynamics and competitive effects of the filed-for transaction. Once firms have completed integration, realized efficiencies, and implemented any strategies they plan to orchestrate, prior acquisitions provide almost no value [80] to the agencies as they assess the competitive conditions surrounding the filed-for transaction because at that juncture, the condition of the current market will reflect the effects of past transactions.[81]

For the last thirty-seven years, the Commission has determined that five years of prior acquisitions, with a threshold based upon the sales and assets of the entity that was acquired, was justifiable.[82] I do not seek to relitigate thirty-seven years of precedent. The question is whether the rulemaking record contained sufficient evidence to justify the request to reach ten years of prior acquisitions without any size threshold. I conclude that it did not.

The HSR Act limits the information that can be required under the Commission's HSR Rules to ''documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [83] Based upon this text, HSR Rules can seek only the information the agencies need to screen for potential violations of the antitrust laws arising from consummation of the filed-for transaction.[84]

Since 1987, the Commission has required only five years of prior acquisitions.[85] Despite the Commission making no efforts to change this rule for thirty-seven years, the NPRM contended that it needed the additional five years of prior acquisitions ''because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration.'' [86] Further, the NPRM alleged that ''changes to the economy and the varied acquisition strategies of filing parties'' justified ''a more detailed consideration of how numerous past acquisitions, including those in related sectors, affect the competitive landscape of the current transaction under review.'' [87] The Supreme Court has explained that when an agency ''depart[s] from a prior policy,'' ''the agency must show that there are good reasons for the new policy.'' [88] And ''a more detailed justification'' is required when an agency's ''new policy rests upon factual findings that contradict those which underlay its prior policy.'' [89] Beyond bald and conclusory assertions, however, neither the NPRM nor the rulemaking record presented ''good reasons'' that justified the production of ten years of prior acquisitions, let alone ''a more detailed justification'' that is required in this circumstance.[90]

Insofar as the NPRM's proposal required the production of information in order to investigate past transactions—*i.e.,* not the filed-for transaction—under theories of serial acquisitions or otherwise,[91] the Commission lacks the authority to gather that information via an HSR filing. Because neither the NPRM nor the rulemaking record provided evidence that ten years would be relevant to analyzing the effects of the filed-for transaction, the NPRM's proposal did nothing more than attempt an end-run around the HSR Act's reportability requirements.[92] Congress already specified which transactions must be reported to the agencies, and the Commission cannot gather information that does not help the agencies analyze the filed-for transaction.[93] Sensibly, the Final Rule does not adopt the proposed changes to the lookback period. In the SBP for the Final Rule, the Commission explains that the information required for prior acquisitions is limited to what the agencies need to analyze the anticompetitive effects of the filed-for transaction.[94]

The proposed removal of the $10 million threshold also suffered deficiencies. The $10 million threshold has been the threshold for prior acquisitions since the original HSR

[80] As one exception, the agencies have considered the ability to realize efficiencies in past transactions as evidence of the likelihood of achieving efficiencies in the current transaction. But even that information becomes stale and loses probative value at some point.

[81] Dan O'Brien, *The 2023 Merger Guidelines: A Giant Leap in the Wrong Direction,* Consumer Technology Association (Jun. 2024) (''[T]he acquisition history is irrelevant to the current merger except to the extent it provides information about the current merger's likely competitive effects.''); *see also Brown Shoe Co.* v. *United States,* 370 U.S. 294, 332 (1962) (''[T]he statute prohibits a given merger only if the effect of that merger may be substantially to lessen competition.'').

[82] NPRM, *supra* note 1, at 42203.

[83] 15 U.S.C. 18a(d)(1).

[84] *Id.*

[85] Premerger Notification; Reporting and Waiting Period Requirements, 50 FR 38742, 38769 (Sep. 24, 1985) (to be codified at 16 CFR parts 801, 802, and 803).

[86] NPRM, *supra* note 1, at 42203.

[87] *Id.*

[88] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (Scalia, J.).

[89] *Id.; see also id.* at 537 (Kennedy, J., concurring) (''Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.'').

[90] *Id.* at 515. In 1987, when the Commission adopted the rule that required filers to report five years of prior acquisitions, it explained that ''[t]he Commission believes that this change can be made without adversely affecting the agencies' ability to conduct a thorough antitrust review. The Commission believes than an accurate account of the acquiring person's acquisitions over the past five years will adequately put it on notice of possible trends toward concentration in the affected industry.'' Premerger Notification; Reporting and Waiting Period Requirements, 50 FR 38742, 38769 (Sep. 24, 1985) (to be codified at 16 CFR parts 801, 802, and 803). The simple conclusory statements in the NPRM do not qualify as ''a more detailed justification,'' which is necessary here because the Commission now contradicts its previous factual finding that five years was adequate for review.

[91] *See* NPRM, *supra* note 1, at 42203.

[92] The HSR Act identifies which transactions must be reported—*i.e.,* filed—based upon three tests: the commerce test, size of transaction test, and the size of person test. 15 U.S.C. 18a(a); *see also* Fed. Trade Comm'n, *Steps for Determining Whether an HSR Filing is Required* (last visited Oct. 4, 2024), *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing.*

[93] Under the Administrative Procedure Act, a court reviewing an agency rule can declare it ''unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'' 5 U.S.C. 706 (Under the Administrative Procedure Act, a court reviewing an agency rule can deem it ''unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right''). ''[N]o matter how important, conspicuous, and controversial the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.'' *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000).

[94] *See* SBP, *supra* note 5, at section II.B.5, 61 of 406 (explaining focus is on reportable transaction).

Rules in 1978.[95] But the NPRM disregarded this forty-six-year history where the threshold, despite inflation, has been the same. To justify abandoning the threshold, the NPRM pointed to ''the Commission's technology acquisition study [that] revealed that between 39.3% and 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition.'' [96] It then stated, without citation, ''[g]iven the relative nascency of these acquired companies, the Commission believes that excluding prior acquisitions of firms that have not yet had the chance to achieve $10 million in net sales or assets does not provide a comprehensive picture of each filer's acquisition strategy.'' [97] Nothing cited by the NPRM suggests that just because an acquisition target is less than five years old, that its sales will be below $10 million. Moreover, nothing in the NPRM explained why the age of targets in ''technology acquisitions'' would be relevant to the whole economy, and yet the proposed rule would have applied universally. Indeed, neither the NPRM nor the rulemaking record presented evidence to justify this dramatic expansion, and without evidence, there is no justification to impose such a requirement on filers.

The NPRM's proposal to double the time period and to remove the $10 million threshold would have added substantial burden to filing parties. The NPRM appeared content with the burden because it provided an expanded ability to analyze non-reportable prior acquisitions, including under theories of serial acquisitions.[98] But as explained, this benefit contravenes the Commission's rulemaking authority. Because the Final Rule must be limited to the Commission's authority, the focus must also be limited to how it assists the agencies' assessment of the filed-for transaction during the initial waiting period. As explained above, the NPRM's prior acquisition expansion would have provided almost nothing that would help the agencies to assess filed-for transactions.

V. Additional Considerations

The changes implemented by the Final Rule request information to analyze only the filed-for transaction. The changes are not to authorize the agencies to engage in general fishing expeditions to analyze non-reportable transactions or other allegedly problematic conduct divorced from the effects of the filed-for transaction. The same could not be said for some of the proposals in the NPRM, and those concerns have been rectified in the Final Rule. I understand potential filers may be skeptical that the information gathered in HSR filings may be collected with an eye toward other purposes. In the Final Rule, each of these provisions is now modified to collect only information that is necessary and appropriate to analyze the filed-for transaction.[99]

The Final Rule requires filers to produce new information about officers and directors within the ''stack'' of companies. The ultimate rule differs substantially from the NPRM's proposal.[100] Among the key changes, the request only applies to acquiring persons; filers no longer have to provide information about board observers; and the request is limited to only those entities who generate revenue in the same NAICS codes as the target. This information, like all the information requested by the Final Rule, is designed to help staff better analyze the filed-for transaction. The SBP provides a detailed description of why this requested information helps obtain that goal.[101] The purpose of this revision is not a general fishing expedition; it is to illuminate complicated and overlapping management structures that may impact the competitive effects of the filed-for transaction.

The additional information about minority shareholders and limited partners has also raised concern. The Final Rule again reflects key changes to the proposals in the NPRM. In particular, the final version eliminates the requirement to create an organization chart and eliminates the requirement to disclose limited partners that do not also have management rights. The complicated nature of this request, especially as included in the NPRM, raised confusion and concern of the Commission's purpose for this request. The SBP goes to great lengths to describe—and illustrate via helpful diagrams—why this information will be important to analyzing the filed-for transactions. The purpose is not to pursue or launch general investigations into theories of harm based upon fringe concepts such as common ownership.[102] Nor do I believe it would be possible to construct such theories based upon the information required by the Final Rule. My vote in support of the Final Rule reflects my understanding and belief this information will help the agencies to more quickly understand the competitive dynamics of a filed-for transaction, and nothing more.

VI. Conclusion

The Final Rule has been scaled back dramatically from the NPRM. And rightly so. I voted in favor of the Final Rule because of the revisions and outright removal of certain proposals in the NPRM. As modified, I believe the Final Rule is consistent with that statutory grant of authority and will help staff analyze the filed-for transaction and protect consumers without unduly burdening the filing parties.

On a going forward basis, the Commission can and should carefully scrutinize the effect of the Final Rule on our enforcement efforts and on the burden it imposes upon filing parties and the agencies' staff. A thoughtful retrospective will allow the Commission to modify the Final Rule, if necessary, in a principled and evidence-based fashion.

Concurring Statement of Commissioner Andrew N. Ferguson

Today, the Commission updates the Hart-Scott-Rodino Act (''HSR'' or ''the Act'')[1] notification form requirements. It concurrently announces that, after an over three-and-a-half-year wait, it will lift its categorical ''temporary suspension'' of early terminations once the Final Rule goes into effect.[2] Unlike

[95] Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450 at 33534 (July 31, 1978).

[96] NPRM, *supra* note 1, at 42203.

[97] *Id.*

[98] The NPRM sought to right the wrongs of the so-called 40 years of failed antitrust enforcement. *See* Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy; *see* NPRM, *supra* note 1, at 42203.

[99] To be clear, if a filing demonstrates anticompetitive conduct, such as price fixing, it can prompt another investigation.

[100] *See* app. A.

[101] SBP, *supra* note 5, at section VI.D.3.c., 241–254 of 406.

[102] *See, e.g.,* Einer Elhauge, *Horizontal Shareholding,* 129 Harv. L.R. 1267 (2016). Though beyond the scope of this statement, I do note that no court has endorsed such a theory of harm and it has faced scrutiny in the literature. *See* Matthew Backus, Christopher Conlon & Michael Sinkinson, *The Common Ownership Hypothesis: Theory and Evidence,* Brookings Econ Studies (Jan. 2019), *https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf*; Keith Glovers & Douglas H. Ginsburg, *Common Sense About Common Ownership,* 2018 Concurrences Rev. 28 (Fall 2018); Thomas A. Lambert & Michael E. Sykuta, *Calm Down About Common Ownership, Regulation (F*all 2018).

[1] 15 U.S.C. 18a.

[2] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-*

Continued

the Commission's recent, doomed effort to ban noncompete agreements,[3] Congress undoubtedly gave us authority to promulgate rules governing HSR notification requirements.[4]

The notice of proposed rulemaking (''NPRM'') that launched today's rulemaking would have abused that authority by imposing onerous, unlawful requirements that could not have survived judicial review.[5] But the NPRM also proposed some important, lawful updates to the HSR instructions. Mergers have become increasingly complex since we first adopted an HSR rule nearly five decades ago. The current HSR instructions do not adequately address forms of business association that were rare in 1978. And long experience implementing HSR has taught the Commission which information is most important to fulfilling Congress's mandate to conduct premerger review. The current HSR instructions did not always ensure that the Commission and the Antitrust Division (together, the ''Antitrust Agencies'') had the information they needed to fulfill Congress's intention.

The NPRM, however, was a nonstarter. My colleagues and I engaged in intense negotiations to separate the lawful wheat from the lawless chaff. Today's Final Rule,[6] and the lifting of the early-termination ban, are the culmination of those negotiations. Were I the lone decision maker, the rule I would have written would be different from today's Final Rule. But it is a lawful improvement over the status quo. And although not required for the Final Rule's lawfulness, the Commission wisely accompanies the Final Rule with a lifting of the ban on early termination. I therefore concur in its promulgation.

I. Congress passed HSR in 1976, adding section 7A to the Clayton Antitrust Act of 1914.[7] It requires merging firms to notify the Antitrust Agencies before consummating large mergers, and forbids them from consummating the merger until some period after notifying the Antitrust Agencies. The purpose of this premerger notify-and-wait requirement was to give the Antitrust Agencies the opportunity to investigate mergers and sue to block them. Premerger review dispenses with ''interminable post-consummation divestiture trials . . . [and] advance[s] the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion.'' [8]

Obviously, the Antitrust Agencies need information about the proposed transactions to review them. Congress therefore provided that firms seeking to merge must ''file notification pursuant to rules under subsection (d)(1)'' of the Act.[9] Subsection (d), titled ''Commission rules,'' in turn commands the Commission to, ''by rule,'' ''require that [a merging party's] notification . . . contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws.'' [10] The Commission may also ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.'' [11] ''Taken together, these statutory provisions give the FTC . . . great discretion . . . to promulgate rules to facilitate Government identification of mergers and acquisitions likely to violate [F]ederal antitrust laws before the mergers and acquisitions are consummated.'' [12]

The Commission has regularly deployed the rulemaking power Congress conferred on it in the Act. The Commission published its first final HSR rule two years after Congress passed the Act.[13] In the intervening decades, the Commission has made dozens of changes to the HSR form and instructions.[14] Some changes expanded the scope of information requested.[15] Others narrowed it.[16] Only one faced judicial review. In 2013, an industry association challenged a Commission rulemaking that required parties to file HSR notifications when they transferred most, but not all, of their pharmaceutical patent rights. The D.C. Circuit held that the rule was a proper exercise of the Commission's rulemaking authority and reflected reasoned decision-making.[17] The revised HSR rule survived and took effect, as have many HSR form changes beforehand and afterwards.

II. The Administrative Procedure Act (''APA'')[18] governs our HSR rulemakings.[19] ''The APA 'sets forth the procedures by which [F]ederal agencies are accountable to the public and their actions are reviewed by courts.' '' [20] First, the Rule must be promulgated in ''observance of procedure required by law.'' [21] For a rule like the Final Rule, section 4 of the APA[22] is the ''procedure required by law,'' and it ''prescribes a three-step procedure.'' [23] ''First, the agency must issue a 'general notice of proposed rulemaking,' ordinarily by publication in the **Federal Register**.'' [24] We published the NPRM for the Final Rule on June 29, 2023.[25] ''Second, if 'notice is required,' the agency must give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.' '' [26] We received approximately 721 comments during the 90-day comment period.[27] ''Third, when

temporarily-suspend-discretionary-practice-early-termination.

[3] See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf*; *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).

[4] See *Pharm. Rsch. & Mfrs. of Am.* v. *FTC,* 790 F.3d 198, 208 (D.C. Cir. 2015) (hereinafter ''*PhRMA*'') (''There is no doubt that the Commission's action was taken pursuant to express delegations of authority. The Act grants the FTC the authority to act by rulemaking.'' (citing 15 U.S.C. 18a)).

[5] FTC, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 FR 42178 (June 29, 2023) (hereinafter ''NPRM'').

[6] FTC, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 10, 2024) (hereinafter ''Final Rule''), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.*

[7] 15 U.S.C. 18a(a); see also *PhRMA,* 790 F.3d at 199.

[8] H.R. Rep. No. 94–1373, at 11 (1976).

[9] 15 U.S.C. 18a(a).

[10] 15 U.S.C. 18a(d)(1). If the initial notification reveals a potential competitive problem, the Antitrust Agencies may seek additional information, which delays the proposed transaction until the merging parties have complied. See 15 U.S.C. 18a(e).

[11] 15 U.S.C. 18a(d)(2).

[12] *PhRMA,* 790 F.3d at 205.

[13] See 43 FR 33450 (July 31, 1978) (publishing final rules for premerger notification).

[14] See FTC, 16 CFR parts 801 and 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose, 107, n.248 (Oct. 10, 2024) (hereinafter ''SBP''), *https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.*

[15] E.g., 76 FR 42471 (July 19, 2011) (adding Items 4(d), 6(c)(ii) and 7(d) to capture additional information).

[16] E.g., 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)).

[17] *PhRMA,* 790 F.3d at, 209–12.

[18] 5 U.S.C. 551 *et seq.*

[19] *PhRMA,* 790 F.3d at 209.

[20] *Dep't of Homeland Security* v. *Regents of the Univ. of Cal.,* 591 U.S. 1, 16 (2020) (quoting *Franklin* v. *Massachusetts,* 505 U.S. 788, 796 (1992)).

[21] 5 U.S.C. 706(2)(D).

[22] *Id.* section 553.

[23] *Perez* v. *Mortgage Bankers Ass'n,* 572 U.S. 92, 96 (2015).

[24] *Ibid.* (quoting 5 U.S.C. 553(b) (cleaned up)).

[25] NPRM, *supra* note 5.

[26] *Perez,* 572 U.S. at 96 (quoting 5 U.S.C. 553(c) (cleaned up)).

[27] SBP, *supra* note 14, at 6, n.4; Press Release, FTC, FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form (Aug. 4, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-doj-extend-public-*

the agency promulgates the final rule, it must include in the rule's text a 'concise general statement of its basis and purpose.' '' [28] With today's Final Rule the Commission includes a statement of basis and purpose that thoroughly explains its reasoning for each of the changes contained in the Final Rule. The Commission has therefore satisfied the APA's procedural requirements.[29]

APA section 10's standard of judicial review also imposes substantive limits on the exercise of our authority under HSR. The APA requires courts to ''hold unlawful and set aside agency action'' that is ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law''; ''contrary to constitutional right, power, privilege, or immunity''; or ''in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'' [30] The APA standard generally requires an agency to show two things. First, that it has a lawful grant of authority from Congress to issue the rule [31]—that is, that Congress enacted a statute conferring on the agency power to issue the rule,[32] and that the statute is consistent with the Constitution.[33] Second, that the agency has exercised that grant of authority in a lawful way.[34]

To be sure, the Commission recently has been all too happy to issue rules without valid grants of authority from Congress.[35] But today's Final Rule is plainly authorized by a valid grant of authority from Congress. HSR commands the Commission to issue rules governing the form and contents of premerger-notification filings as it determines are ''necessary and appropriate to enable [the Antitrust Agencies] to determine whether'' mergers ''may, if consummated, violate the antitrust laws.'' [36] Congress further authorized us to ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of'' the Act.[37] The text of HSR therefore unambiguously commands the agency to issue rules of the type we today issue.[38] And I am not aware of any serious arguments that this grant of discretion to prescribe the procedures by which firms notify the Commission of a pending merger—distinct from the power to adjudicate merger challenges[39]—violates the Constitution. We therefore have statutory and constitutional authority to issue the Final Rule.[40]

The question, then, is whether the Commission has lawfully exercised the power Congress unambiguously conferred on it. As a general matter, an agency lawfully exercises power conferred on it by ''engag[ing] in reasoned decisionmaking,'' which requires that the ''agency['s] action . . . rest[ ] 'on a consideration of the relevant factors.' '' [41] We must ''examine the relevant data and articulate a satisfactory explanation for [our] action including a 'rational connection between the facts found and the choice made.' '' [42] This ''standard is deferential'' to the agency's policy choices, so long as ''the agency has acted within a zone of reasonableness and . . . reasonably considered the relevant issues and reasonably explained the decision.'' [43]

Importantly, this standard does not change because we are amending an existing rule. The APA does not require that ''agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.'' [44] ''The statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.'' [45] When an agency revises an existing regulation, reasoned decision-making ''would ordinarily demand that it display awareness that it *is* changing its position,'' and it must show ''that there

comment-period-30-days-proposed-changes-hsr-form.

[28] *Perez,* 572 U.S. at 96 (quoting 5 U.S.C. 553(c) (cleaned up)).

[29] See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 591 U.S. 657, 685–86 (2020) (explaining that an agency satisfies the procedural requirements of the APA so long as it complies with the ''objective criteria'' of notice, opportunity to comment, and a concise general statement of basis and purpose).

[30] 5 U.S.C. 706(2)(A), (B), (C).

[31] *NFIB* v. *Dep't of Labor,* 595 U.S. 109, 117 (2022) (per curiam) (''Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.'').

[32] *FEC* v. *Cruz,* 596 U.S. 289, 301 (2022) (''An agency, after all, 'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute.'' (quoting *La. Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986))).

[33] *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000) (''[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a *valid* grant of authority from Congress.'' (cleaned up) (emphasis added)).

[34] *Allentown Mack Sales & Serv., Inc.* v. *NLRB,* 522 U.S. 359, 374 (1998) (''Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.'').

[35] See *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).

[36] 15 U.S.C. 18a(d)(1).

[37] *Id.* section 18a(d)(2)(C).

[38] *PhRMA,* 790 F.3d at 208 (''There is no doubt that the Commission's action was taken pursuant to express delegations of authority.'').

[39] See, *e.g.,* Compl. ¶¶ 45, 55–59, 72–76, *The Kroger Co.* v. *FTC,* No. 1:24–cv–438 (S.D. Ohio Aug. 19, 2024), ECF No. 1 (challenging constitutionality of FTC administrative proceedings as a violation of Article III of the Constitution).

[40] When the judiciary last reviewed one of our HSR rules, it deferred to our interpretation of various undefined terms of the Act under the doctrine announced in *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1983). See *PhRMA,* 790 F.3d at 204 (''[W]e apply the familiar *Chevron* framework . . .''). The Supreme Court has since overruled *Chevron,* correctly interpreting the APA to require the judiciary to resolve statutory ambiguities without deferring to administrative agencies' views on how to resolve those ambiguities. See *Loper Bright Enter.* v. *Raimondo,* 144 S. Ct. 2244, 2261 (2024) (''On the contrary, by directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, [the APA] makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus remains the responsibility of the court to decide whether the law means what the agency says.'' (cleaned up)). The Court in *Loper Bright* held, however, that ''[i]n a case involving an agency, . . . the statute's meaning may well be that the agency is authorized to exercise a degree of discretion.'' *Id.* at 2263. The Court gave as examples statutes that delegate ''to an agency the authority to give meaning to a particular statutory term,'' and ''[o]thers'' that ''empower an agency to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a particular term or phrase that 'leave the agencies with flexibility,' such as 'appropriate' or 'reasonable.' '' *Ibid.* (quoting *Wayman* v. *Southard,* 23 U.S. (10 Wheat.) 1, 43 (1825), and *Michigan* v. *EPA,* 576 U.S. 743, 752 (2015)). HSR expressly authorizes the Commission to promulgate rules ''defin[ing] the terms used in'' the Act, and to issue all rules that are ''necessary and appropriate to carry[ing] out the purposes of'' the Act. 15 U.S.C. 18a(d)(2)(A), (C); see also *id.* 18a(d)(1) (authorizing the Commission to issue rules that are ''necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws''). HSR thus appears to be the sort of discretion-conferring statute that the *Loper Bright* Court suggested may require some modicum of judicial deference to agency decision making. My vote in favor of the Final Rule, however, does not depend on the Commission receiving any judicial deference. I conclude that the Final Rule properly interprets and implements HSR.

[41] *Michigan,* 576 U.S. at 750 (quoting *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983)); see also *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 591 U.S. 1, 16 (2020) (The APA ''requires agencies to engage in reasoned decision-making, and directs that agency actions be set aside if they are arbitrary and capricious.'' (cleaned up)).

[42] *State Farm,* 463 U.S. at 43 (quoting *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 246 (1962)).

[43] *FCC* v. *Prometheus Radio Project,* 592 U.S. 414, 423 (2021); see also *Dep't of Commerce* v. *New York,* 588 U.S. 752, 773 (2019) (Courts ''may not substitute [their] judgment for that of the [agency], but instead must confine [them]selves to ensuring that [the agency] remained within the bounds of reasoned decisionmaking.'' (cleaned up)); *Garland* v. *Ming Dai,* 593 U.S. 357, 369 (2021) (''[A] reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.''' (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974)).

[44] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514 (2009) (Scalia, J.).

[45] *Id.* at 515.

are good reasons for the new policy.'' [46] But the APA does not require that the agency show that ''the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.'' [47]

The Final Rule is not perfect, nor is it the rule I would have written if the decision were mine alone. But I believe that it addresses important shortcomings in the current HSR rule, and that it is ''necessary and appropriate'' to enable the Antitrust Agencies to determine whether proposed mergers may violate the antitrust laws.[48]

III. I turn now to the specific provisions of the Final Rule to address whether they are ''necessary and appropriate'' to executing the premerger-review provisions of HSR.[49]

A. The Final Rule requires the disclosure of some information not currently required by the old HSR rule. That information is ''necessary and appropriate'' to the execution of our premerger-review mandate under the Act, and the burdens the disclosure requirements impose on merging firms are justified by the requirements of effective premerger review.

Mergers and acquisitions have become increasingly complex since 1978. The Antitrust Agencies review a large number of deals involving corporate structures that were rare when we adopted our first HSR rule. For example, twenty years ago, only ten percent of acquiring firms were funds or limited partnerships; now, that figure is close to forty percent.[50] Such firms may be shell companies that disclose little public information about their holdings or operations, and, in many cases, have no other assets. But these deals can still present competitive problems through the acquiring person's relationships with other entities. Minority investors, including limited partners, might pull the strings for the acquiring person. And those minority investors might also control entities that compete with the transaction target, creating potential antitrust concerns.[51] The current rule does not require disclosure of investors in entities between the parent company and the acquiring person, nor does it require disclosure of any limited partners, even if they have management rights for the acquiring person. The Final Rule addresses this shortcoming. It requires disclosure of investors that own at least a five percent share in certain entities related to the acquiring person; if those entities are limited partnerships, filers must disclose limited partners that have certain management rights, such as a board seat. But unlike the NPRM, the Final Rule sensibly does not require disclosure of limited partner investors without any management rights.[52] The Final Rule's minority investor disclosures are a reasonable way to address what the Antitrust Agencies fairly determined was a shortcoming of the previous rule, and are necessary and appropriate to determining the competitive effects of a transaction involving limited partnerships or complex corporate structures.[53]

The Final Rule also requires merging firms to disclose information about their potential vertical relationships—that is, whether the two merging firms currently interact with each other at different levels of the supply chain.[54] HSR rules long required disclosure of information about vertical relationships, but a 2001 amendment to the HSR rules removed that requirement.[55] Since 2001, however, the Antitrust Agencies under the leadership of both parties have increased their scrutiny of, and rate of enforcement actions against, vertical mergers. During the Trump Administration, the Antitrust Division litigated the first vertical merger challenge in decades.[56] The Antitrust Agencies released the 2020 Vertical Merger Guidelines, the first major revision to agency guidance on vertical mergers since 1984.[57] The Commission released its 2020 Commentary on Vertical Merger Enforcement, which demonstrated the breadth of Commission investigations and consent agreements involving vertical transactions.[58] And the Commission investigated Illumina's proposed acquisition of Grail, which ultimately led to a successful 2023 Fifth Circuit opinion that effectively blocked the vertical transaction.[59] These efforts continue today. I recently joined a unanimous Commission vote authorizing a complaint to challenge a vertical merger between America's leading mattress supplier and its leading mattress retailer.[60]

Since 2001, however, the Antitrust Agencies have had to rely on limited acquisition-related documents and publicly available information to identify potential vertical-competition concerns. Not every competitive issue shows up in transaction documents or is apparent to Commission staff without experience in the industry. As a result, some anticompetitive transactions have likely slipped through the cracks. The Final Rule will also provide the Antitrust Agencies with other information that they can use to quickly identify (or rule out) potential vertical-competition problems. The new Supply Relationships Description requires filers to identify whether they supply, or are supplied by, the other merging party or its competitors.[61] The buyer must also now indicate whether it has certain types of existing contracts with the seller.[62] This information is ''necessary and appropriate'' to carrying out Congress's command that the Antitrust Agencies review mergers—including vertical mergers—to determine whether they violate the antitrust laws.[63]

The Final Rule requires the disclosure of additional information that will facilitate effective premerger review. Filers must now provide some regularly prepared plans and reports that analyze market shares or competition.[64] Such information, particularly market-share

[46] *Ibid.*

[47] *Ibid* (emphasis in original).

[48] 15 U.S.C. 18a(d)(1).

[49] 15 U.S.C. 18a(d)(1).

[50] See SBP, *supra* note 5, at 25.

[51] See *id.* at 225–27 (''some limited partnerships function as aggregation vehicles that allow private equity or other investor groups to direct the strategic business decisions of the portfolio companies in which they invest.'').

[52] See FTC, 16 CFR part 803—appendix B, Notification for Certain Mergers and Acquisitions: Acquiring Person Instructions, 4–5 (Oct. 10, 2024) (hereinafter ''Acquiring Person Instructions''); SBP at 226–27.

[53] See SBP at 28–31; 15 U.S.C. 18a(d)(1).

[54] FTC, 16 CFR part 803—appendix A, Notification and Report Form for Certain Mergers and Acquisitions: Acquiring Person, 6–7 (Oct. 10, 2024) (hereinafter ''Acquiring Person Form'') (requesting ''other agreements between the acquiring person and target'' and the ''supply relationship description'').

[55] See SBP at 327 (describing past requests for information on vendor-vendee relationships); 66 FR 8680 (Feb. 1, 2001) (HSR rule amendment removing that request).

[56] See *United States* v. *AT&T Inc.,* 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018) (''the Antitrust Division apparently has not tried a vertical merger case to decision in four decades''), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

[57] Press Release, FTC, FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.*

[58] Press Release, FTC, FTC Issues Commentary on Vertical Merger Enforcement (Dec. 22, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-commentary-vertical-merger-enforcement.*

[59] *Illumina, Inc.* v. *FTC,* 88 F.4th 1036 (5th Cir. 2023).

[60] Press Release, FTC, FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm, (July 2, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm.*

[61] See Acquiring Person Instructions at 10.

[62] See Acquiring Person Form at 6.

[63] 15 U.S.C. 18a(d)(1).

[64] See Acquiring Person Instructions at 9.

data, often is not available publicly, nor does it always appear in transaction documents. But market-share data are critical to antitrust enforcement. The Supreme Court many decades ago concluded that mergers of competitors constituting thirty percent or more of the relevant market presumptively violate the Clayton Act.[65] And one of the leading metrics for assessing the competitive effects of a transaction is the Herfindahl-Hirschman Index (HHI),[66] which uses market shares to assess the level of concentration in the relevant market, and the change in concentration that the merger would create.[67] Market-share data therefore are not only ''necessary and appropriate to . . . determin[ing] whether [an] acquisition may, if consummated, violate the antitrust laws.'' [68] They are vital to our enforcement mandate. Requiring the provision of these data also promotes efficiency. If the market shares of the two firms are small, the Antitrust Agencies may swiftly conclude that little further investigation is needed—and, thanks to the concurrent lifting of the unfortunate ban on early termination, may also facilitate the grant of early termination in appropriate cases once the Final Rule becomes effective. And the cost of compliance is modest; parties must collect only documents provided, within the past year, to individuals already subject to other document requests.

In addition, the Overlap Description will require filers to identify whether they compete with the other merging party.[69] Under the current form, parties identify overlaps only through Census Bureau NAICS revenue codes.[70] These codes can be painfully vague or overinclusive, particularly for new sectors. For example, NAICS code 518210 covers ''companies that provide computing infrastructure, data processing, web hosting, and related services'' such as ''data entry services, cloud storage services and cryptocurrency mining.'' [71] Despite a NAICS overlap, many firms within this broad category undoubtedly do not compete. Many other NAICS codes present similar concerns, flagging overlaps where none truly exist. Misleading or overbroad NAICS code overlaps may lead to unnecessary investigations. The Overlap Description will mitigate this problem by permitting filers to explain misleading NAICS code overlaps up front.[72]

Improving the type of information the Commission receives in an HSR notification is likely to improve the merger-review process for many merging parties. If Commission staff believes that a proposed merger merits investigation beyond the initial HSR filing and publicly available information, it must formally open an investigation and obtain clearance for that investigation from the Antitrust Division. Most such investigations show that the transaction poses little risk of competitive harm and are closed without a second request for additional information.[73] Once the investigation is begun, however, the Antitrust Agencies can fall victim to bureaucratic inertia. We, like all law-enforcement agencies, have limited resources. Commencing an investigation and obtaining clearance eats up some of those resources. Commission leadership may therefore resist recommendations to close an investigation quickly even if the early stages of the investigation demonstrate that the merger presents no competitive concerns. Additionally, even investigations that do not lead to a second request can still involve significant cost and delay for merging parties.[74] The information required by the Final Rule will mitigate the risk of false positives. It can reveal that a merger presents no competitive threat at all, and the Commission can avoid crawling down rabbit holes in unnecessary investigations.

Third parties will benefit, too. Commission staff regularly requests voluntary interviews with the merging parties' customers, suppliers, and competitors following an HSR filing. These third parties often cooperate, at the cost of their senior executives' time and legal fees paid to outside lawyers. As these third parties explain the industry and competitive landscape, the lack of any competitive issues can quickly become apparent. By providing the Antitrust Agencies with greater information upfront, the Final Rule can remove the need to burden third parties with such fruitless engagement.

B. The Final Rule must be considered in light of another decision the Commission announces today: the lifting of the suspension on early termination. ''Early termination'' describes the Commission practice of informing merging parties that the Commission is terminating its investigation into the merger before the conclusion of the statutory waiting period, thereby freeing them to consummate the merger immediately. The benefits of early termination are obvious. It reduces financing costs associated with the delay inherent in premerger review, and it allows companies and consumers to realize the benefits of procompetitive mergers more quickly.

Until 2021, Commission staff routinely granted early termination of the initial HSR review period for acquisitions that obviously presented no competitive issues.[75] In February 2021, however, the then-Acting Chairwoman announced a ''temporary suspension'' of early termination due to ''the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic.'' [76] The Antitrust Agencies announced that they ''anticipate[d] the suspension [to] be brief.'' [77]

The ''confluence'' has been over for some time. The pandemic long ago subsided. We have had a permanent Chair since June 2021. And merger filings have slowed to about half the

[65] See *United States* v. *Phila. Nat'l Bank,* 374 U.S. 321, 363–65 (1963) (''Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.'').

[66] *ProMedica Health Sys., Inc.* v. *FTC,* 749 F.3d 559, 568 (6th Cir. 2014) (''Agencies typically use the Herfindahl-Hirschman Index (HHI) to measure market concentration.'').

[67] See *FTC* v. *H.J. Heinz Co.,* 246 F.3d 708, 716 (D.C. Cir. 2001) (''Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.'').

[68] 15 U.S.C. 18a(d)(1).

[69] See Acquiring Person Form at 6.

[70] See SBP at 301. Federal statistical agencies use the North American Industry Classification System to classify businesses. See *id.* at 147, n.296 (citing U.S. Census Bureau, North American Industry Classification System (rev. Sept. 10, 2024), *https://www.census.gov/naics/*).

[71] *Id.* at 300.

[72] See *id.* at 301.

[73] In Fiscal Year 2023, the Commission received clearance to investigate 124 transactions but only issued second requests for additional information for 26 transactions. See FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Exhibit A, Table 1, *https://www.ftc.gov/policy/reports/annual-competition-reports.*

[74] *See* SBP at 89 (''[A]n average of 73 transactions each year . . . were delayed by an additional 30 days and filers were burdened by having to submit additional materials on a voluntary basis even though the investigation did not lead to the issuance of Second Requests. These delays impose costs on the parties and the Agencies, as well as third parties contacted during the extended initial review period.'').

[75] *See id.* at 16, n.22, 95; *see also* Statement of Comm'r Noah J. Phillips and Comm'r Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations, at 2 (Feb. 4, 2021), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions-indefinite.*

[76] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.*

[77] *Ibid.*

number we saw in 2021 and 2022.[78] Nevertheless, the ''temporary suspension'' persisted. The Final Rule recognizes that this persistence is no longer tenable: ''if the Agencies can determine from review of an HSR Filing that a transaction does not present [competitive concerns], the Agencies can more quickly and confidently determine that the transaction does not require a more in-depth review and may proceed to consummation.'' [79]

Indeed, maintaining the ban would have been absurd in light of the Final Rule's explicit recognition that many transactions pose no competitive risks. Specifically, the Final Rule takes a tailored approach to identify and reduce compliance costs for transactions with lower risks of harm. The Final Rule creates a new category—''select 801.30 transactions''—for acquisitions that almost never present competitive concerns, such as executive compensation agreements. For these deals, filers are excused from many new requirements, including descriptions and some document requests.[80] The Final Rule also recognizes when enough is enough. It tailors the burdens of acquiring and acquired persons, rather than requiring both sides of a transaction to provide the same information. Accordingly, it significantly pares back the requests for acquired persons.[81] Finally, the Final Rule also employs a conditional-request format—a series of if/then queries—to omit certain requirements for acquisitions that do not involve an overlap or vertical relationship.[82] Again, the burden is reduced commensurate with the lower risk of harm.

I am pleased that today the Commission announces that it will lift the categorical ban on early termination and restore this important feature of the merger-review process once the Final Rule becomes effective. It should have happened earlier. I have objected before to the majority's tendency to use our HSR authority to accomplish political objectives.[83] An indefinite ban on early termination was just more of the same. Maintaining the ban after the Final Rule's effective date would have undermined the efficiencies that justify the new information that the Final Rule requires. I am glad it is gone.

IV. The Final Rule must stand on its own feet. An arbitrary-and-capricious rule is not lawful merely because it is better than a bad NPRM. And the NPRM with which the Commission launched today's Final Rule was about as bad as it gets. It was indefensible bureaucratic overreach and could not have survived judicial review. It drew no distinctions between merger filings that presented little risk of competitive harm—such as executive compensation agreements—and those that raised potentially serious concerns. Instead, the NPRM applied the same blunderbuss approach to every filing. To make matters worse, the NPRM proposed a deluge of new onerous requirements the benefits of which could never have justified the burdens imposed on merging parties. In fact, several would have added little or no value to the Antitrust Agencies at all during their brief window to identify transactions that warrant further investigation. Had today's Final Rule been identical to the NPRM, I would not have voted for it.

Although today's Final Rule is a logical outgrowth of the NPRM,[84] it dramatically curtails the NPRM's wild overreach. That curtailment unsurprisingly followed the arrival of Republican Commissioners. A Final Rule identical to the NPRM would have been little more than a procedural auxiliary to the majority's general suspicion of mergers and acquisitions.[85] I would not have voted for it. The changes adopted after the arrival of Republicans to the Commission, however, rescued the Final Rule from the NPRM's lawlessness. The Final Rule, unlike the NPRM, is a reasoned decision about what is ''necessary and appropriate'' to carrying out Congress's premerger-review mandate. It also reasonably addresses shortcomings in the old HSR rule. It therefore satisfies the requirements of both the HSR and APA. None of this was true about the NPRM.

Although the Final Rule's lawfulness does not turn on how much better it is than the NPRM, the changes from the unlawful NPRM demonstrate that the Final Rule is in fact the product of reasoned decision-making, which required us to respond to valid objections about the NPRM's many problems.[86] The most important climbdown from the NPRM is the abandonment of the proposed Labor Markets section.[87] This section would have forced merging parties to classify their employees by job category codes from the U.S. Bureau of Labor Statistics,[88] even though few companies use such codes in the ordinary course of business. And it would have required filers to classify their employees by the U.S. Department of Agriculture's ERS commuting zones, even though companies do not use them in the ordinary course of business and these zones have not been updated since 2000 and are unreliable. The new burden would have been massive, and commenters understandably objected vociferously.[89]

Beyond the major burden and methodological problems, the NPRM's

[78] *See* FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Appendix A (showing 7,002, 6,288 and 3,515 HSR filings for 2021, 2022, and 2023, respectively), *https://www.ftc.gov/policy/reports/annual-competition-reports.*

[79] SBP at 16.

[80] *See id.* at 150–51.

[81] *See id.* at 152.

[82] *See id.* at 152–54.

[83] *See* Dissenting Statement of Comm'r Andrew N. Ferguson, *In the Matter of Chevron Corp. and Hess Corp.,* FTC Matter No. 2410008, at 6 (Sept. 30, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/chevron-hess-ferguson-statement_0930.pdf;* Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In re ExxonMobil Corp.,* FTC Matter No. 2410004 (May 1, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.*

[84] *Mock* v. *Garland,* 75 F.4th 563, 583 (5th Cir. 2023) (''After the required NPRM is published in the **Federal Register**, with either the terms or substance of the proposed rule or a description of the subjects and issues involved, the final rule the agency adopts must be a logical outgrowth of the rule proposed.'' (cleaned up)); *Env't Integrity Project* v. *EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005) (''Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former.''); see also *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 160 (2007) (''The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a logical outgrowth of the rule proposed.'' (cleaned up)).

[85] See *infra* pp. 11–14; Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–19 (Oct. 10, 2024).

[86] See, *e.g., Perez,* 575 U.S. at 96 (''An agency must consider and respond to significant comments received during the period for public comment.''); *Chamber of Commerce of the U.S.* v. *SEC,* 85 F.4th 760, 774 (5th Cir. 2023) (An agency must ''consider all relevant factors raised by the public comments and provide a response to significant points within. Comments the agency must respond to include those that can be thought to challenge a fundamental premise underlying the proposed agency decision or include points that if true and adopted would require a change in an agency's proposed rule.'' (cleaned up)); *Bloomberg L.P.* v. *SEC,* 45 F.4th 462, 476–77 (D.C. Cir. 2022) (''[A]n agency must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision. Indeed, the requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments. In sum, an agency's response to public comments must be sufficient to enable the courts to see what major issues of policy were ventilated and why the agency reacted to them as it did.'' (cleaned up)).

[87] For a fulsome accounting of the economic and legal errors that infected the Labor Markets instruction, see Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–13 (Oct. 10, 2024).

[88] NPRM, 88 FR at 42197.

[89] *See, e.g.,* Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2023–0040–0723 at 10–12; Comment of Wachtell, Lipton, Rosen & Katz, Doc. No. FTC–2023–0040–0670 at 6–10; Comment of Dechert LLP, FTC–2023–0040–0659 at 3–5.

Labor Markets instructions were a clear abuse of Congress's mandate that the Commission require only information ''necessary and appropriate'' to identify transactions that ''violate the antitrust laws.'' [90] In the nearly half century since Congress passed HSR, the Antitrust Agencies have never successfully challenged any transactions based on labor market theories that could have been identified by the proposed requirements.[91] Until recently, the Antitrust Agencies had never even tried.[92] It is not for a lack of effort. For years, the Commission and Antitrust Division looked for viable labor market theories when investigating transactions that present other competition concerns. The lack of any success lays bare that the Commission never could have justified the immense cost of requiring every single filer to provide extensive labor-related information. Fortunately, my colleagues on the Commission agreed to jettison the Labor Markets section that likely would have doomed the Final Rule.[93]

The Final Rule also eliminates the NPRM's requirement that merging parties provide all drafts of transaction-related ''document[s] that were sent to an officer, director, or supervisory deal team lead(s).'' [94] Commenters rightly pointed out that this requirement would have imposed an undue burden on merging parties,[95] with the American Bar Association noting that this provision could have forced filers to use e-discovery tools to capture every draft.[96] The cost of this information demand is high. But the value to the Antitrust Agencies would have been low. Commission staff would have struggled to comb through a dozen versions of the same document. And insofar as the goal was to catch merging parties giving honest appraisals about the anticompetitive effects of mergers, I doubt demanding drafts would have succeeded. Knowing that such drafts would have to be produced, parties would just create methods to avoid exposing their honest thoughts in documents that are guaranteed to wind up in the hands of enforcers. Demanding drafts of documents in every transaction would have likely increased the expense of merging—of great benefit to antitrust lawyers—without giving the Antitrust Agencies the sort of ''hot docs'' for which they were hoping. The Final Rule appropriately eliminated this requirement for every transaction. The Commission can obtain drafts under the only circumstances it would ever need them—when it opens investigations into those few mergers that the HSR filings reveal present a genuine risk of anticompetitive effects.

Similarly, the Final Rule curtailed several of the NPRM's other burdensome requirements for merging parties to produce documents. It revises the definition of ''supervisory deal team lead'' to limit it to a single individual, eliminating the need to review multiple employees' files to fulfill this request for transaction-related documents.[97] The Final Rule also removes the NPRM's demand for ordinary course plans and reports that were shared with senior executives but not the CEO. Commenters rightfully noted that this would have forced filers to search the files of additional custodians, greatly increasing the burden on merging parties.[98] Instead, the Final Rule limits the request to certain plans and reports directly provided to the CEO or board of directors.[99] Lastly, the Final Rule no longer forces merging parties to produce all agreements between them. The NPRM's requirement to produce every single agreement between the parties would have been burdensome and expensive, but likely would have shed little light on the potential competitive effects of the merger. Some agreements between merging parties might shed light on competitive effects, but the vast majority would tell us nothing. The Final Rule acknowledges this mismatch of costs and benefits, and instead requires parties to note only whether they have particular types of agreements.[100]

The Final Rule makes many additional changes to the abusive NPRM. It makes clear that filers do not need to disclose any individual's role in a ''non-profit entity organized for a religious or political purpose.'' [101] This exception is important. Requiring a Catholic hospital, for example, to disclose its membership rolls merely because it wishes to make a reportable acquisition, without regard to the competitive effects of that acquisition, would raise serious First Amendment concerns.[102] The Final Rule also creates

[90] 15 U.S.C. 18a(d)(1).

[91] The NPRM identified two successful merger challenges with purported labor theories. See NPRM, 88 FR at 42197, n.47. The first, the Antitrust Division's challenge to Penguin Random House's acquisition of Simon & Schuster, did not involve harm to employees of the merging firms. Instead, the alleged harm was in the market for ''publishing rights to anticipated top-selling books.'' *United States* v. *Bertelsmann SE & Co. KGaA,* 646 F. Supp. 3d 1, 12 (D.D.C. 2022). The second, the Commission's challenge to Lifespan Corporation's acquisition of Care New England, did not include a labor market count in the complaint. See Compl., *In the Matter of Lifespan Corp. and Care New England Health Sys.,* FTC Matter No. 2110031 (Feb. 17, 2022). Commissioner Bedoya identifies another purported merger challenge based on a labor theory, specifically ''decrease[d] fees paid to blood plasma donors.'' Statement of Comm'r Alvaro M. Bedoya, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule, File No. P239300, at n.20 (Oct. 10, 2024) (''Statement of Comm'r Bedoya''). But, like the Antitrust Division's *Bertelsmann* challenge, the complaint did not allege harm to the merging parties' employees and therefore could not have been identified by the NPRM's proposed demands for employee information. See Compl., *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.,* FTC Matter No. 1810081 (Aug. 1, 2018).

[92] Given the pendency of litigation within the Commission's administrative tribunal, I withhold comment on the strength of the Commission's labor market theory in its challenge to The Kroger Company's acquisition of Albertsons Companies, Inc.

[93] Commissioner Bedoya defends the NPRM's Labor Markets section, reasoning that because the antitrust laws apply to the labor markets, the Commission should screen every single merger subject to HSR for potential labor-competition problems. Statement of Comm'r Bedoya, *supra* n.89, at 2, 4. I do not disagree that the antitrust laws apply to labor markets. But that fact would not have made lawful a rule that was identical to the NPRM. Under ordinary principles of administrative law, the Commission would have to ''examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.'' *State Farm,* 463 U.S. at 43 (cleaned up). That means the Commission would need enough evidence of labor-competition problems in mergers to establish that the labor-markets instruction's onerous costs were reasonable. The evidence marshalled by Commissioner Bedoya—a couple papers and a book—comes nowhere near to clearing that bar. Statement of Comm'r Bedoya at 3. The majority made the same mistake in the Noncompete Rule by relying on sparse social-science research to justify massive regulatory burdens. See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 37–45 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf* (''The handful of academic papers cited in the Final Rule cannot justify its incredible reach and relying on them to prohibit noncompete agreements categorically is a clear error of judgment.'' (cleaned up)); *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954, at *13–14 (N.D. Tex. Aug. 20, 2024) (finding the Noncompete Rule arbitrary and capricious because ''[t]he record does not support the Rule.''). Making that mistake here would have been a ''clear error of judgment'' requiring vacatur under the APA. *Huawei Technologies USA, Inc.* v. *FCC,* 2 F.4th 421, 434 (5th Cir. 2021) (cleaned up).

[94] NPRM, 88 FR at 42214.

[95] SBP at 270–71.

[96] Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC–2023–0040–0723 at 15–16.

[97] *See* SBP at 203–05.

[98] E.g., Comment of U.S. Chamber of Com., Doc. No. FTC–2023–0040–0684 at 22, 24.

[99] *See id.* at 274–77.

[100] *See id.* at 291–93.

[101] *See* Acquiring Person Instructions at 5.

[102] *See, e.g., Americans for Prosperity Found.* v. *Bonta,* 594 U.S. 595, 606 (2021) (''This Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.' Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by

Continued

de minimis exclusions, which remove the need for filers to note tiny prior acquisitions, supply relationships, and defense contracts that could not plausibly move the competitive needle.[103] The Final Rule shortens lookback periods for many requests, including prior acquisitions, which limits the burdens associated with digging through dated company records.[104] It removes demands for filers to create some new documents, such as deal timelines and organization charts.[105] And the Final Rule includes other important, burden-reducing changes from the indefensible NPRM, all of which help tailor the Final Rule to only those things that are necessary and appropriate to carry out the requirements of HSR.[106]

I still would prefer a deeper cut. For example, I would not have included the transaction rationale requirement.[107] Our requests for transaction-related documents already cover the same ground, in the parties' own words. I expect most transaction rationales will be heavily lawyered essays designed to ensure that the rationale matches these transaction documents. Indeed, I cannot imagine any lawyer worth his or her salt ever permitting the rationale to depart meaningfully from other parts of the notification. I therefore doubt that the rationales will provide any valuable information that we could not glean elsewhere. Perhaps in some cases parties may use the transaction rationale to explain why a merger that appears suspect at first blush presents no competitive problems. But on the whole, I doubt the transaction rationale will benefit the Antitrust Agencies in the mine run of cases, and I would not impose the burden on every filer.

This example highlights an important consideration the Commission must bear in mind for the future. If post-promulgation experience teaches us that some parts of the rule are not working well, we can and should get rid of them in subsequent rulemakings. We have done that in the past.[108] If, for example, my prediction about the value of the transaction rationale proves correct, we can and should jettison it. The same is true of all provisions of the Final Rule. Although we have satisfied the APA's requirement that the Final Rule be the product of reasoned decision making about what is necessary and appropriate to carry the Act into execution, experience almost certainly will reveal that the Final Rule can be improved. The Commission should abandon whatever parts of the Final Rule do not work.

Considered as a whole, however, the additional information sought in the Final Rule is ''necessary and appropriate'' for the Antitrust Agencies to identify transactions that may violate the antitrust laws.[109] Its benefits are many, and, by comparison, the added burdens are reasonable.

Because the Final Rule represents the Commission's reasoned decision about what is necessary and appropriate to carry into execution the requirements of HSR, and because I believe it lawfully addresses shortcomings in the current HSR rule, I concur in its promulgation.

[FR Doc. 2024–25024 Filed 11–8–24; 8:45 am]

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the majority.' '' (quoting *Roberts* v. *U.S. Jaycees,* 468 U.S. 609, 622 (1984)); *id.* at 608 (forbidding mandatory disclosure of donor rolls unless the disclosure requirement is narrowly tailored to vindicate an important government interest); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 462–63 (1958) (holding that mandatory disclosure of membership rolls without a sufficient justification violates the First Amendment).

[103] *See* SBP at 153–54.

[104] *See id.* at 151–52.

[105] *See id.* at 6, 293–95.

[106] *See id.* at 6–8, 147–56.

[107] *See* SBP at 253–56.

[108] E.g., 70 FR 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)); SBP at 107, n.248 (summarizing numerous changes to HSR Rule since 1978).

[109] 15 U.S.C. 18a(d)(1).

information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notification of proposed determination.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, and Small businesses.

Signing Authority

This document of the Department of Energy was signed on November 24, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, 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 November 24, 2020.

Treena V. Garrett,

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

[FR Doc. 2020–26327 Filed 11–30–20; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing this advance notice of proposed rulemaking (''ANPRM'') to gather information, related to seven topics, that will help to determine the path for future amendments to the premerger notification rules (''the Rules'') under the Hart-Scott-Rodino Antitrust Improvements Act (''the Act'' or ''HSR'').

DATES: Comments must be received on or before February 1, 2021.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014'' on your comment. File your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Robert Jones (202–326–3100), Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024.

SUPPLEMENTARY INFORMATION:

Invitation to Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 1, 2021. Write ''16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the *https://www.regulations.gov* website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''16 CFR parts 801–803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential,''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies

the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *www.regulations.gov*—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 1, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see https://www.ftc.gov/site-information/privacy-policy.*

Overview

The Act and Rules require the parties to certain mergers and acquisitions to file notifications with the Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') (collectively, ''the Agencies'') and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether proposed mergers or acquisitions may violate the antitrust laws if consummated and, when appropriate, to seek injunctions in federal court to prohibit anticompetitive transactions prior to consummation.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

Since the enactment of the Act, the Commission has updated and refined the Rules many times. Indeed, the Agencies have a strong interest in making sure the Rules are as current and relevant as possible. Certain rules interpreting and implementing the Act, some of which have not been changed since they were first promulgated in 1978, may need additional updating. In this ANPRM, the Commission proposes to gather information on seven topics to help determine the path for potential future amendments to numerous provisions of Parts 801, 802, and 803 of the Rules under the Act.

Background

Although it regularly reviews the Rules and revises them on a rolling basis, the Commission is issuing this ANPRM to solicit information to support review of the Rules on a more unified basis as part of its systematic review of all FTC rules and guides. The Commission is aware that market and business practices are constantly evolving, and that these changes make it especially important to evaluate whether the Rules are still serving their intended purpose or if they need to be amended, eliminated, or supplemented.

To accomplish this, the Commission is publishing in this ANPRM a number of questions related to seven different topics about which questions frequently arise in discussions of the Rules: Size of Transaction, Real Estate Investment Trusts, Non-Corporate Entities, Acquisitions of Small Amounts of Voting Securities, Influence outside the Scope of Voting Securities, Devices for Avoidance, and Filing Issues. Answers to questions on these topics will provide information that may facilitate drafting of new or revised rules.

The Commission welcomes comments on all of these topics, or on any sub-topic within them. The Commission, however, does not expect that every commenter will address all seven topics, or even every question relating to each topic. The Commission notes that comments it receives in response to this ANPRM may also inform the Notice of Proposed Rulemaking regarding the proposed change in the § 801.1(a)(1) definition of ''person'' and proposed exemption § 802.15 published in the **Federal Register** at the same time as this ANPRM.

I. Size of Transaction

Section 7A(a)(2) of the Clayton Act mandates an HSR filing when a transaction meets the Size of Transaction (''SOT'') test, subject to other provisions of the Rules, including exemptions.[1] To determine whether a transaction meets the SOT test, filing parties must look to Acquisition Price (''Acquisition Price'') under 16 CFR 801.10 or, in some cases, Fair Market Value (''FMV'') under 16 CFR 801.10(c)(3). As it is the filing parties' responsibility to conduct these calculations, the Commission would benefit from additional information on how filing parties engage in the calculation for both Acquisition Price and FMV.

A. Acquisition Price (16 CFR 801.10)

Under 16 CFR 801.10(c)(2), the Acquisition Price ''shall include the value of all consideration for such voting securities, non-corporate interests, or assets to be acquired.'' [2] The FTC's Premerger Notification Office (''the PNO'') has long taken the position that, when a transaction has a determined Acquisition Price, debt may be excluded from the Acquisition Price in certain circumstances. For example, if a buyer pays off a target's debt as part of the transaction, the buyer may deduct the amount of the retired debt from the Acquisition Price. This position dates from the earliest days of interpreting the HSR Rules in the late 1970s and early 1980s and is based, in part, on the analysis of a target's balance sheet liabilities in the context of an acquisition of voting securities.

The PNO has also allowed the deduction of certain expenses when calculating the Acquisition Price. For example, where the purchase price in the parties' transaction agreement includes funds earmarked to pay off the seller's transaction expenses, the PNO has permitted the parties to deduct that amount when calculating the Acquisition Price based on the view that such payments do not reflect consideration for the target.

The Commission is aware that these informal PNO staff positions can have a significant impact on the calculation of the Acquisition Price and, in turn, on whether a transaction is reportable under the Act. Given the potential for these positions to affect the structure of a transaction, the Commission believes

[1] *Steps for Determining Whether an HSR Filing is Required,* FTC.GOV, *https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing* (last visited July 07, 2020).

[2] 16 CFR 801.10(c)(2).

these informal PNO staff positions may need revision. As a result, the Commission aims to understand the decision-making involved in the deduction of retired debt or other amounts or categories of expenses from the Acquisition Price through responses to the following questions:

1. When negotiating a transaction, does a buyer ever offer to pay off or retire debt as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s?

a. Why might a buyer offer to pay off or retire debt as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

b. Why might a buyer decline to pay off or retire debt as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

c. Does a seller prefer a buyer that is willing to pay off or retire debt as part of the deal? Why or why not? Are seller preferences different now than in the late 1970s/early 1980s?

d. In a multiple bid situation, is a buyer's willingness to pay off or retire debt as part of the deal ever a factor in the seller's selection of the winning bid? Was it a factor in the late 1970s/early 1980s? And if it is evaluated differently today versus the 1970s/early 1980s, why is it evaluated differently?

e. Do sellers ever reject a buyer's offer to pay off or retire debt as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

f. Are there any limitations (legal or otherwise) on a buyer's ability to pay off or retire debt as part of the deal? If so, what are they? How do these limitations differ from limitations in place in the late 1970s/early 1980s?

g. Are buyers more or less likely to pay off or retire debt as part of the deal now than they were in the late 1970s/early 1980s? Why or why not?

2. When negotiating a transaction, does a buyer ever offer to pay other expenses of or within the seller (*e.g.,* legal or banking fees, change of control payments, etc.) as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s?

a. Why might a buyer offer to pay such expenses as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

b. Why might a buyer decline to pay such expenses as part of the deal now as opposed to in the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

c. Does a seller prefer a buyer that is willing to pay such expenses as part of the deal? Why or why not? Are seller preferences different now than in the late 1970s/early 1980s?

d. In a multiple bid situation, is a buyer's willingness to pay such expenses as part of the deal ever a factor in the seller's selection of the winning bid? Was it a factor in the late 1970s/early 1980s? If it is evaluated differently today versus the 1970s/early 1980s, why is it evaluated differently?

e. Do sellers ever reject a buyer's offer to pay such expenses as part of the deal? Under what circumstances? How have these circumstances evolved since the late 1970s/early 1980s? Have the competitive implications of the deal ever been a factor in this decision?

f. Are there any limitations (legal or otherwise) on a buyer's ability to pay such expenses as part of the deal? If so, what are they? Do these limitations differ from limitations in place in the late 1970s/early 1980s? If they differ, how do they differ?

g. Are buyers more or less likely to pay such expenses as part of the deal now than they were in the late 1970s/early 1980s? Why or why not?

3. How do parties currently calculate the Acquisition Price? How has the calculation changed since the late 1970s/early 1980s?

a. Under what conditions is the Acquisition Price different from the purchase price or consideration identified in the transaction agreement? Have these conditions changed since the late 1970s/early 1980s? If they have changed, how have they changed?

b. Do transaction agreements ever lack a firm or certain purchase price? Under what conditions? Have these conditions changed since the late 1970s/early 1980s? If they have changed, how have they changed?

i. Why would parties negotiate a deal without a firm or certain purchase price? What factors have affected such a decision or deal structure? Have these factors evolved since the late 1970s/early 1980s? If they have changed, how have they changed? Have the competitive implications of the deal ever been a factor in this negotiating a deal without a firm or certain purchase price?

ii. What are the limits on the scope of the undetermined payments or deductions? Have these limits changed since the late 1970s/early 1980s? If they have changed, how have they changed?

c. Can an Acquisition Price be subject to undeterminable deductions or deductions of undeterminable value? Under what conditions? Have these conditions evolved since the late 1970s/early 1980s? If they have changed, how have they changed? What are some examples of each kind of deduction and how have they changed since the late 1970s/early 1980s?

d. Are there certain categories of consideration that are commonly deducted or added when calculating the Acquisition Price? Have these categories changed since the late 1970s/early 1980s? If they have changed, how have they changed?

e. Is the ultimate recipient of a payment ever a factor in whether such payment is included when calculating the Acquisition Price? Why or why not? In what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

f. Is employee compensation (*e.g.,* bonus payments, retention payments, payments for contingent employee compensation) ever included when calculating the Acquisition Price? Why or why not? In what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

g. Does the form of employee compensation affect whether it is included in the Acquisition Price? Under what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

h. Is the value of employee compensation ever deducted from the Acquisition Price? Why or why not? Under what circumstances? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

i. Is there a ''control premium'' associated with the acquisition of control? How does an Acquiring Person determine that ''control premium''? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

4. When calculating the Acquisition Price, do parties include all consideration paid for the target? How has this approach changed since the late 1970s/early 1980s?

a. How do parties define ''consideration?'' Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Do parties rely on a standard legal definition for ''consideration?'' If so,

what is it and from what is it derived? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Is consideration defined any differently for the purposes of calculating Acquisition Price than it is for non-HSR purposes? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

d. Are any categories of payments excluded from the above definition of ''consideration?'' Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

e. Is the ultimate recipient of the payment ever a factor in whether such payment is included as consideration? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

5. When calculating the Acquisition Price, how does debt affect the calculation? How has this approach changed since the late 1970s/early 1980s?

a. Does the debt reported on the target's balance sheet affect the calculation of the Acquisition Price? Why or why not? In what circumstances? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Does the buyer's pay off or retirement of debt affect the calculation of the Acquisition Price? Why or why not? In what circumstances? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Does the treatment of debt (either reported on a balance sheet or being paid off or retired by the buyer) differ based on whether the acquisition is of (1) voting securities, (2) non-corporate interests, or (3) assets? Why or why not? Should it? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

d. Should the calculation of Acquisition Price focus on the total amount paid by the Acquiring Person (including debt that is paid off or retired) or the net amount received by the Acquired Person (excluding debt that is paid off or retired)? Why? Has this changed since the late 1970s and early 1980s? If it has changed, how has it changed?

6. Where an acquisition is of voting and non-voting securities, how is the Acquisition Price allocated between the voting securities and the non-voting securities? How has this approach changed since the late 1970s/early 1980s?

a. Are the voting securities and non-voting securities separately valued? Why or why not? Has this changed since the late 1970s/early 1980s? If it has changed, how has it changed?

b. Are each of the voting securities and the non-voting securities valued? Why or why not? Has this changed since the late 1970s and early 1980s? If it has changed, how has it changed?

B. Fair Market Value (16 CFR 801.10(c)(3))

Sometimes a transaction does not have a determined Acquisition Price. This is often due to the fluctuation in stock prices or the inability to calculate the exact amount of contingent future payments. As a result, the Fair Market Value (''FMV'') of the transaction becomes critical to determining reportability under the Act.

Per § 801.10(c)(3), FMV ''shall be determined in good faith by the board of directors of the ultimate parent entity included within the Acquiring Person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials.'' Once the Acquiring Person, or its delegate, has determined the FMV, there is no requirement to share with the Agencies the details of how that FMV was determined. The Commission would like to understand better the determination of FMV through responses to the following questions:

1. When an Acquiring Person is evaluating the potential acquisition of voting securities, non-corporate interests, or assets, what methodologies does that Acquiring Person use to support valuation in the ordinary course of due diligence and negotiation of the acquisition? How have these methodologies changed since the late 1970s/early 1980s?

a. If an acquisition involves the acquisition of non-voting securities, what methodologies does the Acquiring Person use to value the non-voting securities? Have these methodologies changed since the late 1970s/early 1980s? If they have changed, how have they changed?

b. In an acquisition of both voting securities and non-voting securities, does the Acquiring Person ever use one methodology to value the voting securities and a different methodology to value the non-voting securities? Why or why not? Have these methodologies changed since the late 1970s/early 1980s? If they have changed, how have they changed?

c. Where the Acquiring Person receives board appointment or board designation rights (or their non-corporate equivalent) in conjunction with the acquisition of voting (or non-voting) securities, do those rights affect the FMV of the voting (or non-voting) securities acquired? Has this changed since the late 1970s/early 1980s? If this has changed, how has it changed?

2. How does the determination of FMV under 16 CFR 801.10(c)(3) differ from the Acquiring Person's determination of value in the ordinary course of due diligence and negotiation of an acquisition? How has this determination changed since the late 1970s/early 1980s?

a. What factors go into determining FMV? Do these factors vary by industry, type of acquisition (asset, non-corporate interest, intellectual property), size of the target, or for other reasons? Describe each of the ways these factors vary and how each one varies. How have these factors changed since the late 1970s/early 1980s? Are there difficulties involved in performing FMV analyses? If so, what are those difficulties? Have these difficulties changed since the late 1970s/early 1980s? If they have changed, how have they changed? What additional guidance, if any, might the Commission provide to eliminate these difficulties?

b. How often and for what purposes do boards of directors rely on third-party bankers and other appraisers to provide FMV analysis? Do boards of directors evaluate the accuracy of those results compared to their own calculations? If so, how does the board of directors evaluate the accuracy of those results? Has this process changed since the late 1970s/early 1980s? If it has changed, how has it changed?

c. Should the Commission require an independent FMV analysis for some transactions to ensure consistency with standard valuation practices? If so, for what type of transactions should the Commission require independent FMV analysis? If the Commission requires an independent analysis, who should conduct the FMV analysis?

3. When calculating the FMV because the Acquisition Price is not determined as a result of future or uncertain payments, what financial or valuation concepts are used to determine the value of those future or uncertain payments? Have these concepts changed since the late 1970s/early 1980s? If they have changed, how have they changed?

4. How does an Acquiring Person determine the present FMV of assets that are not yet commercialized? For example, how does an Acquiring Person determine the present FMV of

intellectual property surrounding a product that currently is under development? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

5. In determining the FMV, how does the Acquiring Person account for the value of any assumed liabilities (or liabilities of the Acquired Entity)? What impact do such liabilities have on the FMV? Has this determination changed since the late 1970s/early 1980s? If it has changed, how has it changed?

6. Should the Commission require the Acquiring Person to provide the basis for its FMV determination? If so, why? If not, why not?

II. Real Estate Investment Trusts (Section 7A(c)(1) of the Clayton Act)

Congress created real estate investment trusts (''REITs'') in 1960 to allow for the pooling of funds from many small investors to invest in real estate, and gave REITs preferential tax treatment. The legislative history indicates that REIT status was meant to be limited to ''clearly passive income from real estate investments, as contrasted to income from the active operation of businesses involving real estate,'' and those real estate trusts engaging in active business operations would not be afforded REIT tax status.[3]

As a result, the PNO has long taken the informal staff position that when a REIT acquires real property (and assets incidental to the real property), the acquisition is exempt from HSR reporting under section 7A(c)(1) of the Clayton Act, the statutory ordinary course of business exemption. This position is based on the presumption that REITs are solely buying, owning, leasing, and selling real property, and therefore any acquisition of real property is exempt because it is done in the ordinary course of the REIT's business and is unlikely to violate the antitrust laws.

The Commission is aware that the Internal Revenue Service (''IRS'') subsequently made changes in tax law to remove restrictions on REITs and expand the beneficial tax treatment. As a result, many REITs are no longer solely buying, owning, leasing, and selling real property.[4] In fact, many REITs are now engaged in the active operation of businesses. For instance, REITs operate assisted living and other healthcare businesses, as well as companies that own cell towers and billboards, located on REIT-owned real property. Due to these changes, the Commission believes it is possible that a REIT's acquisition of real property may no longer be suitable for the blanket exemption offered under section 7A(c)(1) of the Act. The Commission would like to understand in more detail the current structure and operation of REITs through responses to the following questions:

1. Have REITs evolved from entities that own only real property to entities that can hold operating companies?

a. If so, what has led to the evolution of REITs becoming entities that can hold operating companies?

b. How have changes in tax laws or regulations influenced this evolution?

2. How does an operating company convert to a REIT?

a. Do REIT structures involve one Ultimate Parent Entity (''UPE'')? Two UPEs? How often is each type used? Why?

b. If a REIT has more than one UPE, what is the relationship between those UPEs?

c. If a REIT has more than one UPE, is there an entity above the UPEs that makes decisions for both of them?

3. Is there a way to distinguish REITs that own only real property from those that hold operating companies? If yes, what are the ways to distinguish REITs that own only real property and those that hold operating companies? For instance, are there differences in how they are structured? How else are they different?

4. Assume the PNO's informal staff position exempting REITs did not exist and REITs had to rely solely on the real property exemptions, §§ 802.2 and 802.5.

a. Are there situations in which REIT transactions would no longer be exempt? If so, what kinds of situations?

b. How often would the §§ 802.2 and 802.5 exemptions come into play?

c. Would it be easy for REITs to apply §§ 802.2 and 802.5 to transactions? If so, why? If not, why not?

III. Non Corporate Entities (16 CFR 801.1f(1)(ii))

The Act applies to acquisitions of voting securities or assets. The rise of non-corporate entities, such as partnerships and limited liability companies, has presented challenges under the Act because the PNO had long taken the position that interests in unincorporated entities were neither voting securities nor assets. Thus, any acquisition of interests in such entities had not been a reportable event unless 100% of the interests was acquired, in which case the acquisition was deemed to be that of all of the underlying assets of the partnership or other unincorporated entity.'' [5]

At first, this approach did not present significant issues, because non-corporate entities were created as acquisition vehicles and used to effectuate transactions, not to separately hold operating businesses.[6] But the role of non-corporate entities evolved. As the Commission noted in its 2004 Notice of Proposed Rulemaking, ''[t]he use of unincorporated entities is expanding, and such entities are increasingly engaging in acquiring interests in other corporate and unincorporated entities. For example, the number of corporate income tax filings increased from 4,630,000 to 5,711,000 (23%) between 1994 and 2002, while the number of partnership returns, including LLCs taxed as partnerships, increased from 1,550,000 to 2,236,000 (44%) during the same period. In addition, a number of states have amended their statutes in recent years to allow limited liability companies to merge with other types of legal entities.'' [7] As a result, the Commission determined in its 2005 Final Rule that the acquisition of control, 50% or more of the non-corporate interests (''NCIs'') in a non-corporate entity (''NCE''), would henceforth be reportable.[8]

The Commission is aware that NCEs have continued to evolve. For instance, acquisitions of NCIs are often captured in Securities Purchase Agreements, which imply that NCIs are now deemed to be more like voting securities. Thus, the Commission believes that it is appropriate to re-evaluate the nature of NCEs and NCIs to determine whether NCEs are the equivalent of corporate entities and NCIs function more as voting securities. To that end, the Commission would like to understand in more detail the evolution of NCEs and NCIs since its 2005 Final Rule,[9] through responses to the following questions:

1. Have NCEs evolved in form and substance since 2005? If they have evolved, what significant changes have occurred to shape the evolution of NCEs between 2005 and now?

a. Have the distinctions between NCEs and corporate entities evolved since 2005? If they have evolved, what significant changes have occurred to make NCEs and corporate entities more or less distinct between 2005 and now?

[3] H.R. Rep. No. 86–2020, pt. 2, at 3–4 (1960).

[4] Proposed Rulemaking, 79 FR 27508 (May 14, 2014); Correction to Proposed Rulemaking, 79 FR 38809 (July 9, 2014); Final Regulations, 81 FR 59849 (Aug. 31, 2016).

[5] 69 FR 18686, 18687 (Apr. 8, 2004).

[6] Formal Interpretation 15, 63 FR 54713 (Oct. 13, 1998) (amended 1999) (amended 2001).

[7] 69 FR at 18688.

[8] 70 FR 11502, 11504 (Mar. 8, 2005).

[9] 70 FR 11502 (Mar. 8, 2005).

b. Have the distinctions between NCIs and voting securities evolved since 2005? If they have evolved, what significant changes have occurred to make NCIs and voting securities more or less distinct between 2005 and now?

c. Are NCIs currently the same as voting securities? If so, how? If not, how are they different? Is this different from 2005? If so, how? What has changed between 2005 and now?

d. Does any category of NCIs currently carry a right equivalent to the right to vote for the election of the board of directors of a corporate entity? Is this different from 2005? If so, how? What has changed between 2005 and now?

e. Should the reporting obligations for the acquisition of an interest in a corporate entity and non-corporate entity differ? Is this different from 2005? If so, how? What has changed between 2005 and now?

2. Have the benefits and drawbacks of becoming an NCE evolved since 2005? If they have evolved, have the incentives to become an NCE changed since 2005? If so, how? If not, why not? What has changed between 2005 and now?

IV. Acquisitions of Small Amounts of Voting Securities (16 CFR 801.1, 802.9, 802.64)

Since the implementation of the HSR program, there has been a significant expansion of the holdings of investment entities, including investment funds and institutional investors, as well as expanded interest and ability of such shareholders to participate in corporate governance.[10] In addition, changes in investment behavior have resulted in some investment entities holding small stakes in a large number of firms, including competitors. This has caused some to raise concerns about the competitive effects of common ownership—that is, the competitive effect of an investor holding small minority positions in issuers that operate competing lines of business.[11]

In light of these developments, the Commission is using this ANPRM to take a fresh look at the rules that apply to acquisitions of voting securities by investment entities to determine whether updates may be necessary. The Commission seeks information on the following rules:

A. Definition of ''Solely for the Purpose of Investment'' (16 CFR 801.1, 802.9)

Section (c)(9) of the HSR Act exempts from the requirements of the Act ''acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer.'' To implement this statutory limitation, 16 CFR 802.9 exempts from the requirements of the Act an acquisition of voting securities if made solely for the purpose of investment and if, as a result of the acquisition, the Acquiring Person would hold 10% or less of the outstanding voting securities of the issuer, regardless of the dollar value of the voting securities so acquired or held. Under 16 CFR 801.1(i)(1), ''[v]oting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.'' [12]

In light of changing investor engagement with issuers, the Commission is interested in knowing if it is appropriate to rethink the definition of ''solely for the purpose of investment'' in 16 CFR 801.1(i)(1) and the exemption in 16 CFR 802.9. To that end, the Commission seeks to understand the incentives involved in applying the exemption in 16 CFR 802.9 through responses to the following questions:

1. The ability to rely on 16 CFR 802.9 depends on whether a potential filing person ''has no intention of participating in the formulation, determination, or direction of basic business decisions of the issuer.'' [13]

a. Are there benefits to this approach? If so, what are the benefits?

b. Are there drawbacks to this approach? If so, what are the drawbacks?

c. How could this approach be changed? How would such a change impact investors and issuers?

d. What are the ''basic business decisions'' of the issuer?

i. Is it clear what decisions comprise the ''basic business decisions'' of the issuer?

ii. Are there activities that clearly do not relate to the basic business decisions?

iii. Are there activities that clearly do relate to the basic business decisions?

iv. Is there uncertainty about whether an activity relates to the basic business decisions? If so, why is there uncertainty? To what extent is there uncertainty about whether an activity relates to the basic business decisions?

e. Should the Commission define the ''basic business decisions of the issuer'' as used in the existing Rule?

i. What should the definition include?

ii. Should specific items be excluded from the definition? Which items?

iii. What are the benefits of providing a definition?

iv. What are the risks of providing a definition?

f. Is it clear what is meant by ''no intention of participating'' in the formulation, determination, or direction of the basic business decisions?

i. What type of activity related to determining whether to participate in business decisions currently takes one out of the exemption, or at what point in the process of deciding whether to participate in business decisions is one no longer within the exemption?

ii. What type of activity related to determining whether to participate in business decisions should result in the exemption no longer applying, or at what point in the process of deciding whether to participate in business decisions should one no longer be within the exemption?

iii. Should the language be changed to allow reliance on the exemption until the Acquiring Person has made an affirmative decision to participate in the basic business decisions? If so, what would constitute an affirmative decision to participate in the basic business decisions?

2. In general, for HSR purposes, what differentiates the activities of investors who invest solely for the purpose of investment and investors who do not invest solely for the purpose of investment? Have these activities changed since 1978? If so, how?

a. In what activities do investors who invest solely for the purpose of investment engage? Have these activities changed since 1978? If so, how?

b. What categories of interaction with management indicate an investor's intention is not to hold voting securities solely for the purpose of investment? For example, would those categories include things like discussions of governance issues, discussions of

[10] *See, e.g.,* Edward Rock, *Adapting to the New Shareholder-Centric Reality,* 161 U. Pa. L. Rev. 1907 (2013).

[11] Matthew Backus, Christopher Conlon, & Michael Sinkinson, *Common Ownership in America: 1980–2017,* forthcoming, American Economic Journal (forthcoming 2020) *https://chrisconlon.github.io/site/common_owner.pdf.* (These concerns (and their validity) were discussed at the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Hearings on Common Ownership (Dec. 6, 2018). The transcript of that session is available on the FTC's website, here: *https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18_0.pdf,* and the slide presentations of the participants are available here, *https://www.ftc.gov/system/files/documents/public_events/1422929/cpc-hearings-nyu_12-6-18.pdf.*).

[12] 16 CFR 801.1(i)(1).

[13] 16 CFR 801.1(i)(1).

executive compensation, or casting proxy votes? Have these categories changed since 1978? If so, how?

c. Does the market capitalization of the issuer affect the determination of whether an investment is solely for the purpose of investment or not solely for the purpose of investment? Has this changed since 1978? If so, how?

3. How does the Commission's interpretation of ''solely for the purpose of investment'' compare to the Securities and Exchange Commission's (''SEC'') approach to ''passive'' investors? [14]

a. Assuming no change in the SEC approach, could the Commission adopt the SEC approach? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC approach? Why?

c. What would be the drawbacks of adopting the SEC approach? Why?

d. Does the different role of each agency justify different approaches for investors who hold positions solely for the purpose of investment? If yes, why? If no, why not?

4. How does the Commission's interpretation of ''solely for the purpose of investment'' compare to the elements that must be disclosed in Item 4 of Schedule 13D filed with the SEC? [15]

a. Assuming no change to the SEC rule, could the Commission adopt the SEC elements? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC elements?

c. What would be the drawbacks of adopting the SEC elements?

d. Does the different role of each agency justify different approaches for investors who hold positions solely for the purpose of investment?

5. How do the activities of investment firms differ from those of operating companies?

a. Should the Commission treat different types of acquirers differently for the purpose of the exemption? If yes, why? If no, why not?

b. Should the Commission treat different types of investment companies differently for the purpose of the exemption (for example, mutual fund companies versus hedge fund companies)? If yes, why? If no, why not?

6. Should the Commission preclude parties from using the exemption only if they have taken certain specified actions? If yes, why? If no, why not?

a. What actions should disqualify an Acquiring Person from being able to use the exemption?

i. Should the actions be limited to actions that facilitate or encourage coordination among competitors?

ii. Should actions that affect competition, even if aimed only at a single competitor, preclude the use of the exemption? If yes, why? If no, why not?

iii. Should actions that change the incentives to compete, even if aimed only at a single competitor, preclude the use of the exemption? If yes, why? If no, why not?

iv. What other actions should preclude utilizing the exemption?

b. Would allowing the Acquiring Person to acquire 9.9% of the voting securities of the Issuer prior to taking the specified action undercut the ability to obtain filings early enough to ascertain potential competitive harm before a transaction is consummated? If yes, why? If no, why not?

c. Would such a conditioning of the loss of the exemption be consistent with the wording of the statute, including ''solely'' and the ''purpose'' of the acquisition? If yes, why? If no, why not?

i. Is the acquisition *solely* for investment if the Acquiring Person is considering taking action inconsistent with the exemption, but has not yet taken the action?

ii. Is the acquisition for the *purpose* of investment if the Acquiring Person has determined to take action inconsistent with the exemption, but has not yet taken the action?

d. Should the Commission require an HSR filing for past acquisitions once the specified actions have been taken? If yes, why? If no, why not?

i. Would this be consistent with the HSR Act's requirement to make the filing prior to the acquisition? If yes, why? If no, why not?

ii. Would this be consistent with the requirement that the Acquiring Person certify that it has a good faith intent to make an acquisition requiring notification? If yes, why? If no, why not?

B. Definition of Institutional Investors (16 CFR 802.64)

Under § 802.64, institutional investors are exempt from HSR reporting when making acquisitions of 15% or less of voting securities in the ordinary course of business and solely for purpose of investment. During the initial HSR rulemaking in 1978, entities were identified as institutional investors because they were viewed as constrained by law (*e.g.,* non-profits) or fiduciary duty (*e.g.,* pension trusts, insurance companies, etc.), or generally uninterested in ''affecting management of the companies whose stock they buy'' (*e.g.,* broker-dealers).[16] The list identifying what type of entity is considered an institutional investor has never been updated.

It is unclear to the Commission whether this exemption should be maintained and implemented in the same manner in which it was first promulgated in 1978. In light of changes in the investor landscape since that time, the Commission may need to update the list of institutional investors that are presumed to engage in acquisitions solely for the purpose of investment. Thus, the Commission aims to understand the current institutional investor landscape in order to make that determination through responses to the following questions:

1. Given that 16 CFR 802.64 has not changed since 1978, does it need to be updated?

a. Does 16 CFR 802.64 accurately reflect the universe of entities that make investments in the ordinary course of business solely for the purpose of investment? Are there entities currently listed in the exemption that should be removed? If so, why?

b. Are there entities not currently listed that should be treated as institutional investors? If so, why and what are they? Explain the justification for treating the entity as an institutional investor: Does it fit within the paradigm identified by the Commission in first promulgating 16 CFR 802.64 (*i.e.,* (i) constrained by law; (ii) constrained by fiduciary duty; or (iii) uninterested in affecting management of the companies whose stock they buy)? Are there other reasons the entity should be treated as an institutional investor?

[14] Under SEC Rule 13d–1(c), certain beneficial owners may file a short form statement on Schedule 13G in lieu of a 13D statement if that person ''has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to 17 CFR 240.13d–3(b), other than activities solely in connection with a nomination under 17 CFR 240.14a–11.'' 17 CFR 240.13d–1(c). The SEC relies on a ''control purpose'' test to identify ''passive'' investments; that is, beneficial owners that acquired shares ''not with the purpose nor with the effect of changing or influencing the control of the issuer.'' The SEC has a broad view of the types of activities that could show such a ''control purpose,'' and that determination is assessed based on a totality of the circumstances. For instance, a shareholder that fails to qualify as an investor solely for the purpose of investment under the HSR Act may nonetheless be eligible to use Schedule 13G depending on various factors, such as the subject matter of the shareholder's discussions with the issuer's management. *See* Exchange Act Sections 13(d) and 13(g) and Regulation 13D–G Beneficial Ownership Reporting, Compliance and Disclosure Interpretations (''C&DIs''), Question 103.11 (July 14, 2016) *https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm#103.11.*

[15] Item 4 of Schedule 13D requires filers to state the purpose or purposes of the acquisition of securities of the issuer and to describe any plans or proposals which they might have. 17 CFR 240.13d–10117 CFR 240.13d–101.

[16] 43 FR 33450, 33503 (July 31, 1978).

c. Should the Commission provide a list of indicia that an investor must meet to qualify as an institutional investor for purposes of the HSR Act, instead of a list of entities considered to be institutional investors? If yes, why and what should these indicia be? If no, why not?

d. Is the 15% level for the Commission's exemption still consistent with the purpose of the HSR Act? What evidence is there that the level should be higher or lower?

The SEC has also promulgated a definition of ''institutional investors'' as part of its beneficial ownership disclosure requirements. When a person or group of persons acquires beneficial ownership of more than five percent of a voting class of a company's equity securities registered under the Securities Exchange Act, they are required to file a Schedule 13D with the SEC.[17] Depending upon the facts and circumstances, the person or group of persons may be eligible to file the more abbreviated Schedule 13G in lieu of Schedule 13D.[18] One of the exemptions relates to acquisitions of securities in the ordinary course of business by a ''qualified institutional investor'' under Rule 13d–1(b).[19]

2. How does the Commission's definition of institutional investor compare to the definition used by the SEC in identifying a person able to file a Schedule 13G?

a. Assuming no change in the SEC rule, should the Commission adopt the SEC definition of a person who acquires voting securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer? If yes, why? If no, why not?

b. What would be the benefits of adopting the SEC definition?

c. What would be the drawbacks of adopting the SEC definition?

d. Does the different role of each agency justify different definitions for institutional investors?

3. What are the activities of institutional investors and how have they changed since 1978?

a. What activities do institutional investors engage in with the issuers whose shares they hold? Have these activities changed since 1978? If so, how have these activities changed?

i. What is the scope of ''shareholder engagement'' that institutional investors undertake? Has this changed since 1978? If so, how has it changed?

ii. What topics or issues are the subject of such engagement? Have these topics or issues changed since 1978? If so, how have they changed?

iii. How often does such engagement occur? Has this changed since 1978? If so, how has this changed?

iv. Does the amount, degree, or type of issue discussed vary by issuer, or are there consistent themes of discussion and engagement? Has this changed since 1978? If so, how has this changed?

v. When do institutional investors participate in the formulation, determination, or direction of the basic business decisions of issuers? Has this changed since 1978? If so, how has it changed?

b. How do index funds fit within the portfolios of institutional investors? Have index funds evolved since 1978? If so, how have they evolved?

i. Why do intuitional investors choose to create an index fund, exchange-traded fund, or the like? What are the benefits and drawbacks of creating such a fund?

ii. How does the acquisition of voting securities held by an index fund, exchange-traded fund, or the like occur? Do acquirors use an algorithm or some other automated mechanism to facilitate acquisitions?

iii. Who oversees an index fund, exchange-traded fund, or the like? Is there one person or entity within an investment organization tasked with overseeing such a fund? More than one? How often is it one versus more than one?

4. How do institutional investors manage holdings in the same issuer? How has this changed since 1978?

a. Do institutional investors jointly manage holdings in the same issuer? Do they separately manage holdings in the same issuer? Both? Has this changed since 1978? If so, how has it changed?

b. How do institutional investors make the decision to jointly or separately manage holdings in the same issuer? Has this changed since 1978? If so, how has this changed?

c. Do answers to any of the above questions depend on the type of issuer or the type of institutional investor or other factors? If so, what factors are relevant? How does each factor influence the actions of institutional investors? Have the factors changed since 1978? If so, how have they changed?

5. How do institutional investors apply the concept of solely for the purpose of investment? Has this changed since 1978? If so, how has it changed?

a. Do the entities listed in 16 CFR 802.64 currently hold the voting securities of issuers solely for the purpose of investment? How does this differ from institutional investor behavior in 1978? What significant changes in institutional investor behavior have occurred between 1978 and 2020?

b. What kinds of entities not listed in 16 CFR 802.64 currently hold the voting securities of issuers solely for the purpose of investment? How does the current behavior of these entities differ from their behavior in 1978?

c. If institutional investors make certain acquisitions solely for the purpose of investment and other acquisitions not solely for the purpose of investment, is it appropriate to provide a status exemption for all of their activities? If yes, why? If no, why not?

d. Do institutional investors rely on 16 CFR 802.64 to exempt acquisitions in or by index funds, exchange-traded funds or the like? If so, how?

V. Influence Outside the Scope of Voting Securities (16 CFR 801.1, 802.31)

The HSR Act applies to the acquisition of assets and voting securities. ''The term voting securities means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer, or of an entity included within the same person as the issuer.'' [20] The acquisition of a voting security carries with it the right to influence the business of a company through the ability to vote for the directors of that company, among other things.

The Commission is aware, however, that there are ways to gain influence over a company without the acquisition of the right to vote for the election of directors inherent in voting securities. For instance, the acquisition of convertible voting securities or the use of board observers could each result in the ability to influence a company's business decisions. Currently, neither the acquisition of convertible voting securities nor rights to be a board observer are reportable events under the Act. The Commission, therefore, needs to ascertain whether the acquisition and exercise of these rights provide opportunities to influence an issuer's business decisions, and thus should be reportable events.

[17] Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* and 17 CFR 240.13d–101.

[18] Section 13(g) was added to the Exchange Act as part of the Domestic and Foreign Investment Improvement Disclosure Act of 1977. Public Law 95–214, sec. 203, 91. Stat. 1494.

[19] Under SEC Rule 13d–1(b)(1)(i)–(ii)(A)–(K), certain beneficial owners may file a short form statement on Schedule 13G in lieu of a 13D statement under certain conditions.

[20] 16 CFR 801.1(f)(1)(i).

A. Convertible Voting Securities (16 CFR 802.31)

The acquisition of convertible debentures (convertible into common stock), options, warrants, or preferred shares, even with no present right to vote for directors, may result in the ability to influence the business of a company. The Rules capture these kinds of stakes in the concept of a convertible voting security. ''The term convertible voting security means a voting security which presently does not entitle its owner or holder to vote for directors of any entity.'' [21] Section 802.31 exempts the acquisition of convertible voting securities.

The PNO has taken the informal position that the acquisition of convertible voting securities, when accompanied by the right to designate or appoint individuals to the board of directors of the issuer equal to the percentage of voting securities that would be held upon conversion, is reportable under the Act. The Commission is considering revising § 802.31 to explicitly require compliance with the HSR Act's reporting requirements when the acquisition of convertible voting securities is coincident with the Acquiring Person having or obtaining the right to designate or appoint any individuals to the board of the issuer. The Commission aims to understand the potential benefits and burdens of such a change through responses to the following questions:

1. Is the acquisition of convertible voting securities, when accompanied with the right of appointment or designation of individuals to the issuer's board of directors, equivalent to the acquisition of voting securities with the present right to vote for election of the issuer's board of directors? In what ways are they the same and in what ways are they different? What provisions could accompany the right to appoint that would make the acquisition the most like an acquisition of voting securities? What provisions make them different for competition purposes? Have these provisions changed since 1978? If so, how have they changed?

2. Why would an Acquiring Person choose one alternative over the other? Have the benefits of one alternative over another changed since 1978?

a. Is there a benefit of acquiring convertible voting securities while holding or obtaining the right to appoint or designate individuals to an issuer's board of directors, as compared to the acquisition of securities that have the present right to vote? If so, what is the benefit? Has the benefit changed since 1978? If so, how has it changed?

b. Under what situations does such a benefit arise? Have these situations changed since 1978? If so, how have they changed?

3. What are the reasons the Commission should or should not require a filing whenever the acquirer of convertible non-voting securities receives a right to designate one or more directors prior to conversion?

a. Should issuers that have cumulative voting be subject to the same requirements as issuers that do not have cumulative voting? Why should they be subject to different requirements? Is there a difference in how much influence an acquirer would have based on whether the issuer has cumulative voting? Why? How would the Commission be able to distinguish when it is a problem and when it is not?

4. What would be the burden associated with this possible change?

a. Would the burden fall most on an identifiable class of transactions? How would such a change affect how an identifiable class of transactions is structured?

b. Would such a change introduce significant inefficiencies into the market for corporate control? What would be the effect of that change in the market?

B. Board Observers

Another potential way to gain influence over a company, beyond the scope of acquiring voting securities, is through board observers. The Commission understands that it is becoming increasingly common for issuers and NCEs to include board observers as part of their governance structure. Issuers and NCEs often grant rights to select and appoint board observers to investors with significant equity, in addition to or in lieu of providing investors with board seats. Even though board observers lack the ability to vote on matters that come before the issuer's board, they may nevertheless have significant influence over the outcome of matters submitted to the board for approval.[22] At the very least, board observers gain insight into an issuer's strategic decision-making, which is not only useful to the investor sponsoring the board observer, but may also be useful to competitors in the market, especially when those board observers also serve as officers or directors of a competitor.[23] Companies likely benefit from interacting with board observers because company management can obtain additional investor insight without having to alter the composition or voting balance on the board.

Given the opportunities that board observers have to interact with corporate officers, directors, and other managers, and to gain access to confidential information related to strategic and operational decisions, the Commission would like to better understand the role of board observers. In particular, the Commission would like to know how investors might use board observers' rights to influence competitive decision-making of issuers and NCEs to ascertain whether the acquisition of rights that provide opportunities to wield this kind of influence should be reportable under the Act. To that end, the Commission seeks responses to the following questions:

1. What types of information are available to an issuer/NCE board observer?

a. With what frequency is a board observer invited to all meetings? Is a board observer always entitled to all info provided to board members? Is a board observer permitted to request additional information beyond what is presented at a board meeting? If so, with what frequency?

b. Are board observers subject to any restrictions on how they can use the information they obtain in their capacity as board observers? Are these restrictions based on contract, bylaws or regulations?

c. Do issuers/NCEs create formal review processes for information scheduled to be sent to a board observer? If so, with what frequency? Are outside counsel involved in monitoring compliance? If so, with what frequency?

d. Is the information scheduled to be sent to a board observer subject to a non-disclosure agreement that limits its dissemination to others, including officers and directors of competitors or investors in competitors?

e. Do issuers/NCEs draft formal guidance for their boards as to what topics should not be discussed in the presence of board observers? If so, with what frequency? Are outside counsel involved in monitoring compliance? If so, with what frequency?

2. What means does an issuer/NCE board observer have to influence board policies or the strategic or operational direction of the firm?

[21] 16 CFR 801.1(f)(2).

[22] *Obasi Investment Ltd. et al.* v. *Tibet Pharmaceuticals, Inc. et al.,* 931 F.3d 179, 183 (3d Cir. 2019).

[23] *See* Complaint, *In re Altria Group/JUUL Labs,* Dkt. 9383, ¶ 9, at *https://www.ftc.gov/system/files/documents/cases/d09393_administrative_part_iii_complaint-public_version.pdf.*

a. Does a board observer ever enjoy any special right of notice or consultation regarding major capital expenditures or strategic decisions?

b. Does a board observer have access, outside of board meetings, to managers in the corporation, to investment committee members in an NCE, or to persons with similar decision-making roles regarding the operations of the business? If so, with what frequency?

c. Do board observers have the ability to request a meeting of the issuer's/NCE's board? If so, with what frequency?

d. Do issuers/NCEs impose restrictions on a board observer's speaking role during board meetings? If so, with what frequency? How common are ''silent'' board observers?

e. How frequently do board observers move into senior executive roles at issuers/NCEs?

3. What are the parameters of the board observer role?

a. Is a board observer's relationship with the issuer/NCE always explicitly defined in a written agreement between the issuer and the investor? How common are informal board observer arrangements?

b. Are board observers (or those who sponsor their observation of board matters) covered by conflict of interest rules or black-out periods such as those that limit investments by board members?

4. Are there any protocols on selection/approval of board observers and/or processes in place to ensure that observers are not in a position to facilitate sharing of competitively sensitive information among competitors?

5. For all of the questions above, do rules or practices regarding board observer rights to obtain confidential information differ substantially between issuers and NCEs? What factors account for any such differences?

VI. Transactions or Devices for Avoidance (16 CFR 801.90)

16 CFR 801.90 provides that the Commission must disregard the structure of transactions or devices used by the parties for the purpose of avoiding the HSR Act requirements and review the substance of the transaction as a whole to determine whether an HSR filing is required. The PNO often receives questions about whether specific scenarios would be violations under § 801.90, and the PNO has occasionally offered informal staff positions on § 801.90. For instance, the PNO has an informal staff position that says if a target makes a payout prior to its acquisition in the form of an extraordinary dividend, such a payment would not trigger 16 CFR 801.90 if, as a result of the dividend, the target no longer meets the size of person test.[24] The PNO's informal staff position is based on the idea that if an extraordinary dividend reduces the target's cash on hand, it is unlikely to present a 16 CFR 801.90 issue.

But there are situations where the purpose of such a payout may be more complicated. For instance, if the payout involves more than the distribution of cash on hand, this could present an issue under 16 CFR 801.90. Each issuance of an extraordinary dividend or like payment must be carefully analyzed to make sure that it is not a device for avoidance under § 801.90. The Commission has questions about whether filing parties are engaging in this analysis or, instead, assuming that every extraordinary dividend is not a device for avoidance under § 801.90. In order to determine which are and are not devices for avoidance, the Commission would therefore like to understand the mechanisms by which targets engage in these and other kinds of practices through responses to the following questions:

1. What mechanisms do targets use to pay out extraordinary dividends and what are the reasons for such dividends?

a. Is the focus on the reduction of cash on hand or are there other motivations for issuing such dividends? If so, what are the other motivations?

b. Are there other ways of structuring extraordinary dividends? If so, what are they? If not, why not?

c. How often do targets issue extraordinary dividends in advance of being acquired? What are the reasons that targets issue such dividends?

d. Is the buyer ever involved in the target's decision to issue an extraordinary dividend in advance of an acquisition? Why or why not?

2. Do targets use mechanisms other than extraordinary dividends to reduce cash on hand?

a. If so, what are they and how are they structured? If not, why not?

b. Is the buyer involved? If yes, why and with what frequency? If not, why not?

3. What other actions should the Commission scrutinize as possible devices for avoidance?

VII. Filing Issues (16 CFR 802.21, 16 CFR Part 803 Appendix A and B)

The Commission has a strong interest in an HSR filing process and an HSR Form that garners competitively significant information to assist the Agencies in their review of transactions. To that end, the Commission intends to explore amending (a) the 16 CFR 802.21 five-year period during which a party may acquire additional voting securities without refiling, and (b) the requirement in Item 8 of the HSR Form to disclose certain prior acquisitions.

A. Acquisitions of Voting Securities That Do Not Cross the Next Threshold (16 CFR 802.21)

Under 16 CFR 802.21, filing parties have five years from the end of the waiting period to acquire additional voting securities without making another filing, as long as the additional acquisitions do not exceed the next threshold. For instance, Party A files to cross the $100 million threshold (as adjusted) on January 1 and receives early termination on January 20, which ends the waiting period. Party A then has five years from January 20 to continue to acquire voting securities of the same issuer up to the next threshold, in this case $500 million (as adjusted), as long as it crosses the $100 million threshold (as adjusted) within one year.

The time period in proposed § 802.21 was 180 days, but numerous comments persuaded the Commission this time period was too short.[25] In the final rules, the Commission chose a period of five years, both as a result of these comments and because it made sense to correlate the timing of the exemption with the timing of the Census and resulting updated data.[26] Given the changes in worldwide economic activity since 1978, Commission is now concerned that the § 802.21 five-year period may be too long. At the time of the initial filing, the transaction may not present competition concerns, but such concerns could develop as a result of changes in the lines of business of the Acquiring Person and Acquired Person during the five-year period, but those changes would not require a new filing. As a result, the Commission seeks to understand the impact of shortening the § 802.21 five-year period through responses to the following questions:

1. Have there been changes in economic activity significant enough to raise concerns that the Commission may miss important competitive effects if it does not shorten the five-year term?

2. If there are reasons to believe that the § 802.21 five-year period is too long, what period would address concerns that additional acquisitions of the Acquired Entity present competitive

[24] Am. Bar Ass'n., Premerger Notification Practice Manual, Interpretation 96 (5th ed.).

[25] 43 FR 33450, 33493 (July 31, 1978).

[26] *Id.*

concerns because the lines of business of the Acquiring Person and/or Acquired Person have changed? Why would another period be more appropriate?

3. Is there is a class of Acquiring Persons for whom the decrease in the exemption period would cause significant burden? If not, why not? If so, how?

B. Prior Acquisitions

When the Acquiring Person and the Acquired Person report in the same or ''overlapping'' NAICS revenue code in Item 5 of the HSR Form, the Acquiring Person must report certain prior acquisitions in Item 8: (1) The acquisition of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity (subject to $10 million limitation) and (2) any acquisition of assets valued at or above the statutory size-of-transaction test at the time of their acquisition. Item 8 limits the Acquiring Person's disclosure to those acquisitions within the overlapping NAICS code over the last five years.

The Commission is concerned that Item 8 does not capture all competitively significant acquisitions. There are several reasons why this might be the case. For instance, the Acquiring Person does not have to disclose prior acquisitions when it and the Acquired Person report revenue in different NAICS codes. Nevertheless, overlapping NAICS codes are imperfect predictors of whether the acquisition presents competitive concerns that need review. For instance, an Acquiring Person is not subject to the disclosure requirement if a prior acquisition involved a potential competitor with no revenue in an overlapping NAICS code at the time of the acquisition. Similarly, an Acquiring Person need not disclose a prior acquisition that involved a vertical relationship when companies at different levels of the distribution chain report in different NAICS codes. As a result, the Commission is considering eliminating the overlapping NAICS code limitation in Item 8 so that the Acquiring Person would have to list all its acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity (subject to the $10 million limitation) and any acquisition of assets valued at or above the statutory size-of-transaction test at the time of their acquisition in the five years prior to filing. The Commission seeks comment on this potential change through responses to the following questions:

1. What would be the benefit or burden associated with this possible change? Are there any classes of transactions for which the benefit or burden would be greater? If there are classes of transactions for which the benefit is greater, why is the benefit greater? If there are classes of transactions for which the burden is greater, why is the burden greater?

2. Is there any way to distinguish prior acquisitions that might have competitive significance from those that do not, such that the Commission would not need to require a list of all prior acquisitions?

In addition to the topics outlined above, commenters are welcome to provide input on any other HSR Rule. As part of that input, identify the changes in investor behavior or competitive dynamics that would justify a change in the Commission's current approach.

By direction of the Commission.

April Tabor,

Acting Secretary.

Statement of Commissioner Rohit Chopra

September 21, 2020.

Summary

- Premerger notification is a critical data source, but the Commission faces enormous information gaps when seeking to detect and halt anticompetitive transactions.
- While the proposed rule closes a loophole when it comes to investment manager holdings, the proposed approach to exempt a wide swath of minority stakes is concerning and adds to existing information gaps.
- The Commission needs to update the treatment of certain debt transactions when determining deal size for the purpose of premerger notification. The current approach allows dealmakers to structure anticompetitive transactions in ways that can go unreported.

In September 1976, Congress gave the Federal Trade Commission an important tool enabling it to block harmful mergers. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (''HSR Act'') requires prior notification to the antitrust agencies in advance of closing certain mergers and acquisitions.[1]

Prior to the HSR Act's enactment, companies could quickly ''scramble the eggs'' of assets and operations, or even shut down functions. This made it extremely difficult for the antitrust agencies to remedy competitive harms through divestitures of assets. Years of protracted litigation to stop further damage and distortions were often the result.[2]

The HSR Act fundamentally changed the process of merger review by giving the antitrust agencies time to halt anticompetitive transactions before these deals closed. Today, the FTC focuses a substantial portion of its competition mission on investigating and challenging mergers reported under the HSR Act. Importantly, only a small set of transactions—the ones with the highest valuations—are subject to premerger notification. The HSR Act specifies the valuation threshold, currently set at $94 million, which is typically adjusted upward each year. Since there are many ways to determine a deal's valuation, Congress gave the FTC broad authority to implement rules so that buyers know if they need to report their transactions and what they are required to submit with their filing. The Commission can also exempt classes of transactions and tailor filing requirements.

While premerger notification filings provide the Commission with certain nonpublic information,[3] gathering and analyzing market intelligence on transaction activity and competitive dynamics is a major challenge. We need to continuously assess how we can enhance our market monitoring techniques and evolve our analytical approaches.

Today, the Commission is soliciting comment on two rulemakings regarding our policies to implement the HSR Act's premerger notification protocols. The first publication, a Notice of Proposed Rulemaking, proposes specific rules and exemptions. While some of the proposals are helpful improvements, I respectfully disagree with our approach to exempting a broad swath of transactions from reporting. The second publication, an Advance Notice of Proposed Rulemaking, requests comment on a broad range of topics to set the stage for modernizing the premerger notification program to align with market realities. I support soliciting input to rethink our approach. I discuss each of these rulemakings below.

Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking outlines specific amendments that the Commission is proposing to the HSR rules. The aggregation and exemption provisions are particularly noteworthy. The aggregation provisions are worthwhile, since they close a loophole and align with market realities. However, I am concerned about the exemption provisions, since we will completely lose visibility into a large set of transactions involving non-controlling stakes.

Aggregation Provisions

The financial services industry is well known for using an alphabet soup of small entities, like shell companies, partnerships, and other investment vehicles, to structure deals. Even though they may be under common management by the same person or group, like a private equity fund or a hedge fund, these smaller legal entities are all treated separately under the existing rules.

The proposed aggregation provisions will help to prevent acquirers from splitting up

[1] Clayton Act section 7A, 15 U.S.C. 18a.

[2] For example, in *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964), it took seventeen years of litigation before a divestiture finally took place.

[3] I agree with Commissioner Slaughter that current filing requirements, including for minority stakes, can have the beneficial effect of deterring certain anticompetitive transactions.

transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

Exemption Provisions

By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements—it is a total exemption, so the agency will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.[4]

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal—or even with a contractual option—of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this document.

Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.[5] The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size thresholds on an annual basis, the number of HSR-reportable transactions has *decreased.*

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.[6]

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that ''roll ups'' are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemakings, so that our approach reflects market realities.

[FR Doc. 2020–21754 Filed 11–30–20; 8:45 am]

BILLING CODE 6750–01–P

[4] The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. See Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), *https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10.*

[5] Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, ''catch and kill'' acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, ''roll-ups,'' an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. *See* Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.*

[6] *See* Healthcare Transaction Notification Requirement, WASH. STATE OFF. OF THE ATT'Y GEN. (last visited Sept. 16, 2020), *https://www.atg.wa.gov/healthcare-transactions-notification-requirement; see also* S.H.B. 1607, 66th Leg., Reg. Sess. (Wash. 2019).

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is proposing amendments to the premerger notification rules (''the Rules'') that implement the Hart-Scott-Rodino Antitrust Improvements Act (''the Act'' or ''HSR'') to change the definition of ''person'' and create a new exemption. The Commission also proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

DATES: Comments must be received on or before February 1, 2021.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR parts 801–803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014'' on your comment. File your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 400, 407, and 457

[Docket ID FCIC–23–0004]

RIN 0563–AC83

Actual Production History (APH) and Other Crop Insurance Transparency

AGENCY: Federal Crop Insurance Corporation, U.S. Department of Agriculture (USDA).

ACTION: Final rule with request for comments.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) is amending its regulations to incorporate existing actual production history (APH) requirements into the policy to enhance and improve accessibility, clarity, and transparency for the producer. FCIC is also incorporating existing same year production reporting (SYPR) rules into the policy, clarifying prevented planting rules, incorporating the High-Risk Alternate Coverage Endorsement (HR–ACE) into the policy, clarifying double cropping requirements when another plan of insurance does not require records of acreage and production, and updating organic provisions. In this rule, FCIC is authorizing the availability of enterprise units (EU) and whole farm units (WFU) to be designated in the actuarial documents. The changes to the crop insurance policies resulting from the amendments in this rule are applicable for the 2024 and succeeding crop years for crops with a contract change date on or after June 30, 2023. For all other crops, the changes to the policies made in this rule are applicable for the 2025 and succeeding crop years.

DATES:

Effective date: This final rule is effective June 30, 2023.

Comment date: We will consider comments that we receive by the close of business August 28, 2023. FCIC may consider the comments received and may conduct additional rulemaking based on the comments.

ADDRESSES: We invite you to submit comments on this rule. You may submit comments by going through the Federal eRulemaking Portal as follows:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and search for Docket ID FCIC–23–0004. Follow the instructions for submitting comments.

All comments will be posted without change and will be publicly available on *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Francie Tolle; telephone (816) 926–7829; or email *francie.tolle@usda.gov.* Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice) or (844) 433–2774 (toll-free nationwide).

SUPPLEMENTARY INFORMATION:

Background

FCIC serves America's agricultural producers through effective, market-based risk management tools to strengthen the economic stability of agricultural producers and rural communities. FCIC is committed to increasing the availability and effectiveness of Federal crop insurance as a risk management tool. Approved Insurance Providers (AIPs) sell and service Federal crop insurance policies in every state through a public-private partnership. FCIC reinsures the AIPs who share the risks associated with catastrophic losses due to major weather events. FCIC's vision is to secure the future of agriculture by providing world class risk management tools to rural America.

Federal crop insurance policies typically consist of the Basic Provisions, the Crop Provisions, the Special Provisions, the Commodity Exchange Price Provisions, if applicable, other applicable endorsements or options, the actuarial documents for the insured agricultural commodity, the Catastrophic Risk Protection Endorsement, if applicable, and the applicable regulations published in 7 CFR chapter IV. Throughout this rule, the terms ''Crop Provisions,'' ''Special Provisions,'' and ''policy'' are used as defined in the Common Crop Insurance Policy (CCIP) Basic Provisions in 7 CFR 457.8. Additional information and definitions related to Federal crop insurance policies are in 7 CFR 457.8.

In this rule, FCIC amends the Area Risk Protection Insurance (ARPI) Basic Provisions (7 CFR part 407), CCIP Basic Provisions (7 CFR 457.8), and the General Administrative Regulations in subpart G of part 400 (Actual Production History) (7 CFR 400.51 through 400.56). The changes made in this rule are applicable for the 2024 and succeeding crop years for crops with a contract change date on or after June 30, 2023. For all other crops, the changes to the policy made in this rule are applicable for the 2025 and succeeding crop years.

Actual Production History (APH)

FCIC will add guidelines for establishing a producer's approved yield to section 5 of the CCIP Basic Provisions. The approved yield is the basis for establishing liability, premium, guarantee, and indemnity for yield-based crop insurance plans. The intended effect of this action is to incorporate existing regulatory language, located at 7 CFR part 400 (subpart G) and procedural language, located in the FCIC–18010 Crop Insurance Handbook (CIH), regarding the APH requirements, into the policy to enhance and improve accessibility, clarity, and transparency for the producer. Subpart G is revised to indicate its applicability expires as this rule becomes effective in the CCIP Basic Provisions. Specifically, as each crop's contract change date passes, the APH rules in subpart G expire at the same time the APH rules in the CCIP Basic Provisions become effective. Subpart G will be removed and reserved at a future date, once all applicable contract change dates have lapsed, and the language is obsolete.

FCIC is adding several new definitions to section 1 of the CCIP Basic Provisions that were previously defined in subpart G or the CIH related to APH rules: ''annual yield,'' ''APH base period,'' ''APH crop year,'' ''APH database,'' ''applicable T-Yield,'' ''appraised production,'' ''approved yield,'' ''assigned yield,'' ''average yield,'' ''continuous production reports,'' ''determined yield,'' ''insurable acres,'' ''master yield,'' ''new insured,'' ''new producer,'' ''production reporting date,'' ''temporary yield,''

''transitional yield (T-Yield),'' and ''variable T-Yield.''

FCIC is inserting the APH provisions into section 5 of the CCIP Basic Provisions and renamed the section ''APH Database and Approved Yield Calculation.'' This section had previously been reserved without a heading.

The new definitions in section 1 and new provisions in section 5 are intended to ensure clarity with the APH rules and do not change any APH calculations or determinations in the policy.

FCIC is incorporating changes into section 5(b)(1)(ii) of the CCIP Basic Provisions, previously incorporated in 2017 through procedures, to exclude acreage and the actual production from acreage that is damaged by an unavoidable uninsured fire and/or a third party when calculating the approved APH yield and production guarantee that does not penalize a producer's future insurance coverage due to a loss through no fault of their own. FCIC is adding a definition for ''unavoidable uninsured fire'' to section 1 of the CCIP Basic Provisions that was previously contained in procedures.

Prevented Planting

FCIC is revising the prevented planting provisions in section 17 of the CCIP Basic Provisions. Prevented planting is a feature of many crop insurance plans that provides a partial payment to cover certain pre-plant costs for a crop that was prevented from being planted due to an insurable cause of loss.

FCIC is clarifying that the added land ratio for prevented planting in section 17(e)(1)(i)(B), uses cropland acres available for planting only. The number of prevented planting eligible acres for a crop may be increased by multiplying that number by the ratio of the total cropland acres available for planting that the producer is farming in the current crop year (if greater) to the total cropland acres available for planting that the producer farmed in the previous year. Previously, the policy did not specify, as originally intended, that only cropland acres available for planting are included in the calculation to create the added land ratio. For example, if a producer had 500 acres of cropland available for planting in 2021, then added 200 acres in 2022, but only 100 of those were available for planting, then only 100 could be used in the calculation for the added land ratio in 2022 (added land ratio = 600 ÷ 500 = 1.2).

FCIC is clarifying the eligible criteria for prevented planting coverage in sections 17(d)(1), 17(d)(1)(ii)(B), and 17(d)(2) to include destruction of a producer's irrigation system from an insured cause of loss. Previously, prevented planting coverage was only available when an insured cause of loss occurred resulting in failure or breakdown of a producer's irrigation system. There have been cases where a naturally occurring weather event caused the irrigation system to be destroyed rather than failed or broken down. Adding ''destruction'' clarifies the intent of the provision so that producers do not lose valuable prevented planting coverage.

FCIC is incorporating Final Agency Determinations (FAD), FAD–244, FAD–248, and FAD–309, and Manager's Bulletin MGR–20–003 into section 17(f)(12) of the CCIP Basic Provisions. These FADs and Manager's Bulletin collectively clarified the intent of the policy, with respect to the factors AIPs may consider when determining whether a cause of loss that may prevent planting existed at the time the insured took possession of the added land. Incorporating the FADs and Manager's Bulletin will ensure transparency and consistent administration of the prevented planting rules by AIPs. The revisions do not change any prevented planting requirements in the policy.

Same Year Production Reporting (SYPR)

FCIC is incorporating existing production reporting guidelines in sections 3(f) and 3(g) of the CCIP Basic Provisions to reflect same year production reporting guidelines that were previously spread across Special Provisions statements, applicable Crop Provisions language, and procedural language, located in the FCIC–18010 CIH. This change will enhance and improve accessibility, clarity, and transparency for the producer.

FCIC is adding several new definitions to section 1 of the CCIP Basic Provisions that were previously defined in the Special Provisions, Crop Provisions, or procedures regarding production reporting: ''insured's production reporting date,'' and ''lag year.'' FCIC is also clarifying the definition of ''production report'' in the CCIP Basic Provisions to refer to reporting rules in section 3 and add consistency with the new definitions and provisions added for same year production reporting. Consistent with these changes, FCIC is also adding a new definition of ''actual production'' and clarifying the definition of ''production report'' in section 1 of the ARPI Basic Provisions.

The new and revised definitions in section 1 and added provisions in section 3(f) are intended to ensure clarity and transparency on production reporting and do not change any production reporting requirements in the policy.

Double Cropping

FCIC is clarifying the double cropping requirements in section 15(h) of the CCIP Basic Provisions and section 13(c) of the ARPI Basic Provisions when another plan of insurance (*i.e.,* under a different Basic Provisions) does not require records of acreage and production to determine if a producer can receive a full indemnity on both crops. This change incorporates FAD–301 which explains if a producer double cropped acreage for which one of the crops double cropped is insured under a different plan of insurance and the Crop Provisions do not require double crop history that includes records of acreage and production, the less restrictive requirements may be followed to satisfy double cropping requirements for both crops. For example, a producer has 20 acres of annual forage wheat for grazing. On the same acreage the producer plants and insures cotton, the annual forage double cropping requirements must be met. If those Crop Provisions are met, the producer is eligible for a full indemnity payment on both the annual forage wheat and the cotton.

Incorporating FAD–301 will ensure transparency and consistent administration of double cropping rules by AIPs. The revisions do not change double cropping rules in the policy.

High-Risk Alternate Coverage

FCIC is incorporating the HR–ACE into section 3(b) of the CCIP Basic Provisions. On May 19, 2022, the FCIC Board of Directors approved converting HR–ACE from pilot to permanent status. To streamline the policy the producer receives, HR–ACE, and all other high-risk coverage options, will be consolidated and incorporated into section 3(b)(2)(ii) of the CCIP Basic Provisions. The HR–ACE document will be obsoleted from the Risk Management Agency's (RMA's) website upon publication of this rule. References to high-risk options will be revised throughout the CCIP Basic Provisions to refer to section 3(b)(2)(ii).

Enterprise Units and Whole Farm Units

FCIC is authorizing enterprise units (EU) and whole farm units (WFU) to be expanded to other crops through the actuarial documents, in section 34(a) of the CCIP Basic Provisions. Previously,

EUs and WFUs were allowed for the revenue protection plan of insurance or authorized through the Special Provisions. FCIC is allowing the actuarial documents to authorize the availability of EUs and WFUs for administrative efficiency, eliminating the need to add a Special Provision statement every time EUs or WFUs are added to a new crop not under a revenue protection plan of insurance. FCIC is simplifying section 34(a) by removing paragraphs that previously referred to revenue protection, renumbering subsequent paragraphs, and updating internal citations corresponding to the new paragraph numbers.

Organic and Transitioning to Organic

The Agriculture Marketing Service (AMS) National Organic Program (NOP) published a final rule on January 19, 2023, National Organic Program (NOP); Strengthening Organic Enforcement (88 FR 3548), announcing certain changes to the Organic Integrity Database. In accordance with those changes, FCIC is updating corresponding provisions in section 37(c) of the CCIP Basic Provisions and section 14(d) of the ARPI Basic Provisions. For example, in this rule, operations listed in the Organic Integrity Database as transitioning to organic will be eligible for organic transitional crop insurance programs. The database is operated by the NOP and is a registry of certified organic operations that holds data provided by USDA-accredited organic certifiers. The NOP is modifying the system to allow certifiers to upload listings of operations that are transitioning to organic (or transitional operations) if they meet certain criteria. FCIC is enhancing organic crop insurance programs by adding ease of program administration for AIPs to verify if an operation is transitioning to organic based on the NOP database.

FCIC is also revising the term ''organic plan'' to ''organic system plan'' throughout the CCIP Basic Provisions to match the AMS NOP regulation.

Clarifications and Corrections

In addition to the changes above, the rule will:

- Add ''Space Force'' to the definition of ''Veteran farmer and rancher'' in the ARPI Basic Provisions and CCIP Basic Provisions;
- Make the term ''attorney's fees'' possessive when applicable in the ARPI Basic Provisions and CCIP Basic Provisions;
- Correct the term ''entity'' to the defined term ''person'' when applicable in the ARPI Basic Provisions and CCIP Basic Provisions;
- Correct the reference to 4 CFR part 102 in section 24(c)(4) of the CCIP Basic Provisions (FCIC Policies) and section 22(c)(4) of the ARPI Basic Provisions (FCIC Policies) to refer to 31 CFR part 901;
- Correct the term ''Actuarial Tables'' to the defined term ''actuarial documents'' in subpart G;
- Correct the location of certain dates from the ''actuarial documents'' to the ''Special Provisions'' where applicable, throughout the ARPI Basic Provisions; and
- Incorporate editorial changes. For example, change all instances of the term ''database'' (where applicable) to ''APH database'' for consistency and remove unnecessary words from parenthetical phrases *e.g.,* remove ''the'' from (see the definition of ''second crop'').

Effective Date, Notice and Comment, and Exemptions

The Administrative Procedure Act (APA, 5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves specified actions, including matters relating to contracts. This rule governs contracts for crop insurance policies and therefore falls within that exemption. Although not required by APA or any other law, FCIC has chosen to request comments on this rule.

This rule is exempt from the regulatory analysis requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.

For major rules, the Congressional Review Act requires a delay of the effective date of 60 days after publication to allow for Congressional review. This rule is not a major rule under the Congressional Review Act, as defined by 5 U.S.C. 804(2). Therefore, this final rule is effective on June 30, 2023.

Executive Orders 12866 and 13563

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review,'' direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The requirements in Executive Orders 12866 and 13563 for the analysis of costs and benefits apply to rules that are determined to be significant or economically significant.

The Office of Management and Budget (OMB) has designated this rule as not significant under Executive Order 12866. Therefore, OMB has not reviewed this rule and analysis of the costs and benefits is not required under either Executive Order 12866 or Executive Order 13563.

Clarity of the Regulation

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this rule, we invite your comments on how to make the rule easier to understand. For example:

- Are the requirements in the rule clearly stated? Are the scope and intent of the rule clear?
- Does the rule contain technical language or jargon that is not clear?
- Is the material logically organized?
- Would changing the grouping or order of sections or adding headings make the rule easier to understand?
- Could we improve clarity by adding tables, lists, or diagrams?
- Would more, but shorter, sections be better? Are there specific sections that are too long or confusing?
- What else could we do to make the rule easier to understand?

Environmental Review

In general, the environmental impacts of rules are to be considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347) and the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508). FCIC conducts programs and activities that have been determined to have no individual or cumulative effect on the human environment. As specified in 7 CFR 1b.4, FCIC is categorically excluded from the preparation of an Environmental Analysis or Environmental Impact Statement unless the FCIC Manager (agency head) determines that an action may have a significant environmental effect. The FCIC Manager has determined this rule will not have a significant environmental effect. Therefore, FCIC will not prepare an environmental assessment or environmental impact statement for this action and this rule

serves as documentation of the programmatic environmental compliance decision.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR part 11 are to be exhausted.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

RMA has assessed the impact of this rule on Indian Tribes and determined that this rule does not, to our knowledge, have Tribal implications that require Tribal consultation under E.O. 13175. The regulation changes do not have Tribal implications that preempt Tribal law and are not expected have a substantial direct effect on one or more Indian Tribes. If a Tribe requests consultation, RMA will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified in this rule are not expressly mandated by Congress.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions of State, local, and Tribal governments, or the private sector. Agencies generally must prepare a written statement, including cost benefits analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments, or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Federal Assistance Program

The title and number of the Assistance Listing,[1] to which this rule applies is No. 10.450—Crop Insurance.

Paperwork Reduction Act of 1995

The purpose of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, subchapter I), among other things, are to minimize the paperwork burden on individuals, and to require Federal agencies to request and receive approval from the Office of Management and Budget (OMB) prior to collecting information from ten or more persons. This rule does not change the information collection approved by OMB under control numbers 0563–0053.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Agencies, offices, and 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 or 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.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov*.

USDA is an equal opportunity provider, employer, and lender.

List of Subjects

7 CFR Part 400

Acreage allotments, Administrative practice and procedure, Claims, Crop insurance, Drug traffic control, Fraud, Government employees, Income taxes, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Wages.

7 CFR Part 407

Acreage allotments, Administrative practice and procedure, Barley, Corn, Cotton, Crop insurance, Peanuts, Reporting and recordkeeping requirements, Sorghum, Soybeans, Wheat.

7 CFR Part 457

Acreage allotments, Crop insurance, Reporting and recordkeeping requirements.

Final Rule

For the reasons discussed in the **SUPPLEMENTARY INFORMATION**, FCIC amends 7 CFR parts 400, 407, and 457, effective for the 2024 and succeeding crop years for crops with a contract change date on or after June 30, 2023, and for the 2025 and succeeding crop years for all other crops, as follows:

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

Subpart G—Actual Production History

■ 1. The authority citation for part 400, subpart G, continues to read as follows:

Authority: 7 U.S.C. 1506, 1516.

■ 2. Revise § 400.51 to read as follows:

§ 400.51 Availability of Actual Production History program.

(a) This subpart is obsolete for the 2024 and succeeding crop years for crops with a contract change date on or after June 30, 2023, and for the 2025 and succeeding crop years for all crops with

[1] See *https://sam.gov/content/assistance-listings.*

a contract change date prior to June 30, 2023.

(b) An Actual Production History (APH) Coverage Program is offered under the provisions contained in 7 CFR part 457 and all Special Provisions (as defined in 7 CFR 457.8) thereto unless specifically excluded by the Special Provisions.

(c) The APH program operates within limits prescribed by, and in accordance with, the provisions of the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), only on those crops identified in this section in those areas where the actuarial documents provide coverage. Except when in conflict with this subpart, all provisions of the applicable crop insurance contract for these crops apply.

PART 407—AREA RISK PROTECTION INSURANCE REGULATIONS

■ 3. The authority citation for part 407 continues to read as follows:

Authority: 7 U.S.C. 1506(l) and 1506(o).

■ 4. Amend § 407.9 by:
■ a. In section 1:
■ i. Add a definition of ''Actual production'' in alphabetical order;
■ ii. In the definition of ''Application'', remove the words ''will commence'' and add ''commences'' in their place;
■ iii. In the definition of ''Buffer zone'', remove the words ''organic plan'' and add ''organic system plan'' in their place;
■ iv. Revise the definition of ''Contract'';
■ v. In the definition of ''Cover crop'', remove the words ''see the definition'' and add ''see definition'' in their place;
■ vi. In the definition of ''Final planting date'', remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ vii. Revise the definition of ''Liability'';
■ viii. Remove the definition of ''Organic plan'';
■ ix. Add a definition of ''Organic system plan'' in alphabetical order;
■ x. In the definition of ''Premium billing date'', remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ xi. Revise the definition of ''Production report'';
■ xii. In the definition of ''Sales closing date'', remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ xiii. In the definition of ''Tenant'', remove the text ''(see the definition of ''share'' above)'' and add ''(see definition of ''share'')'' in its place; and
■ xiv. Revise the definition of ''Veteran farmer or rancher'';
■ b. In section 2:
■ i. In paragraphs (c)(1)(ii)(A) and (c)(2)(ii)(B), remove the word ''Simply'' and add ''simply'' in its place;
■ ii. In paragraphs (k)(2)(i)(A) and (B), remove the text ''owed)'' and add ''owed.)'' in its place;
■ iii. In paragraph (k)(2)(iii)(C)(*1*)(*ii*), remove the words ''For example'' and add ''for example'' in their place;
■ iv. In paragraph (l)(2)(i), remove the word ''entity'' and add ''person'' in its place wherever it appears; and
■ v. In paragraphs (l)(4) introductory text and (5), remove the word ''entity'' and add ''person'' in its place;
■ c. In section 4, in paragraph (b)(5), remove the words ''For example'' and add ''for example'' in their place;
■ d. In section 5, in paragraph (b), remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ e. In section 7:
■ i. In paragraph (d)(2), remove the words ''This is'' and add ''this is'' in their place;
■ ii. In paragraph (e), remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ iii. In paragraph (f), remove the words ''No premium'' and add ''no premium'' in their place;
■ iv. In paragraph (i)(2)(i)(A), remove the word ''entity'' and add ''person'' in its place; and
■ v. In paragraphs (i)(2)(ii)(A) and (B), remove the words ''of this section'';
■ f. In section 8:
■ i. In paragraph (a), remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ ii. In paragraph (c)(1), remove the words ''Acreage initially'' and add ''acreage initially'' in their place;
■ iii. In paragraph (j)(3), remove the words ''If the'' and add ''if the'' in their place; and
■ iv. In paragraph (n)(1), remove the words ''production reporting date'' and add ''applicable production reporting date'' in their place;
■ g. In section 9, in paragraph (b)(1)(ii), remove the word ''Children'' and add ''children'' in its place;
■ h. In section 10, in paragraph (a), remove the words ''For the purposes'' and add ''for the purposes'' in their place;
■ i. In section 13:
■ i. In paragraph (c)(5), remove the text ''section 13(h)(4)'' and add ''section 13(c)(4)'' in its place;
■ ii. Revise paragraph (c)(6); and
■ iii. In paragraph (d)(1), add a comma after the words ''for example'';
■ j. In section 14:
■ i. In paragraph (c)(2), remove the words ''organic plan'' and add ''organic system plan'' in their place; and
■ ii. Revise paragraphs (d)(1) and (2);
■ k. In section 18, in paragraph (c) introductory text, remove the words ''For example'' and add ''for example'' in their place;
■ l. In the first instance of section 22:
■ i. In paragraph (b), remove the words ''actuarial documents'' and add ''Special Provisions'' in their place;
■ ii. In paragraph (c)(4), remove the text ''4 CFR part 102'' and add ''31 CFR part 901'' in its place; and
■ iii. In paragraph (d), remove the word ''federal'' and add ''Federal'' in its place;
■ m. In the second instance of section 22:
■ i. In paragraph (a)(1), remove the words ''actuarial documents'' and add ''Special Provisions'' in their place; and
■ ii. In paragraph (c), remove the text ''(see subsection (d) of this section)'' and add ''(see section 22(d))'' in its place;
■ n. In the first instance of section 23, in paragraph (e):
■ i. Remove the word ''attorney'' and add ''attorney's'' in its place; and
■ ii. Add a comma after the word ''appeal'';
■ o. In the second instance of section 23, in paragraph (g), remove the word ''attorney'' and add ''attorney's'' in its place;
■ p. In sections 26, introductory text, and 27, remove the word ''federal'' and add ''Federal'' in its place; and
■ q. In section 28:
■ i. In paragraph (d), remove the words ''of this section'' and add ''of section 28'' in their place; and
■ ii. In paragraph (e)(2)(viii), remove the word ''federal'' and add ''Federal'' in its place.

The revisions and additions read as follows:

§ 407.9 Area risk protection insurance policy.

* * * * *

1. Definitions

* * * * *

Actual production. The harvested and/or appraised amount of an agricultural commodity in number of pounds, bushels, tons, cartons, or other units of measure as provided in the applicable Crop Provisions.

* * * * *

Contract. (See definition of ''policy.'')

* * * * *

Liability. (See definition of ''policy protection.'')

* * * * *

Organic system plan. A written plan, in accordance with the National Organic Program published in 7 CFR part 205, that describes the organic farming

practices that you and a certifying agent agree upon annually or at such other times as prescribed by the certifying agent.

* * * * *

Production report. A written report provided by you in accordance with section 8 showing your annual production. The report contains yield information for the current year, including planted acreage and production. This report must be supported by acceptable production records.

* * * * *

Veteran farmer or rancher.

(1) An individual who has served active duty in the United States Armed Forces, including the Air Force, Army, Coast Guard, Marine Corps, Navy, or Space Force, and their reserve components; was discharged or released under conditions other than dishonorable; and:

(i) Has not operated a farm or ranch;

(ii) Has operated a farm or ranch for not more than 5 years; or

(iii) First obtained status as a veteran during the most recent 5-year period.

(2) A person, other than an individual, may be eligible for veteran farmer or rancher benefits if all substantial beneficial interest holders qualify individually as a veteran farmer or rancher in accordance with paragraph (1) of this definition; except in cases in which there is only a married couple, then a veteran and non-veteran spouse are considered a veteran farmer or rancher.

* * * * *

13. Indemnity and Premium Limitations

* * * * *

(c) * * *

(6) With respect to double cropped acreage, if the two crops you have double cropped are insured under policies with different double crop history records requirements (*e.g.,* records of acreage and production), the less restrictive requirements may be followed to satisfy double cropping requirements for both crops. For example, you have 20 acres of annual forage wheat for grazing. On the same acreage you plant and insure cotton. The annual forage double cropping provisions do not include double cropping record history requirements. If the annual forage double cropping provisions are met, you are eligible for a full indemnity payment on both the annual forage wheat and the cotton.

* * * * *

14. Organic Farming Practices

* * * * *

(d) * * *

(1) For certified organic acreage, a written certification in effect directly from a certifying agent indicating the name of the person certified, effective date of certification, certificate number, types of commodities certified, and name and address of the certifying agent (a certificate issued to a tenant may be used to qualify a landlord or other similar arrangement). A certificate issued from the National Organic Program's Organic Integrity Database (or successor certificate reporting tool) is acceptable;

(2) For transitional acreage, an organic system plan documenting the use of practices that would result in certified organic status that includes the record information as described in section 14(d)(1), or written documentation from a certifying agent indicating an organic system plan is in effect for the acreage; and

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 5. The authority citation for part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 6. Amend § 457.8, in the Common Crop Insurance Policy, by:

■ a. Removing the words ''the database'' and adding ''the APH database'' in their place wherever they appear;

■ b. Under the headings ''FCIC Policies'' and ''Reinsured Policies'', in the first paragraph, remove the words ''including the adjustment of'' and add ''including establishing your approved yield and the adjustment of'' in their place;

■ c. In section 1:

■ i. Add a definition of ''Actual production'' in alphabetical order;

■ ii. Revise the definitions of ''Actual Production History (APH)'' and ''Actual yield'';

■ iii. Add definitions for ''Annual yield'', ''APH base period'', ''APH crop year'', ''APH database'', and ''Applicable T-Yield'' in alphabetical order;

■ iv. In the definition of ''Application'', remove the words ''will commence'' and add ''commences'' in their place;

■ v. Add a definition of ''Appraised production'' in alphabetical order;

■ vi. Revise the definition of ''Approved yield'';

■ vii. Add a definition of ''Assigned yield'' in alphabetical order;

■ viii. Revise the definition of ''Average yield'';

■ ix. In the definition of ''Buffer zone'', remove the words ''organic plan'' and add ''organic system plan'' in their place;

■ x. Add a definition of ''Continuous production reports'' in alphabetical order;

■ xi. Revise the definition of ''Contract'';

■ xii. In the definition of ''Cover crop'', remove the words ''see the definition'' and add ''see definition'' in their place;

■ xiii. Add a definition of ''Determined yield'' in alphabetical order;

■ xiv. In the definition of ''Direct marketing'', remove the words ''the policyholder'' and add ''you'' in their place;

■ xv. Add definitions of ''Insurable acres'', ''Insured's production reporting date'', ''Lag year'', ''Master yield'', ''New insured'', and ''New producer'' in alphabetical order;

■ xvi. Remove the definition of ''Organic plan'';

■ xvii. Add the definition of ''Organic system plan'' in alphabetical order;

■ xviii. Revise the definition of ''Production report'';

■ xix. Add definitions of ''Production reporting date'' and ''Temporary yield'' in alphabetical order;

■ xx. In the definition of ''Tenant'', remove the text ''(see the definition of ''share'' above)'' and add ''(see definition of ''share'')'' in its place;

■ xxi. Add definitions of ''Transitional yield (T-Yield)'', ''Unavoidable uninsured fire'', and ''Variable T-Yield'' in alphabetical order; and

■ xxii. Revise the definition of ''Veteran farmer or rancher'';

■ d. In section 2:

■ i. In paragraphs (b)(5)(ii)(A) and (b)(6)(ii)(B), remove the word ''Simply'' and add ''simply'' in its place;

■ ii. In paragraphs (f)(2)(i)(A) and (B), remove the text ''owed)'' and add ''owed.)'' in its place;

■ iii. In paragraph (f)(2)(iii)(C)(*1*)(*ii*), remove the words ''For example'' and add ''for example'' in their place;

■ iv. In paragraph (f)(4), remove the words ''Since applications'' and add ''since applications'' in their place;

■ v. In paragraph (g)(2)(i), remove the word ''entity'' and add ''person'' in its place wherever it appears; and

■ vi. In paragraph (g)(4) introductory text, remove the word ''entity'' and add ''person'' in its place;

■ e. In section 3:

■ i. Revise paragraphs (b)(2)(ii) and (f);

■ ii. In paragraph (g)(2)(i), remove the words ''production reporting date'' and add ''applicable production reporting date'' in their place;

■ iii. In paragraph (g)(2)(ii), remove the word ''Simply'' and add ''simply'' in its place;

■ iv. Redesignate paragraphs (g)(3) and (4) as paragraphs (g)(9) and (10);

■ v. Add new paragraphs (g)(3) and (4) and paragraphs (g)(5) through (8);

■ vi. Revise newly redesignated paragraphs (g)(9) and (g)(10)(iii) and paragraphs (h)(1), (h)(2) introductory text, and (h)(2)(i); and
■ vii. In paragraph (i) introductory text, remove the words ''Not applicable'' and add ''not applicable'' in their place;
■ f. Add section 5;
■ g. In section 6:
■ i. In paragraphs (c)(1)(ii) and (d)(3)(ii)(A)(*2*), remove the words ''If you fail'' and add ''if you fail'' in their place; and
■ ii. In paragraph (g)(1)(i), remove the words ''In the event'' and add ''in the event'' in their place;
■ h. In section 7:
■ i. In paragraph (h)(2)(i)(A), remove the word ''entity'' and add ''person'' in its place; and
■ ii. In paragraphs (h)(2)(ii)(A) and (B), remove the words ''of this section'';
■ i. In section 8, in paragraphs (b)(1) and (4), remove the words ''For example'' and add ''for example'' in their place;
■ j. In section 9, revise paragraph (c);
■ k. In section 10, in paragraph (b)(1)(ii), remove the word ''Children'' and add ''children'' in its place;
■ l. In section 11, in paragraph (a)(1), remove the words ''For the purposes'' and add ''for the purposes'' in their place;
■ m. In section 12, in paragraph (c), remove the text ''insurable cause of loss)'' and add ''insurable cause of loss.)'' in its place;
■ n. In section 14:
■ i. In paragraph (e)(1)(i) and paragraph (e)(1)(ii) introductory text, remove the words ''Extensions will'' and add ''extensions will'' in their place;
■ ii. In paragraph (e)(3)(i), remove the text ''60 days after September 30)'' and add ''60 days after September 30.)'' in its place; and
■ iii. In paragraph (f)(3), remove the words ''If any evidence'' and add ''if any evidence'' in their place;
■ o. In section 15:
■ i. In paragraph (b)(1), remove the words ''If you fail'' and add ''if you fail'' in their place; and
■ ii. Revise paragraph (h)(7) introductory text;
■ p. In section 17:
■ i. Revise paragraphs (d)(1) introductory text, (d)(1)(ii)(B), (d)(2), and (e)(1)(i)(B) introductory text;
■ ii. In paragraph (f)(1) introductory text, remove the words ''If the crop'' and add ''if the crop'' in their place;
■ iii. In paragraph (f)(1)(ii), remove the words ''There can'' and add ''there can'' in their place;
■ iv. In paragraph (f)(3), remove the words ''The number'' and add ''the number'' in their place;
■ v. In paragraph (f)(11)(i), remove the words ''Crops for which'' and add ''crops for which'' in their place; and
■ vi. Revise paragraphs (f)(12), (g), and (h) introductory text;
■ q. In section 18:
■ i. In paragraph (d)(1), remove the words ''If conditions'' and add ''if conditions'' in their place;
■ ii. In paragraph (e)(2)(ii), remove the words ''If the'' and add ''if the'' in their place;
■ iii. In paragraph (g)(2), remove the words ''The request'' and add ''the request'' in their place; and
■ iv. In paragraph (n), remove the words ''If the'' and add ''if the'' in their place;
■ r. In the first instance of section 20, in paragraph (f), remove the word ''attorney'' and add ''attorney's'' in its place;
■ s. In the second instance of section 20:
■ i. In paragraph (e)(3), remove the word ''attorney'' and add ''attorney's'' in its place; and
■ ii. In paragraph (i), remove the word ''attorneys'' and add ''attorney's'' in its place;
■ t. In section 21, in paragraph (b)(1), remove the words ''This requirement'' and add ''this requirement'' in their place;
■ u. In section 23, remove the word ''federal'' and add ''Federal'' in its place;
■ v. In the first instance of section 24:
■ i. In paragraph (c)(4), remove the text ''4 CFR part 102'' and add ''31 CFR part 901'' in its place;
■ ii. Revise paragraph (d); and
■ iii. Designate the undesignated paragraph following paragraph (d) as paragraph (e);
■ w. In the second instance of section 24, in paragraph (c), remove the text ''(see subsection (d) of this section)'' and add ''(see section 24(d))'' in its place;
■ x. In section 25, remove the period at the end of the section heading;
■ y. In section 27, in paragraph (e)(2)(viii), remove the word ''federal'' and add ''Federal'' in its place;
■ z. In section 31, remove the word ''federal'' and add ''Federal'' in its place;
■ aa. In section 34:
■ i. Revise paragraph (a) introductory text;
■ ii. Remove paragraphs (a)(1) and (2);
■ iii. Redesignate paragraphs (a)(3) through (5) as paragraphs (a)(1) through (3);
■ iv. In newly redesignated paragraph (a)(2)(ii), remove the text ''section 34(a)(4)(i)(A)'' and add ''section 34(a)(2)(i)(A)'' in its place wherever it appears;
■ v. In newly redesignated paragraph (a)(2)(vi), remove the text ''section 34(a)(4)(i)'' and add ''section 34(a)(2)(i)'' in its place;
■ vi. In newly redesignated paragraphs (a)(2)(viii)(B), (a)(2)(viii)(C)(*1*)(*i*) and (*ii*), and (a)(2)(viii)(C)(*2*), remove the text ''section 34(a)(4)'' and add ''section 34(a)(2)'' in its place;
■ vii. In newly redesignated paragraphs (a)(3)(i)(A)(*1*), (*2*), and (*3*), remove the text ''section 34(a)(5)(v)'' and add ''section 34(a)(3)(v)'' in its place;
■ viii. Revise paragraph (a)(3)(i)(C);
■ ix. In newly redesignated paragraph (a)(3)(v)(A) introductory text, remove the text ''section 34(a)(5)(i)'' and add ''section 34(a)(3)(i)'' in its place;
■ x. In paragraph (b)(2), remove the text ''for any reason)'' and add ''for any reason.)'' in its place;
■ xi. In paragraph (b)(3), remove the words ''You may'' and add ''you may'' in their place; and
■ xii. Revise paragraph (c)(3);
■ bb. In section 35, in paragraph (b)(2)(ii)(A), remove the words ''If you'' and add ''if you'' in their place;
■ cc. In section 36:
■ i. In paragraph (a) introductory text, remove the words ''within a database'' and add ''within an APH database'' in their place;
■ ii. In paragraph (a)(1)(i), remove the text ''your database'' and add ''your APH database'' in its place; and
■ iii. In paragraph (a)(1)(ii), remove the text ''will be used).'' and add ''will be used.)'' in its place; and
■ dd. In section 37:
■ i. Revise the section heading;
■ ii. In paragraph (b)(2), remove the words ''organic plan'' and add ''organic system plan'';
■ iii. Revise paragraphs (c)(1)(i) and (ii);
■ iv. In paragraph (c)(2) introductory text, remove the words ''organic plan'' and add ''organic system plan'' in their place;
■ v. In paragraph (c)(2)(i), remove the words ''or plan'' and add ''or organic system plan'' in their place;
■ vi. In paragraph (f), add a comma after the word ''transitional''; and
■ vii. In paragraph (h), remove the words ''organic plan'' and add ''organic system plan''.

The revisions and additions read as follows:

§ 457.8 The application and policy.

* * * * *

Common Crop Insurance Policy

* * * * *

1. Definitions

* * * * *

Actual production. The harvested and/or appraised amount of an agricultural commodity in number of

pounds, bushels, tons, cartons, or other units of measure as provided in the applicable Crop Provisions.

Actual Production History (APH). A determination of the production guarantee using your historical actual production for the crop, as applicable.

Actual yield. The yield per acre based on actual production from the planted or grown acreage, in accordance with section 5(b).

* * * * *

Annual yield. A yield per acre for a crop year, used to complete the APH base period in an APH database. An annual yield may be any of the following: actual yield, assigned yield, transitional yield (T-Yield), or other yield calculated according to FCIC approved procedures.

APH base period. A minimum of four, up to a maximum of ten, most recent consecutive APH crop years for which continuous production reports are available, or as otherwise specified in the Crop Provisions or Special Provisions. The APH base period includes the most recent APH crop year's annual yield unless a lag year(s) applies to the crop, in which case, the most recent annual yield will be the crop year prior to the current crop year as specified in FCIC approved procedures.

APH crop year. The year the crop was planted or grown, and insurable in accordance with the applicable Crop Provisions, whether insured or not, and identified by the year it is normally intended to be harvested.

APH database. A series of consecutive, annual yields that include the respective acreage and actual production, when applicable, used to determine each annual yield, for each APH crop year in the APH base period.

Applicable T-Yield. The T-Yield in effect, as specified in FCIC approved procedures, for an APH database.

* * * * *

Appraised production. Unharvested potential crop production determined by us, or any other person authorized by FCIC, that includes both total production and any adjustments as provided in the applicable Crop Provisions or FCIC approved procedures used in calculating actual yields.

Approved yield. The yield calculated by us, or any other person authorized by FCIC, based on annual yields contained in the APH database to establish the production guarantee calculated in accordance with section 5(c).

* * * * *

Assigned yield. An annual yield assigned according to FCIC approved procedures for an APH crop year when you do not file an acceptable production report, or upon request by us, or any other person authorized by FCIC, you do not provide acceptable evidence of acreage and production records to support your production report. The assigned yield will not be more than 75 percent of the prior year's approved yield or 65 percent of the applicable T-Yield if a prior year's approved yield is not available.

* * * * *

Average yield. The average of the annual yields for all APH crop years within the APH database calculated by us, or any other person authorized by FCIC, in accordance with section 5(c).

* * * * *

Continuous production reports. Each APH crop year within an APH database must be consecutive starting from the most recent APH crop year for any production report submitted by you and determined to be acceptable by us, or any other person authorized by FCIC. Continuity is not considered to be interrupted for any crop year the crop was not planted, was prevented from being planted, was not insurable in accordance with the Crop Provisions, or was not produced in compliance with any other applicable USDA program. If production report(s) are not provided for such consecutive history, continuity will be considered to have been broken unless you can provide documentation that the conditions listed herein existed for any crop year.

Contract. (See definition of ''policy.'')

* * * * *

Determined yield. An annual yield designated by FCIC, or calculated and assigned by us, in specific situations authorized by FCIC approved procedures.

* * * * *

Insurable acres. Acreage that meets all policy insurability requirements, whether insured or not.

* * * * *

Insured's production reporting date. The date, provided in the actuarial documents, by which you are required to submit a production report for the current crop year, unless otherwise specified in the policy or FCIC approved procedures.

* * * * *

Lag year. A delay of reporting of a crop year(s) in the APH base period, authorized by FCIC approved procedures when production records are generally not available for the crop by the production reporting date.

* * * * *

Master yield. An optional approved yield calculation you may elect for certain crops and counties, as designated by FCIC approved procedures.

* * * * *

New insured. A person who was not insured the previous crop year without respect to an insurance provider or plan of insurance.

New producer. A person, including anyone with a substantial beneficial interest in the person, who has not produced the insured crop in the county, whether or not such crop was insured, for more than two APH crop years prior to the current crop year.

* * * * *

Organic system plan. A written plan, in accordance with the National Organic Program published in 7 CFR part 205, that describes the organic farming practices that you and a certifying agent agree upon annually or at such other times as prescribed by the certifying agent.

* * * * *

Production report. A written report provided by you in accordance with section 3 showing your annual production that will be used by us to determine your approved yield for insurance purposes. The report contains yield information for the current and previous APH crop year(s), when applicable, including planted acreage and production. This report must be supported by acceptable production records.

Production reporting date. The date, provided in the actuarial documents, by which you are required to provide a production report at the beginning of a crop year if you meet the requirements in sections 3(f)(1)(i) through (iv).

* * * * *

Temporary yield. An annual yield used in place of an actual yield when you are unable to finish harvest due to an insurable cause of loss, a delayed claim for indemnity, or your production records are unavailable from the processor, marketing outlet, or similar point of crop distribution by the production reporting date.

* * * * *

Transitional yield (T-Yield). An annual yield established within the county, or homogeneous area of land, for a crop, type, practice, map area, or other actuarial basis, as provided in the actuarial documents or calculated in accordance with FCIC approved procedures.

Unavoidable uninsured fire. Fire caused by an uninsured and unavoidable cause of loss resulting from actions outside the control of the insured. For example, fire caused by a passing train which sparks a fire that

spreads to and destroys a grain crop is clearly caused by a third party and is unavoidable; fire caused by you setting a fire to burn brush that spreads and burns your crop is within your control.

* * * * *

Variable T-Yield. The applicable T-Yield multiplied by a percentage factor and used as an annual yield in the APH database according to FCIC approved procedures, or as otherwise provided in the policy. The percent of the applicable T-Yield is determined by the number of years of acceptable actual, assigned, or temporary yields available for the crop in the county.

* * * * *

Veteran farmer or rancher. (1) An individual who has served active duty in the United States Armed Forces, including the Air Force, Army, Coast Guard, Marine Corps, Navy, or Space Force, and their reserve components; was discharged or released under conditions other than dishonorable; and:

(i) Has not operated a farm or ranch;

(ii) Has operated a farm or ranch for not more than 5 years; or

(iii) First obtained status as a veteran during the most recent 5-year period.

(2) A person, other than an individual, may be eligible for veteran farmer or rancher benefits if all substantial beneficial interest holders qualify individually as a veteran farmer or rancher in accordance with paragraph (1) of this definition; except in cases in which there is only a married couple, then a veteran and non-veteran spouse are considered a veteran farmer or rancher.

* * * * *

3. Insurance Guarantees, Coverage Levels, and Prices

* * * * *

(b) * * *

(2) * * *

(ii) You have additional coverage for the crop in the county with acreage designated as high-risk by FCIC and you execute a High-Risk Land Exclusion Option on or before the applicable sales closing date with the same insurance provider from which your additional coverage was obtained. The High-Risk Land Exclusion Option allows you the following choices for your high-risk land:

(A) You may exclude coverage for high-risk land under the additional coverage policy and not insure it;

(B) You may insure high-risk land under a separate Catastrophic Risk Protection Endorsement; or

(C) If available in the actuarial documents, you may insure high-risk land on a separate additional coverage policy with coverage greater than provided by the Catastrophic Risk Protection Endorsement but less than the coverage elected on the additional coverage policy insuring your non-high-risk land.

* * * * *

(f) A production report(s) is required for all crops with a yield-based plan of insurance, and the information contained within the production report is used to establish your approved yield(s).

(1) You must report your current year's crop production on the same basis used to establish your approved yield(s), by the insured's production reporting date contained in the actuarial documents, or as otherwise specified in the Special Provisions. This production report will be used to establish approved yield(s) for the following APH crop year. Failure to timely provide this production report will result in assigned yields being used to determine your approved yield(s) for the following APH crop year. In addition to this production report, you may have to provide an additional production report at the beginning of the crop year by the production reporting date contained in the actuarial documents, as follows:

(i) If you are a new insured who grew the crop the year prior to the current crop year, you may report actual production for that crop year and include additional crop years, if continuous production reports are provided. Failure to provide this production report will result in variable T-Yields being used to determine your approved yield(s) for the current crop year.

(ii) If you are an insured who transferred your policy to us for the current crop year, you may provide us with a copy of the completed and signed production report you submitted to your previous insurance provider for the prior APH crop year. This production report will be used to establish your approved yield(s) for the current crop year.

(iii) If we cannot establish your approved yield for any APH database for the current crop year as required by FCIC approved procedures, you must provide us a new production report containing the prior year's production on the basis of the current crop year's unit structure and by type, practice, map area, and other characteristics, if applicable, you are requesting.

(iv) You may certify actual production for any prior APH crop year if your certification meets the requirements of section 3(f)(3) to be used in an APH database(s) for the current crop year when:

(A) Reporting actual production for an APH crop year not previously certified;

(B) Replacing a yield determined in accordance with section 5(b); or

(C) Making a change or revision as authorized in FCIC approved procedures.

(2) Production must be reported by county, crop, type, practice, map area, other characteristics, unit structure elected (or level lower than unit structure elected), and land location in accordance with FCIC approved procedures. To be acceptable for an APH crop year, a production report must:

(i) Be provided annually by you;

(ii) Be certified as accurate by you;

(iii) Be submitted by the applicable production reporting date; and

(iv) Be supported by production records meeting the requirements in section 3(g)(3). Production records must substantiate all information provided on the production report.

(3) Your production report must contain all actual production of the insured crop, from all acreage of the insured crop, which includes insurable, uninsurable and uninsured acreage, for the APH crop year being reported and certified identifying:

(i) Gross and net actual production, with net actual production being gross actual production adjusted for standard deductions that apply under the terms of the policy including test weight, moisture, foreign material, or any other specified deduction, when such deductions are available in the production records;

(ii) Type of acceptable production records;

(iii) Disposition of the crop, *e.g.,* harvested or unharvested; and

(iv) Any other information required on the production report form in accordance with FCIC approved procedures.

(4) If you do not file an acceptable production report by the applicable production reporting date, the annual yield for the applicable APH crop year will be the assigned yield. The assigned yield will be used to calculate your approved yield for the purpose of determining your coverage for the current or following crop year, as applicable. Optional units will not be available the following crop year unless the reason for not filing an acceptable production report is one of the following:

(i) You are a new insured;

(ii) You are unable to provide an acceptable production report by the production reporting date due to the

inability to finish harvest because of an insurable cause of loss; or

(iii) Production records are not yet available from a processor, marketing outlet, or similar point of crop distribution or production records are not yet available due to a delayed claim for indemnity.

(5) In the event certified acreage or actual production from two or more persons sharing in the crop on the same acreage for the same APH crop year is different, we or any other person authorized by FCIC shall, at our discretion, determine the acreage and actual production to be used to determine the approved yield. Upon determining the correct acreage and actual production, we will correct your, and any other insured's, production report and APH database, and notify any other insurance provider who may have an insured with a share in the crop for the same acreage. If the correct acreage and actual production cannot be determined, the production report will be considered unacceptable, and you will receive an assigned yield in accordance with section 3(f)(4).

(6) If you have filed a claim for any crop year, the documents signed by you which state the amount of production used to complete the claim for indemnity will be the production report for that year unless otherwise specified by FCIC.

(7) Appraisals obtained from only a portion of the acreage in a field that remains unharvested after the remainder of the crop within the field has been destroyed or put to another use will not be used to establish your actual yield unless representative samples are required to be left by you in accordance with the Crop Provisions.

(8) If no insurable acreage of the insured crop is planted for a year, a production report indicating zero planted acreage will maintain the continuity of production reports for APH record purposes and that calendar year will not be included in the approved yield calculations.

* * * * *

(g) * * *

(3) Records must be available to substantiate production reports, within the tolerances provided in FCIC approved procedures, that document and verify the actual production between types, practices, map areas, unit structures and land locations as certified on the production report.

(4) Acceptable production record requirements for a crop are provided in FCIC approved procedures and identify crops requiring verifiable records or farm management records. These requirements must be met for production records to be acceptable.

(i) Verifiable records include, but are not limited to:

(A) Records of production commercially sold to, or stored by, a disinterested third party;

(B) Claim for indemnity determinations made by an insurance provider, or any other person authorized by FCIC, as applicable;

(C) Documents with actual production verified by another USDA agency;

(D) Appraisal of unharvested acreage performed by an insurance provider or any other person authorized by FCIC;

(E) Measurement of farm-stored production performed by an insurance provider, another USDA agency, or any other person authorized by FCIC;

(F) Pick records identifying the amount of actual production harvested daily by individuals;

(G) Contemporaneous daily sales records; and

(H) Records from recognized or approved precision farming technology systems.

(ii) Farm management records include, but are not limited to:

(A) Measurement of farm stored production performed by you;

(B) Automated yield monitoring systems;

(C) Contemporaneous livestock feeding records;

(D) Field harvest records; and

(E) Seed records.

(5) Acceptable production records must be adjusted for standard deductions that apply under the terms of the policy, including test weight, moisture, foreign material, and any other deductions in accordance with the applicable Crop Provisions or FCIC approved procedures when such deductions are available in the production records.

(6) Acceptable production records must be maintained for the record retention period as provided in section 21(b)(2).

(7) You are not required to maintain production records beyond the record retention period specified in section 21(b)(2); however, we or any other person authorized by FCIC may review any production records that are available from you, or any other sources who may have records of actual production applicable to an APH database, at any time.

(8) You must provide acceptable production records, as specified in section 3(g)(3) through (5):

(i) Upon request by us or any other person authorized by FCIC during the completion of a claim for indemnity; or

(ii) During any audit, review, or when otherwise requested by us or any other person authorized by FCIC to verify acreage, actual production, and all other information certified on the production report.

(9) If you do not have acceptable production records to support the information you certified on your production report you will receive an assigned yield in accordance with section 3(f)(4), for the applicable units, for any APH crop year that does not have such production records in accordance with FCIC approved procedures. If the conditions of section 34(b)(3) are not met, you will receive an assigned yield for the applicable basic unit.

(10) * * *

(iii) Any overpaid indemnity must be repaid or any additional premium we determine to be owed must be paid; and

* * * * *

(h) * * *

(1) By including an assigned yield determined in accordance with section 3(f)(4), if the actual yield reported in the APH database is excessive for any crop year, as determined by FCIC under its approved procedures, and you do not provide verifiable records to support the yield in the APH database. If there are verifiable records for the yield in your APH database, but the yield is significantly different from other yields in the county or your other yields for the crop and you cannot prove there is a valid agronomic basis to support the differences in the yields, the yield will be the average of the yields for the crop or the applicable county transitional yield if you have no other yields for the crop;

(2) By reducing it to an amount consistent with the average of the approved yields for other APH databases for your farming operation with the same crop, type, and practice or the county transitional yield, as applicable, if:

(i) The approved APH yield is greater than 115 percent of the average of the approved yields of all applicable APH databases for your farming operation that have actual yields in them or it is greater than 115 percent of the county transitional yield if no applicable APH databases exist for comparison;

* * * * *

5. APH Database and Approved Yield Calculation

(a) With respect to your APH database:

(1) An APH database must be established to determine the approved yield and the average yield, established on the basis of:

(i) Crop;

(ii) Type;
(iii) Practice;
(iv) T-Yield map area;
(v) Unit, as applicable; and
(vi) Other requirements as specified by FCIC approved procedures.

(2) The APH database is established using consecutive annual yields, as determined in section 5(b), for each APH crop year in the APH database.

(b) Annual yields are determined by us, or any other person authorized by FCIC, in accordance with FCIC approved procedures. Annual yields are used in establishment of the APH database, and include the following types of yields:

(1) An actual yield, calculated by dividing the actual production by insurable acres from acceptable production reports, except as follows:

(i) For perennial crop acreage that was previously uninsurable due to underage requirements specified in the Crop Provisions, the actual yield may be calculated using production from the acreage prior to it becoming insurable, in accordance with FCIC approved procedures, when elected by you and you provide acceptable production reports;

(ii) For crop acreage that is damaged by unavoidable uninsured fire or a third party, insurable acreage and actual production from such acreage will not be included in the calculation of the actual yield when elected by you, and approved by us or any person authorized by FCIC, in accordance with FCIC approved procedures; and

(iii) For uninsurable crop acreage, acres and actual production from such acreage may be included in the calculation of the actual yield when actual production from such acreage is commingled with harvested production from insurable acreage;

(2) A temporary yield that is equal to the prior year's approved yield. In subsequent crop years, the temporary yield is replaced by an actual yield from an acceptable production report submitted by you or, in the absence of an acceptable production report, an assigned yield;

(3) An assigned yield if you:

(i) Did not provide an acceptable production report for the previous APH crop year in the APH database; or

(ii) Do not provide acceptable production records for any APH crop year within the record retention period specified in section 21(b)(2) to support, within tolerances established by FCIC approved procedures, information provided on the production report, when requested by us or any other person authorized by FCIC;

(4) A determined yield, designated by FCIC, or calculated and assigned by us, or any other person authorized by FCIC, in situations when the available actual production information and the approved yield is not reflective of the expected actual production for the area, in accordance with section 5(c) and FCIC approved procedures; or

(5) A T-Yield for any APH crop year when there is not a minimum of four years of annual yields in the APH database as outlined in section 5(b)(1) through (4).

(i) A variable percentage will apply to the T-Yield published in the actuarial documents, based on the number of years of actual yields provided for the crop, as follows:

(A) For three years or more, use 100 percent of the applicable T-Yield;

(B) For two years, use 90 percent of the applicable T-Yield;

(C) For one year, use 80 percent of the applicable T-Yield;

(D) For no years, use 65 percent of the applicable T-Yield; or

(E) For qualifying new producers, use 100 percent of the T-Yield published in the actuarial documents.

(ii) A T-Yield may be calculated in accordance with FCIC approved procedures when you add land or new types and practices to your farming operations.

(c) The average yield and approved yield are used to establish the insurance guarantee.

(1) Calculate the average yield and approved yield as follows:

(i) Establish the APH database using annual yields by APH crop year in accordance with section 5(b), prior to any adjustments authorized for annual yields from section 36(a);

(ii) Sum all the annual yields from section 5(c)(1)(i);

(iii) Divide the sum of section 5(c)(1)(ii) by the number of annual yields in the APH database. The result is the average yield;

(iv) Using the annual yields determined from section 5(c)(1)(i), apply any applicable adjustments authorized from section 36(a);

(v) Sum all the annual yields from section 5(c)(1)(iv); and

(vi) Divide the sum of section 5(c)(1)(v) by the number of annual yields in the APH database and apply any applicable adjustments from section 5(c)(2) or (3), section 9(e), or section 36(b). The result is the approved yield.

(2) Adjustment to the approved yield by us or any other person authorized by FCIC, in accordance with FCIC approved procedures, may be made in limited situations when the approved yield is not reflective of the expected actual production for the current crop year.

(3) Master yields may be established whenever crop rotation requirements and land leasing practices limit the yield history available. FCIC will establish crops and locations for which master yields are available. To qualify, you must have at least four most recent continuous crop years' annual production reports of the insured crop. Master yields are based on acreage and production history from all acreage of the insured crop in the county in which you have/had a share in the crop's production on the same basis as your approved yield. When applicable, your master yield will be your approved yield as authorized by approved FCIC procedures.

(4) For perennial crops, excluding forage, an approved yield may be adjusted if:

(i) A significant upward or downward yield trend over consecutive APH crop years is evident;

(ii) Tree or vine damage, or cultural practices performed will reduce the expected actual production for the current crop year from previous crop years' actual production; or

(iii) Other situations are determined to exist, in accordance with FCIC approved procedures, when the approved yield is not reflective of the expected actual production for the current crop year.

(5) An approved yield may be adjusted to reflect the degree of success of a systematic area-wide effort to detect, eradicate, suppress, control, or at a minimum prevent or retard, the spread of plant disease or plant pests, and which increases the yield of the insured crop on your farm when allowed under the terms of the policy.

* * * * *

9. Insurable Acreage

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(c) Notwithstanding the provisions in section 8(b)(2), if acreage is irrigated and a premium rate is not provided for an irrigated practice, you may either report and insure the irrigated acreage as ''non-irrigated,'' or report the irrigated acreage as not insured. (If you elect to insure such acreage under a non-irrigated practice, your irrigated yield will only be used to determine your approved yield if you continue to use a good irrigation practice. If you do not use a good irrigation practice, you will receive a yield determined in accordance with section 3(h)(3).)

* * * * *

15. Production Included in Determining an Indemnity and Payment Reductions

* * * * *

(h) * * *

(7) With respect to double cropped acreage, if the two crops you have double cropped are insured under policies with different double crop history records requirements (*e.g.,* records of acreage and production), the less restrictive requirements may be followed to satisfy double cropping requirements for both crops. For example, you have 20 acres of annual forage wheat for grazing. On the same acreage you plant and insure cotton. The annual forage double cropping provisions do not include double cropping record history requirements. If the annual forage double cropping provisions are met, you are eligible for a full indemnity payment on both the annual forage wheat and the cotton.

* * * * *

17. Prevented Planting

* * * * *

(d) * * *

(1) Drought, failure of the irrigation water supply; failure, breakdown, or destruction of irrigation equipment or facilities; or the inability to prepare the land for irrigation using your established irrigation method, due to an insured cause of loss only if, on the final planting date (or within the late planting period if you elect to try to plant the crop), you provide documentation acceptable to us to establish:

* * * * *

(ii) * * *

(B) The irrigation equipment or facilities have failed, broken down, or been destroyed if such failure, breakdown, or destruction is due to an insured cause of loss specified in section 12(d).

(2) Causes other than drought; failure of the irrigation water supply; failure, breakdown, or destruction of the irrigation equipment or facilities; or your inability to prepare the land for irrigation using your established irrigation method, provided the cause of loss is specified in the Crop Provisions. However, if it is possible for you to plant on or prior to the final planting date when other producers in the area are planting and you fail to plant, no prevented planting payment will be made.

(e) * * *

(1) * * *

(i) * * *

(B) If you acquire additional land for the current crop year, the number of eligible acres determined in section 17(e)(1)(i)(A) for a crop may be increased by multiplying it by the ratio of the total cropland acres available for planting that you are farming this year (if greater) to the total cropland acres available for planting that you farmed in the previous year, provided that:

* * * * *

(f) * * *

(12) If after considerations of historical weather patterns, timing of the final planting date, your planting history, and other factors, we determine a cause of loss has occurred that may prevent planting at the time:

(i) You take possession of the leased acreage (except acreage you leased the previous crop year and continue to lease in the current crop year);

(ii) You take possession of the purchased acreage;

(iii) The acreage is released from a USDA program which prohibits harvest of a crop;

(iv) You request a written agreement to insure the acreage; or

(v) You acquire the acreage through means other than lease or purchase (such as inherited or gifted acreage).

(g) If you purchased an additional coverage policy for a crop, and you executed a High-Risk Land Exclusion Option and separately insured acreage which has been designated as high-risk land by FCIC in accordance with section 3(b)(2)(ii)(B) and (C), the maximum number of acres eligible for a prevented planting payment will be limited for each policy as specified in section 17(e) and (f).

(h) If you are prevented from planting a crop for which you do not have an adequate base of eligible prevented planting acreage, as determined in accordance with section 17(e)(1), we will use acreage from another crop insured by us for the current crop year for which you have remaining eligible prevented planting acreage.

* * * * *

[For FCIC policies]

24. Amounts Due Us

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(d) Interest on any amount due us found to have been received by you because of fraud, misrepresentation or presentation by you of a false claim will start on the date you received the amount with the additional 6 percent penalty beginning on the 31st day after the notice of amount due is issued to you. This interest is in addition to any other amount found to be due under any other Federal criminal or civil statute.

* * * * *

34. Units

(a) You may elect an enterprise unit or whole-farm unit as allowed by the actuarial documents.

* * * * *

(3) * * *

(i) * * *

(C) At least two of the insured crops must each have planted acreage that constitutes 10 percent or more of the total planted acreage liability of all insured crops in the whole-farm unit (for crops for which revenue protection is available, liability will be based on the applicable projected price only for the purpose of section 34(a)(3)(i)(C));

* * * * *

(c) * * *

(3) In addition to, or instead of, establishing optional units by section, section equivalent or FSA farm number, or irrigated and non-irrigated acreage, separate optional units may be established for acreage of the insured crop grown and insured under an organic farming practice. Certified organic, transitional, and buffer zone acreages do not individually qualify as separate units. (See section 37 for additional provisions regarding acreage insured under an organic farming practice.)

* * * * *

37. Organic Farming Practices

* * * * *

(c) * * *

(1) * * *

(i) For certified organic acreage, a written certification in effect directly from a certifying agent indicating the name of the person certified, effective date of certification, certificate number, types of commodities certified, and name and address of the certifying agent (a certificate issued to a tenant may be used to qualify a landlord or other similar arrangement). A certificate issued from the National Organic Program's Organic Integrity Database (or successor certificate reporting tool) is acceptable.

(ii) For transitional acreage, an organic system plan documenting the use of practices that would result in certified organic status that includes the record information as described in section 37(c)(1)(i), or written documentation from a certifying agent indicating an organic system plan is in effect for the acreage.

* * * * *

Marcia Bunger,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 2023–13375 Filed 6–28–23; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0458]

Safety Zone; Military Ocean Terminal Concord Safety Zone, Suisun Bay, Military Ocean Terminal Concord, CA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone in the navigable waters of Suisun Bay, off Concord, CA, in support of explosive on-loading to Military Ocean Terminal Concord (MOTCO) from June 26, 2023, through June 30, 2023. This safety zone is necessary to protect personnel, vessels, and the marine environment from potential explosion within the explosive arc. The safety zone is open to all persons and vessels for transitory use, but vessel operators desiring to anchor or otherwise loiter within the safety zone must obtain the permission of the Captain of the Port San Francisco or a designated representative. All persons and vessels operating within the safety zone must comply with all directions given to them by the Captain of the Port San Francisco or a designated representative.

DATES: The regulations in 33 CFR 165.1198 will be enforced from 12:01 a.m. on June 26, 2023, until 11:59 p.m. on June 30, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call, or email Lieutenant William K. Harris, U.S. Coast Guard Sector San Francisco, Waterways Management Division, at 415–399–7443, *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.1198 for the Military Ocean Terminal Concord, CA (MOTCO) regulated area from 12:01 a.m. on June 26, 2023, until 11:59 p.m. on June 30, 2023, or as announced via marine local broadcasts. This safety zone is necessary to protect personnel, vessels, and the marine environment from potential explosion within the explosive arc. The regulation for this safety zone, § 165.1198, specifies the location of the safety zone which encompasses the navigable waters in the area between 500 yards of MOTCO Pier 2 in position 38°03′30″ N, 122°01′14″ W and 3,000 yards of the pier. During the enforcement periods, as reflected in § 165.1198(d), if you are the operator of a vessel in the regulated area you must comply with the instructions of the COTP or the designated on-scene patrol personnel. Vessel operators desiring to anchor or otherwise loiter within the safety zone must contact Sector San Francisco Vessel Traffic Service at 415–556–2760 or VHF Channel 14 to obtain permission.

In addition to this notification of enforcement in the **Federal Register,** the Coast Guard plans to provide notification of this enforcement period via marine information broadcasts.

Dated: June 21, 2023.

Jordan M. Baldueza,

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

[FR Doc. 2023–13824 Filed 6–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0527]

Safety Zone; San Francisco Giants Fireworks, San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the San Francisco Giants Fireworks in the Captain of the Port, San Francisco area of responsibility during the dates and times noted below. This action is necessary to protect personnel, vessels, and the marine environment from the hazards associated with the fireworks display. During the enforcement period, unauthorized persons and vessels are prohibited from entering into, transiting through, or remaining in the safety zone, unless authorized by the Patrol Commander (PATCOM), any Official Patrol defined as other Federal, State, or local law enforcement agencies on scene to assist the Coast Guard in enforcing the regulated area.

DATES: The regulations in 33 CFR 165.1191 will be enforced for the location identified in Table 1 to § 165.1191, Item number 1, from 10 a.m. until 10:40 p.m. on July 3, 2023.

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

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone in 33 CFR 165.1191 Table 1, Item number 1 for the San Francisco Giants Fireworks from 10 a.m. until 10:40 p.m. on July 3, 2023. The safety zone will extend to all navigable waters of the San Francisco Bay, from surface to bottom, within a circle formed by connecting all points 100 feet outwards of the fireworks barge during the loading, transit, and arrival of the fireworks barge from the loading location to the display location and until the start of the fireworks display. From 10 a.m. until 9 p.m. on July 3, 2023, the fireworks barge will be loading pyrotechnics from Pier 50 in San Francisco, CA. The fireworks barge will remain at the loading location until its transit to the display location. From 9 p.m. to 9:15 p.m. on July 3, 2023, the loaded fireworks barge will transit from Pier 50 to the launch site near Pier 48 in approximate position 37°46′36″ N, 122°22′56″ W (NAD 83) where it will remain until the conclusion of the fireworks display. Upon the commencement of the 10-minute fireworks display, scheduled to begin at the conclusion of the baseball game, between 9:30 p.m. and 10 p.m. on July 3, 2023, the safety zone will increase in size and encompass all navigable waters of the San Francisco Bay, from surface to bottom, within a circle formed by connecting all points 700 feet out from the fireworks barge near Pier 48 in approximate position 37°46′36″ N, 122°22′56″ W (NAD 83). This safety will be enforced from 10 a.m. until 10:40 p.m. on July 3, 2023, or announced via Marine Information Broadcast.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM or other Official Patrol, defined as a Federal, State, or local law enforcement agency on scene to assist the Coast Guard in enforcing the safety zone. During the enforcement period, if you are the operator of a vessel in one of the safety zones you must comply with the directions from the Patrol Commander or other Official Patrol. The PATCOM or Official Patrol may, upon request allow the transit of commercial vessels through regulated areas when it is safe to do so.

In addition to this enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this

enforcement period via the Local Notice to Mariners.

If the Captain of the Port determines that the regulated area need not be enforced for the full duration stated in this notice, a Marine Information Bulletin may be used to grant general permission to enter the regulated area.

Dated: June 21, 2023.

Jordan M. Baldueza,

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

[FR Doc. 2023–13715 Filed 6–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0483]

RIN 1625–AA00

Safety Zone; Redwood City Fourth of July Fireworks; Redwood Creek, Redwood City, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Redwood Creek in Redwood City, CA in support of a fireworks display on July 4, 2023. The safety zone is necessary to protect personnel, vessels, and the marine environment from potential hazards created by pyrotechnics. Unauthorized persons or vessels are prohibited from entering into, transiting through, or remaining in the safety zone without the permission of the Captain of the Port San Francisco or a designated representative.

DATES: This rule is effective from 9 a.m. July 3, 2023, until 10:20 p.m. July 4, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0483 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer First Class Shannon Curtaz-Milian, U.S. Coast Guard, Sector San Francisco, at 415–399–7440, *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. The Coast Guard did not receive final details for this event until June 12, 2023. It is impracticable to go through the full notice and comment rule making process because the Coast Guard must establish this safety zone by July 3, 2023, and lacks sufficient time to provide a reasonable comment period and to consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to public interest because action is necessary to protect personnel, vessels, and the marine environment from the potential safety hazards associated with the fireworks display on Redwood Creek in Redwood City, CA on July 4, 2023.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port San Francisco has determined that potential hazards associated with the Redwood City Fourth of July Fireworks will be a safety concern for anyone within a 100-foot radius of the fireworks vessel during loading and staging on July 3, 2023, and anyone within a 850-foot radius of the fireworks vessel starting 30 minutes before the fireworks display is scheduled to commence and ending 30 minutes after the conclusion of the fireworks display on July 4, 2023. For this reason, this temporary safety zone is needed to protect personnel, vessels, and the marine environment in the navigable waters around the fireworks vessel and during the fireworks display.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 9 a.m. on July 3, 2023, until 10:20 p.m. on July 4, 2023, during the loading, staging, and transit of the fireworks vessel in San Francisco Bay from Pier 50 to Redwood Creek, Redwood City, CA, and until 30 minutes after completion of the fireworks display. During the loading, staging, and transit of the fireworks vessel, scheduled to take place between 9 a.m. on July 3, 2023, until 9 p.m. on July 4, 2023, until 30 minutes prior to the start of the fireworks display, the safety zone will encompass the navigable waters around and under the fireworks vessel, from surface to bottom, within a circle formed by connection of all points 100 feet out from the fireworks vessel. The fireworks display is scheduled to start from 9:30 p.m. and end at approximately 9:50 p.m. on July 4, 2023, on Redwood Creek in Redwood City, CA.

The fireworks vessel will remain at Pier 50 until the start of its transit to the display location. Movement of the vessel from Pier 50 to the display location is scheduled to take place from 3 p.m. to 7 p.m. on July 4, 2023, where it will remain until the conclusion of the fireworks display.

At 9 p.m. on July 4, 2023, 30 minutes prior to the commencement of the 20-minute fireworks display, the safety zone will increase in size and encompass the navigable waters around and under the fireworks vessel, from surface to bottom, within a circle formed by all connecting points 850 feet from the circle center at approximate position 37°30′28.48″ N, 122°12′51.53″ W (NAD 83). The safety zone will terminate at 10:20 p.m. on July 4, 2023, or as announced via Broadcast Notice to Mariners.

This regulation is necessary to keep persons and vessels away from the immediate vicinity of the fireworks loading, staging, transit, and display site. Except for persons or vessels authorized by the COTP or the COTP's designated representative, no person or vessel may enter or remain in the restricted area. A ''designated representative'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel, or a Federal, State, or local officer designated by or assisting the Captain of the Port San Francisco (COTP) in the enforcement of the safety zone. This regulation is necessary to ensure the

safety of participants, spectators, and transiting vessels.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the limited duration and narrowly tailored geographic area of the safety zone. Although this rule restricts access to the waters encompassed by the safety zone, the effect of this rule will not be significant because the local waterways users will be notified to ensure the safety zone will result in minimum impact. The vessels desiring to transit through or around the temporary safety zone may do so upon express permission from the COTP or the COTP's designated representative.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone in the navigable waters around the loading, staging, transit, and display of fireworks near Pier 50 in San Francisco Bay and on Redwood Creek in Redwood City. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–132 to read as follows:

§ 165.T11–132 Safety Zone; Redwood City Fourth of July Fireworks; Redwood Creek, Redwood City, CA.

(a) *Location.* The following area is a safety zone: all navigable waters of San Francisco Bay, from surface to bottom, within a circle formed by connecting all points 100 feet out from the fireworks vessel during loading and staging at Pier 50 in San Francisco, CA as well as transit and arrival to Redwood Creek, Redwood City, CA. Between 9 p.m. and 10:20 p.m. on July 4, 2023, the safety zone will expand to all navigable waters, from surface to bottom, within a circle formed by connecting all points 850 feet out from the fireworks vessel in approximate position 37°30′28.48″ N 122°12′51.53″ W (NAD 83) or as announced via Broadcast Notice to Mariners.

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

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

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative. Persons and vessels may request permission to enter the safety zone on VHF–23A or through the 24-hour Command Center at telephone (415) 399–3547.

(d) *Enforcement period.* This section will be enforced from 9 a.m. on July 3, 2023, until 10:20 p.m. on July 4, 2023.

(e) *Information broadcasts.* The COTP or the COTP's designated representative will notify the maritime community of periods during which this zone will be enforced, in accordance with 33 CFR 165.7.

Dated: June 21, 2023.

Jordan M. Baldueza,

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

[FR Doc. 2023–13825 Filed 6–28–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0478]

Safety Zones; Recurring Events in Captain of the Port Duluth—LaPointe Fireworks

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the LaPointe Fireworks in LaPointe, WI from 9:30 p.m. through 10:30 p.m. This action is necessary to protect participants and spectators during the LaPointe Fireworks taking place in the North Channel off LaPointe. During the enforcement period, entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Duluth or designated on-scene representative.

DATES: The regulations in 33 CFR 165.943(b) will be enforced from 9:30 p.m. through 10:30 p.m. on July 04, 2023, for the LaPointe Fireworks safety zone, § 165.943 Table 1(6).

FOR FURTHER INFORMATION CONTACT: If you have questions on this document, call or email LT Joe McGinnis, telephone (218) 725–3818, email *DuluthWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone for the annual LaPointe Fireworks in 33 CFR 165.94 Table 1(6) from 9:30 p.m. through 10:30 p.m. on July 04, 2023, on all waters of Lake Superior bounded by the arc of a circle with a 1,120-foot radius from the fireworks launch site with its center in position 46°46′40″ N, 090°47′22″ W.

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Duluth or their designated on-scene representative. The Captain of the Port's designated on-scene representative may be contacted via VHF Channel 16.

This document is issued under authority of 33 CFR 165.943 and 5 U.S.C. 552 (a). In addition to this publication in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of the enforcement of this safety zone via Broadcast Notice to Mariners.

Dated: June 23, 2023.

J.M. DeWitz,

Commander, U.S. Coast Guard, Captain of the Port Duluth.

[FR Doc. 2023–13823 Filed 6–28–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2023–0214; FRL–10875–02–R7]

Air Plan Approval; State of Missouri; Confidential Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the State Implementation Plan (SIP) for the State of Missouri. This final action will amend the SIP to approve a revision submitted by the State of Missouri on September 20, 2022, to the existing state rule, ''Confidential Information.'' These revisions include structural, formatting and other text changes that are administrative in nature and do not impact the stringency of the SIP or air quality. The EPA's approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on July 31, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2023–0214. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Steven Brown, Environmental

Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7718; email address: *brown.steven@epa.gov.*

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

Table of Contents

I. What is being addressed in this document?

The EPA is approving a SIP revision submitted by the State of Missouri on September 20, 2022. Missouri requested the EPA approve revisions to 10 Code of State Regulations (CSR) 10–6.210 in the Missouri SIP. The state has revised the rule and made structural, formatting, and text changes to correct typographical errors. After review and analysis of the revisions, the EPA concluded that these changes do not have adverse effects on air quality. The full text of these changes can be found in the State's submission, which is included in the docket for this action. The EPA's analysis of the revisions can be found in the technical support document (TSD), also included in the docket.

II. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from 02/15/2022 to 4/07/2022 and received one comment from a Missouri staff member pertaining to a definition change. The EPA's Notice of Proposed Rulemaking (NPRM) and supporting information contained in the docket were made available for public comment from May 8, 2023, to June 7, 2023 (88 FR 29596). The EPA received one comment in support of approval, which is included in the docket.

In addition, as explained above and in more detail in the TSD, which is part of this docket, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

III. What action is the EPA taking?

The EPA is taking final action to amend the Missouri SIP by approving the State's revisions to rule 10 CSR 10–6.210 ''Confidential Information.'' Approval of these revisions will ensure consistency between State and federally approved rules. As described in the NPRM (88 FR 29596), and the TSD, the EPA has determined that these changes meet the requirements of the Clean Air Act and will not adversely impact air quality or the stringency of the SIP.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as described and set forth below in the amendments to 40 CFR part 52, the EPA is finalizing the incorporation by reference of the Missouri rule 10 CSR 10–6.210—*Confidential Information,* with a local effective date of September 30, 2022, which provides procedures and conditions for handling confidential Information. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

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

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

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, 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. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

[1] 62 FR 27968, May 22, 1997.

Missouri 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. EPA did not perform an EJ analysis and did not consider EJ in this action. 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.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 28, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter.

Dated: June 21 2023.

Meghan A. McCollister,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart AA—Missouri

■ 2. In § 52.1320, the table in paragraph (c) is amended by revising the entry ''10–6.210'' to read as follows:

§ 52.1320 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
*	*	*	*	*
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
*	*	*	*	*
10–6.210	Confidential Information	9/30/2022	6/29/2023, [insert **Federal Register** citation].	
*	*	*	*	*

* * * * *

[FR Doc. 2023–13618 Filed 6–28–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065; RTID 0648–XD117]

Fisheries of the Exclusive Economic Zone Off Alaska; Sablefish in the Bering Sea Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for non-Community Development Quota (CDQ) sablefish by vessels using trawl gear in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2023 non-CDQ sablefish initial total allowable catch (ITAC) by vessels using trawl gear in the Bering Sea subarea of the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), June 27, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (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.

The 2023 non-CDQ sablefish ITAC by vessels using trawl gear in the Bering Sea subarea of the BSAI is 3,398 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023).

The Regional Administrator has determined that the 2023 ITAC for non-CDQ sablefish by vessels using trawl gear in the Bering Sea subarea of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,100 mt, and is setting aside the remaining 2,298 mt as bycatch

to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, in accordance with § 679.20(d)(1)(iii), NMFS is prohibiting directed fishing for non-CDQ sablefish by vessels using trawl gear in the Bering Sea subarea of the BSAI. While this closure remains in effect, 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 closure of non-CDQ sablefish by vessels using trawl gear in the Bering Sea subarea in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of June 26, 2023.

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: June 26, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–13896 Filed 6–27–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 124
Thursday, June 29, 2023

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

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; FCC 23–49; FR ID 149026]

Prior Express Consent Under the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes measures to clarify and strengthen consumers' ability to revoke consent to receive both robocalls and robotexts. The Commission proposes to codify past guidance on prior express consent to make these requirements more apparent to callers and consumers. In addition, the Commission proposes to amend its rules to strengthen the ability of consumers to decide which robocalls and robotexts they wish to receive by exercising their right to grant and revoke consent to individual callers. Specifically, the Commission proposes to: ensure that revocation of consent does not require the use of specific words or burdensome methods; require that callers honor do-not-call and consent revocation requests within a reasonable time, not to exceed 24 hours of receipt; codify the ruling that consumers only need to revoke consent once to stop getting all robocalls and robotexts from a specific entity; and allow wireless consumers the option to stop robocalls and robotexts from their own wireless service provider.

DATES: Comments are due on or before July 31, 2023, and reply comments are due on or before August 14, 2023.

ADDRESSES: You may submit comments, identified by CG Docket No. 02–278, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

FOR FURTHER INFORMATION CONTACT: Richard D. Smith of the Consumer and Governmental Affairs Bureau at (717) 338–2797 or *Richard.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), in CG Docket No. 02–278, FCC 23–49, adopted on June 8, 2023 and released on June 9, 2023. The full text of the document is available for public inspection and copying via the Commission's Electronic Comment Filing System (ECFS). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice).

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 through 1.1216. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

Initial Paperwork Reduction Act of 1995 Analysis

The *NPRM* seeks comment on proposed rule amendments that may result in modified information collection requirements. If the Commission adopts any modified information collection requirements, the Commission will publish a notice in the **Federal Register** inviting the public to comment on the requirements, as required by the Paperwork Reduction Act. Public Law 104–13; 44 U.S.C. 3501–3520. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. Public Law 107–198; 44 U.S.C. 3506(c)(4).

Synopsis

1. The Commission initiates this proceeding to clarify and strengthen consumers' rights under the TCPA to grant and revoke consent to receive robocalls and robotexts. Specifically, the Commission proposes to: (1) ensure that revocation of consent does not require the use of specific words or burdensome methods; (2) require that callers honor do-not-call and consent revocation requests within a reasonable time, not to exceed 24 hours of receipt; (3) codify the ruling that consumers only need to revoke consent once to stop getting all robocalls and robotexts from a specific entity; and (4) allow wireless consumers the option to stop robocalls and robotexts from their own wireless service provider. As discussed below,

the Commission seeks comment on these proposals and on the costs and benefits of the proposals, including for smaller businesses and consumers.

A. Revoking Consent in Any Reasonable Way

2. The Commission proposes to codify its 2015 ruling confirming that consumers who have provided prior express consent to receive autodialed or prerecorded voice calls may revoke such consent through any reasonable means. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278, WC Docket No. 07–135, Declaratory Ruling and Order, published at 80 FR 61129, October 9, 2015. The Commission believes this will make clearer to callers and consumers that a consumer has a right to revoke consent under the TCPA. Specifically, the Commission proposes codifying a rule that would make clear that consumers may revoke prior express consent in any reasonable manner that clearly expresses a desire not to receive further calls or text messages, including using words such as ''stop,'' ''revoke,'' ''end,'' or ''opt out,'' and that callers may not infringe on that right by designating an exclusive means to revoke consent that precludes the use of any other reasonable method. The Commission seeks comment on this proposal.

3. Additionally, the Commission proposes to codify that reasonable methods to revoke consent typically include revocation requests made by text message, voicemail, or email to any telephone number or email address at which the consumer can reasonably expect to reach the caller. The Commission proposes to codify that, when a consumer uses any such method to revoke consent, doing so creates a presumption that the consumer has revoked consent, absent evidence to the contrary. For example, the use of reply text messages is a reasonable and widely recognized means for text recipients to revoke prior consent to text messages. The sending of a ''STOP'' message in reply to an incoming text message is the standard recommended by industry groups such as the Mobile Marketing Association. In addition, text messages may, on occasion, inadvertently be directed to reassigned or wrong numbers. In these instances, the text recipient may have no contact information other than the text itself, since the recipient is not the party that provided prior consent to the sender, and the only method they may have to contact the sender is with a reply text message. Thus, the Commission proposes to codify that the sending of ''STOP'' or a similar message that reasonably conveys a desire to not receive further messages in reply to an incoming text message creates a presumption that the consumer has revoked consent in a reasonable way. Should the text initiator choose to use a texting protocol that does not allow reply texts, we propose that it would bear the risk of potential liability under the TCPA unless it both provides a clear and conspicuous disclosure on each text to the consumer that two-way texting is not available due to technical limitations of the texting protocol and clearly and conspicuously provides alternative ways for a consumer to revoke consent, such as a link or instructions to text a different number. The Commission seeks comment on these proposed rules.

4. The Commission believes that these proposed rules are consistent with the Commission's prior finding that placing significant burdens on the called party who no longer wishes to receive such calls or texts is inconsistent with the TCPA and with our finding that the TCPA requires ''only that the called party clearly express his or her desire not to receive further calls'' to invoke this right to revoke consent. The Commission seeks comment on whether callers have encountered any difficulties in complying with this longstanding precedent that consumers can revoke consent via any reasonable method. Based on this experience, are there specific issues or circumstances that have arisen that the Commission should address in the context of this proceeding to provide clarity as to the factors that make the means of revocation ''reasonable'' both from a consumer's perspective and that of a caller? Has the Commission struck an appropriate balance here between protecting the consumer's privacy interests and facilitating the caller's ability to process opt-out requests?

5. The Commission also recognizes that the scope of a ''reasonable'' means to revoke consent is not unlimited. The Commission seeks comment on any such limitations it should codify. What are the most common situations in which callers are unable to process opt-out requests from consumers? Are there ways that the Commission could address these situations in this proceeding consistent with its goal not to place an unreasonable burden on consumers to opt out of robocalls? The Commission proposes to codify that callers that do not believe that consumers have used a reasonable method to convey a request to revoke consent will be afforded an opportunity to rebut the presumption on a case-by-case basis, should a complaint be filed with the Commission or finder of fact. The Commission seeks comment on the types of evidence that would suffice to rebut the presumption. For example, if the consumer directs the request to a telephone number or email address, and the caller presents evidence that the consumer lacks a reasonable basis to expect that the request will be received by it, should the Commission hold that such a method to revoke consent is not in fact reasonable? The Commission believes such a rule would balance the consumer's right to revoke consent in an easy and reasonable manner with the caller's ability to process such revocation requests. The Commission seeks comment on this proposal, including any impact on small entities.

B. Timeframe for Honoring a Do-Not-Call or Revocation Request

6. The Commission proposes to require that, within 24 hours of receipt, callers must honor company-specific do-not-call and revocation-of-consent requests for robocalls and robotexts that are subject to the TCPA. The Commission's rules currently provide no specific timeframes for honoring revocation-of-consent requests for robocalls and robotexts made to residential or wireless telephone numbers. The Commission's rules currently require callers making telemarketing calls or exempted artificial and prerecorded voice calls to residential telephone numbers and exempted package delivery calls and texts to wireless consumers to honor do-not-call requests within a reasonable time not to exceed 30 days from the date of any such request. This proposal will require amending those existing rules and establishing new rules where no specific timeframe for honoring such requests currently exists. The Commission seeks comment on this proposal, including on the 24-hour period. Is this period reasonable? Should the Commission, rather, require that revocations be honored immediately upon receipt or consider some other timeframe?

7. Consumers are understandably frustrated when they receive robocalls and robotext messages days or even weeks following a request to stop such communications. Such delays also undermine a consumer's right to determine which robocalls and robotexts they wish to receive under the privacy protections afforded by the TCPA. In addition, the Commission believes that advances in technology over the years, including automated and interactive technologies, have made the

processing of do-not-call and consent revocation requests more efficient and timely than in the past. The Commission believes that such technological advances provide callers and senders of text messages with the tools they need to process all do-not-call and consent revocation requests in near real time. The Commission seeks comment on these beliefs.

8. Consistent with the conditions imposed on other calls to wireless telephone numbers that are exempt from the prior-express-consent requirement, the Commission also proposes to amend its rules for exempted package delivery calls to require that such callers honor an opt-out request immediately. This proposal will place such callers on an equal footing with other categories of callers that have been granted an exemption to call wireless telephone numbers without prior express consent. Alternatively, is there any reason that package delivery calls should continue to be treated differently from other exempted callers to allow for up to 30 days to honor an opt-out request? The Commission believes these proposals will provide consumers with certainty that their do-not-call and consent revocation requests are honored in a timely manner, enhancing the ability of consumers to stop unwanted robocalls and robotexts. The Commission seeks comment on these proposals, including any burdens this may impose on callers, including small entities.

C. Revocation Confirmation Text Message

9. The Commission proposes to codify the *Soundbite Declaratory Ruling* clarifying that a one-time text message confirming a consumer's request that no further text messages be sent does not violate the TCPA or the Commission's rules as long as the confirmation text merely confirms the called party's opt-out request and does not include any marketing or promotional information, and the text is the only additional message sent to the called party after receipt of the opt-out request. In the *Soundbite Declaratory Ruling,* the Commission noted that ''confirmation messages ultimately benefit and protect consumers by helping to ensure, via such confirmation, that the consumer who ostensibly opted out in fact no longer wishes to receive text messages from entities from whom the consumer previously expressed an affirmative desire to receive such messages.'' The Commission believes that codifying this ruling will better ensure that both text senders and recipients are aware of it, including the limitations imposed on such one-time confirmation text messages. The Commission seeks comment on this proposal. In the time since it went into effect, have callers or consumers encountered any issues not addressed in the *Soundbite Declaratory Ruling*?

10. The Commission also proposes to codify that senders can include a request for clarification in the one-time confirmation text, provided the sender ceases all further robocalls and robotexts absent an affirmative response from the consumer that they wish to receive further communications from the sender. The Commission further propose that a lack of any response to the confirmation call or text must be treated by the sender as a revocation of consent for all robocalls and robotexts from the sender. It does so in response to Capital One's petition seeking confirmation that the text sender may request clarification in its one-time confirmation message of the scope of the recipient's revocation request when that recipient has consented to receiving multiple categories of informational messages from the sender. The Commission notes that banks and financial institutions support Capital One's request, indicating that consumers often consent to receive multiple categories of informational messages and that opt-out requests in these situations can be ambiguous as to whether the request applies to all or just certain types of those messages. Consumer groups have also expressed support for Capital One's request, provided that a lack of any response to the confirmation text message must be interpreted by the sender to mean that the consumer's revocation request was intended to encompass all robocalls and robotexts and the sender must therefore cease all further robocalls and robotexts to that consumer absent further clarification from the consumer. The Commission seeks further comment on any additional issues not fully addressed in the record.

11. Consistent with the *Soundbite Declaratory Ruling* and Capital One's request, the Commission proposes to codify that any such clarification message must not contain any marketing or advertising content or seek to persuade the recipient to reconsider their opt-out decision. Rather, this proposed clarification is strictly limited to informing the recipient of the scope of the opt-out request absent some further confirmation from the consumer that they wish to continue receiving certain categories of text messages from the sender. The Commission seeks comment on this limitation.

12. The Commission proposes to emphasize that this confirmation text message is limited to a final one-time text message absent an affirmative response from the consumer that they wish to continue to receive certain categories of informational calls or text messages from the sender. The Commission proposes that, in the absence of any such affirmative response, no further robocalls or robotexts can be made to this consumer. In addition, the Commission proposes that a ''STOP'' text sent in response to the one-time request for confirmation does not then allow the text sender to send another request for further clarification. As noted above, both industry and consumer groups support this proposal. Does the record fully address the views of all parties?

13. The Commission seeks comment on these proposals and any other related issues, such as any impact on smaller entities. Is this the appropriate limit to put on the clarification from the *Soundbite Declaratory Ruling*? Are there other limitations the Commission should impose to protect consumers' rights to opt out of text messages yet ensure callers' ability to correctly interpret consumers' intent in revoking consent? Should the Commission instead decline to offer the clarification Capital One seeks?

D. Wireless Carrier Calls to Subscribers

14. The Commission proposes to require wireless providers to honor their customers' requests to cease autodialed, prerecorded voice, and artificial voice calls, and autodialed texts. To effectuate this change, the Commission proposes to alter our prior ruling to require wireless providers to subject such calls to certain conditions that protect the privacy interests of subscribers.

15. In 1992, the Commission concluded that wireless carriers need not obtain consent prior to initiating autodialed, artificial voice, or prerecorded voice calls to their own subscribers because such communications were not charged to the called party. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CC Docket No. 92–90, Report and Order, published at 57 FR 48333, October 23, 1992. Following this ruling, Congress amended the TCPA to grant the Commission express statutory authority to exempt from the prior-express-consent requirement calls to wireless numbers that are not charged to the called party subject to such conditions as the Commission deems necessary to protect the privacy rights afforded under the TCPA. As a result, the ability of wireless carriers to call their own subscribers without prior

express consent, where the consumer is not charged for the call, was based on the language of § 227(b)(1)(A)(iii) and was not a creation of a § 227(b)(2)(C) exemption; therefore, the Commission has not subjected this ability to conditions to protect the privacy rights of wireless subscribers that the Commission has imposed in other analogous situations where callers have been granted an exemption to make robocalls or send robotexts to wireless numbers without prior express consent.

16. This situation has created disagreements as to whether the Commission has authority to impose an opt-out requirement on communications from wireless service providers to their customers. Two wireless subscribers filed petitions seeking clarification that they can revoke consent to receive calls and messages from their wireless provider after such a request to stop such communications was denied by their wireless providers. In response to requests for comments on these petitions, wireless providers and organizations opposed the relief sought, arguing that the TCPA's prohibitions do not apply to communications from wireless providers to their customers because there is no charge to the subscribers for calls and messages to them. As a result, these commenters contend, there is no prior consent to be revoked because prior express consent is not required to make such calls under the TCPA. The Commission seeks comment on these considerations in the context of its proposed exemption.

17. The Commission proposes to revisit the 1992 ruling that ''cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged.'' Instead of that blanket exemption for all wireless calls for which the subscriber is not charged, the Commission proposes to create and codify a qualified exemption—based on its authority under § 227(b)(2)(C)—for informational robocalls and robotexts from wireless providers to their subscribers. More specifically, those calls would be exempt from the prior-express-consent requirement if, and only if, certain conditions are satisfied. As noted, the Commission has exercised this statutory authority to recognize certain limited exemptions in other analogous situations where such calls also are made without a charge to the called party. The Commission notes that § 227(b)(2)(C)'s authority to grant exemptions from the prior-express-consent requirement is predicated on the ability of callers to make such calls with no charge to the consumer. The Commission believes that requirement would be meaningless if all such calls or texts were deemed to be wholly outside the prior express consent requirement merely because they were free to the end user, as some wireless providers have argued. Consistent with § 227(b)(2)(C), which permits the Commission to impose such conditions it deems necessary in the interest of privacy, the Commission proposes conditions that are similar to those it imposed to protect the privacy interests of consumers in other situations where it has recognized an exemption from the prior-express-consent requirement for robocalls to wireless telephone numbers. The proposed conditions are as follows:

(A) voice calls and text messages are initiated by a wireless service provider only to an existing subscriber of that wireless service provider at a number maintained by the wireless service provider;

(B) voice calls and text messages must state the name and contact information of the wireless provider (for voice calls, these disclosures must be made at the beginning of the call);

(C) voice calls and text messages must not include any telemarketing, solicitation, or advertising;

(D) voice calls and text messages must be concise, generally one minute or less in length for voice calls or 160 characters or less in length for text messages;

(E) a wireless service provider may initiate a maximum of three voice calls or text messages during any 30-day period;

(F) a wireless service provider must offer recipients within each message an easy means to opt out of future such messages; voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call; voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls; text messages must inform recipients of the ability to opt out by replying ''STOP''; and,

(G) a wireless service provider must honor opt-out requests immediately.

18. The Commission believes such an exemption, subject to the conditions imposed above, balances the privacy interests of the TCPA with the legitimate interests of wireless providers in communicating with their own subscribers. And because the TCPA only restricts calls initiated with an autodialer or using an artificial or prerecorded voice to a wireless telephone number, wireless providers can use a live agent or equipment that does not constitute an autodialer to make such calls or send texts without running afoul of the TCPA. In addition, the Commission proposes that wireless providers have the option to obtain the prior express consent of their subscribers to avoid the need to rely on this exemption and its accompanying conditions, including the numerical limits imposed on such exempted calls. The Commission seeks comment on these conditions. Are further conditions needed for calls from a wireless service provider to its subscribers? Alternatively, the Commission seeks comment on any benefits consumers receive from calls or messages that may be lost as a consequence of an opt-out or limit on the number of calls or messages sent. Are there any potential drawbacks for consumers to the conditions proposed? If so, should the Commission modify its proposed conditions to account for any such drawbacks?

19. Lastly, the Commission believes such an exemption satisfies the obligations of § 8 of the TRACED Act. Specifically, the class of parties that may make such exempted calls in these situations is strictly limited to the wireless service provider. The class of parties that may be called is limited to an existing subscriber of a wireless service provider, and the number of such calls and messages is limited to three calls within any 30-day period. To the extent that there are any calls or texts that wireless service providers are mandated to make to their subscribers pursuant to any federal or state law, the Commission seeks comment on whether such calls or texts should not be counted toward the numerical limit of such communications that are imposed in the 30-day timeframe. The Commission seeks comment on this proposal, including any burdens this proposal may impose on wireless providers, including small entities.

E. Legal Authority

20. The Commission tentatively concludes that its legal authority for the proposed rules contained herein derives from §§ 154 and 227 of the Communications Act of 1934, as amended (the Act). The Commission further proposes to rely on its authority under § 8 of the TRACED Act to establish limitations on the proposed exemption for wireless providers from the TCPA's prior-express-consent requirement. As discussed above, the Commission as the expert agency on the

TCPA has addressed issues relating to prior express consent by robocall consumers on numerous occasions. The Commission believes that these sources grant it sufficient authority to adopt the proposed rules contained herein, and it seeks comment on this conclusion. Are there any other sources of legal authority the Commission should rely on? Do any of these sources of authority not apply to the rules it proposes?

F. Proposed Effective Date

21. The Commission proposes that the rule changes set forth herein go into effect upon publication of an Order in the **Federal Register**, or for those rules that require OMB review under the Paperwork Reduction Act, upon OMB approval and publication of the notice of approval in the **Federal Register**. The Commission seeks comment on whether this proposed timeline provides a sufficient opportunity for affected parties to comply with any new requirements imposed by the proposed rules or whether a longer implementation period is warranted. The Commission also seeks comment on whether these effective dates should be the same for all affected parties, or whether it should provide more time for small entities to comply.

Initial Regulatory Flexibility Analysis

22. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided on the first page of this document. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

23. The NPRM seeks comment on proposals to clarify and strengthen the right of consumers to grant or revoke consent to receive robocalls and robotexts under the TCPA. Under the Telephone Consumer Protection Act of 1991 (TCPA), certain types of calls and texts may only be sent with the prior express consent of the called party. The ability of consumers to exercise this right to provide or revoke consent is essential to protecting the privacy rights of consumers by allowing them to decide which callers may communicate with them via robocalls and robotexts.

24. The NPRM proposes to codify prior Commission rulings and adopt new requirements to ensure that the requirements relating to providing or revoking consent under the TCPA are clear to both callers and consumers. Specifically, the *NPRM* proposes to make clear that consumers may revoke prior express consent in any reasonable manner that clearly expresses a desire not to receive further calls or text messages, including using words such as ''stop,'' ''revoke,'' ''end,'' or ''opt out,'' and that callers may not infringe on that right by designating an exclusive means to revoke consent that precludes the use of any other reasonable method. The *NPRM* also proposes to require that callers honor do-not-call and revocation requests within a reasonable time not to exceed 24 hours of receipt. Further, the *NPRM* reiterates that consumers only need to revoke consent once to stop getting all calls and texts from a specific entity. It also proposes to codify that a one-time text message confirming a consumer's request that no further text messages be sent does not violate the TCPA or the Commission's rules as long as the confirmation text merely confirms the called party's opt-out request, does not include any marketing or promotional information, and the text is the only additional message sent to the called party after receipt of the opt-out request. Finally, the *NPRM* proposes to require wireless providers to honor a customer's request to cease autodialed, prerecorded voice, and artificial voice calls, and automated texts.

B. Legal Basis

25. The proposed rules are authorized under §§ 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 227, and § 8 of the TRACED Act.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

26. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A ''small-business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

27. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* The Commission's actions, over time, may affect small entities that are not easily categorized at present. The Commission therefore describes, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.

28. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

29. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

30. *Telemarketing Bureaus and Other Contact Centers.* This industry

comprises establishments primarily engaged in operating call centers that initiate or receive communications for others-via telephone, facsimile, email, or other communication modes-for purposes such as (1) promoting clients products or services, (2) taking orders for clients, (3) soliciting contributions for a client, and (4) providing information or assistance regarding a client's products or services. These establishments do not own the product or provide the services they are representing on behalf of clients. The SBA small business size standard for this industry classifies firms having $16.5 million or less in annual receipts as small. According to U.S. Census Bureau data for 2017, there were 2,250 firms in this industry that operated for the entire year. Of this number 1,435 firms had revenue of less than $10 million. Based on this information, the majority of firms in this industry can be considered small under the SBA small business size standard.

31. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

32. In cases where consumers invoke their right to grant or revoke consent to small entity callers to receive robocalls and robotexts under the TCPA, these callers may need to implement new methods to record and track such requests to honor them within the specified timeframes. At this time however, the Commission is not in a position to determine whether, if adopted, its proposals and the matters upon which it seeks comment will require small entities to hire professionals to comply, and cannot quantify the cost of compliance with the potential rule changes discussed herein. It anticipates the information it receives in comments including where requested, cost and benefit analyses, will help the Commission identify and evaluate additional relevant compliance matters for small entities, including compliance costs and other burdens that may result from the proposals and inquiries it makes in the *NPRM.*

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant alternatives, specifically small business alternatives, that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

34. The *NPRM* specifically seeks comment on any costs or burdens imposed on callers to implement any of the proposals set forth in the *NPRM* which could help the Commission identify burdens for small entities and other actions that can be taken to minimize impact on small entities. For example, the *NPRM* proposes and seeks comment on what constitutes a ''reasonable'' manner to revoke consent, noting that it is not without limitation. An alternative consideration is whether callers will have an opportunity to demonstrate that a consumer has not used a reasonable means to convey their revocation of consent request. Allowing this flexibility may reduce the burden on small entities' ability to respond to process revocation requests. The *NPRM* considers any compliance costs for small businesses if the proposed rules are adopted and seeks comment on ways to minimize any such burdens. The *NPRM* also proposes that callers must honor do-not-call and revocation requests within 24-hours, and seeks comment on whether other timeframes should be considered, including whether small entities may benefit from longer timeframes to implement these requests. Many of the requirements noted in the *NPRM* have been adopted by the Commission in rulings that date back many years. As a result, the Commission anticipates that many callers have already made efforts to comply with these obligations and may have no new burdens.

35. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the *NPRM* and this IRFA, in reaching its final conclusions and taking action in this proceeding.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

36. None.

List of Subjects in 47 CFR Part 64

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 617, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

Subpart L—Restrictions on Telemarketing, Telephone Solicitations, and Facsimile Advertising

■ 2. Section 64.1200 is amended by revising paragraph (a)(9)(i)(F) and adding paragraphs (a)(9)(v), (10), and (11) and revising paragraph (d)(3) to read as follows:

§ 64.1200 Delivery restrictions.

* * * * *.

(a) * * *

(9) * * *

(i) * * *

(F) The package delivery company must offer package recipients the ability to opt out of receiving future delivery notification calls and messages and

must honor an opt-out request immediately; and,

* * * * *

(v) Calls made by a wireless service provider to an existing subscriber, provided that all of the following conditions are met:

(A) voice calls and text messages are initiated by a wireless service provider only to an existing subscriber of that wireless service provider at a number maintained by the wireless service provider;

(B) voice calls and text messages must state the name and contact information of the wireless provider (for voice calls, these disclosures must be made at the beginning of the call);

(C) voice calls and text messages must not include any telemarketing, solicitation, or advertising;

(D) voice calls and text messages must be concise, generally one minute or less in length for voice calls or 160 characters or less in length for text messages;

(E) a wireless service provider may initiate a maximum of three voice calls or text messages during any 30-day period;

(F) a wireless service provider must offer recipients within each message an easy means to opt out of future such messages; voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call; voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls; text messages must inform recipients of the ability to opt out by replying ''STOP''; and,

(G) a wireless service provider must honor opt-out requests immediately.

* * * * *

(10) A called party may revoke prior express consent, including prior express written consent, to receive calls or text messages made pursuant to paragraphs (a)(1) through (3) of this section by using any reasonable method to clearly express a desire not to receive further calls or text messages from the caller or sender. The use of text message, voicemail, or email to any telephone number or email address at which the consumer can reasonably expect to reach the caller to revoke consent creates a rebuttable presumption that the consumer has revoked consent absent evidence to the contrary. The sending of ''STOP'' or a similar text message that reasonably conveys a desire to not receive further messages in reply to an incoming text message creates a presumption that the consumer has revoked consent in a reasonable way. Callers or senders of text messages covered by paragraphs (a)(1) through (3) of this section may not designate an exclusive means to request revocation of consent. Should the text initiator choose to use a texting protocol that does not allow reply texts, it must provide a clear and conspicuous disclosure on each text to the consumer that two-way texting is not available due to technical limitations of the texting protocol, and clearly and conspicuously provide reasonable alternative ways to revoke consent. All requests to revoke prior express consent or prior express written consent made in any reasonable manner must be honored in a reasonable time not to exceed 24 hours from receipt of such request.

(11) A one-time text message confirming a request to revoke consent from receiving any further text messages does not violate paragraphs (a)(1) through (2) of this section as long as the confirmation text merely confirms the text recipient's revocation request and does not include any marketing or promotional information, and is the only additional message sent to the called party after receipt of the revocation request. To the extent that the text recipient has consented to several categories of text messages from the text sender, the confirmation message may request clarification as to whether the revocation request was meant to encompass all such messages; the sender must cease all further texts absent further clarification that the recipient wishes to continue to receive certain text messages.

* * * * *

(d) * * *

(3) *Recording, disclosure of do-not-call requests.* If a person or entity making an artificial or prerecorded-voice telephone call pursuant to an exemption under § 64.1200(a)(3)(ii) through (v) or any call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making such calls (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed 24 hours from the receipt of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the call is made, the person or entity on whose behalf the call is made will be liable for any failures to honor the do-not-call request. A person or entity making an artificial or prerecorded-voice telephone call pursuant to an exemption under § 64.1200(a)(3)(ii) through (v) or any call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a call is made or an affiliated entity.

* * * * *

[FR Doc. 2023–13821 Filed 6–28–23; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 88, No. 124
Thursday, June 29, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

UNITED STATES AFRICAN DEVELOPMENT FOUNDATION

Public Quarterly Meeting of the Board of Directors

AGENCY: United States African Development Foundation.

ACTION: Notice of meeting.

SUMMARY: The U.S. African Development Foundation (USADF) will hold its quarterly meeting of the Board of Directors to discuss the agency's programs and administration. This meeting will occur at the USADF office.

DATES: The meeting date is Tuesday, July 25, 2023, 9:00 a.m. to 12:00 noon.

ADDRESSES: The meeting location is USADF, 1400 I St. NW, Suite 1000, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Kerline Perry, (202)233–8805.

Authority: Public Law 96–533 (22 U.S.C. 290h).

Dated: June 26, 2023.

Wendy Carver,

Business Manager.

[FR Doc. 2023–13870 Filed 6–28–23; 8:45 am]

BILLING CODE 6117–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comments Requested

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology Comments regarding these information collections are best assured of having their full effect if received by July 31, 2023. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function

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

Agricultural Marketing Service

Title: Reporting and Recordkeeping Requirements for 7 CFR, part 29.

OMB Control Number: 0581–0056.

Summary of Collection: The Fair and Equitable Tobacco Reform Act of 2004 (7 U.S.C. 518) eliminated price supports and marketing quotas for all tobacco beginning with the 2005 crop year. Mandatory inspection and grading of domestic and imported tobacco were eliminated as well as the mandatory pesticide testing of imported tobacco and the tobacco Market News Program. The Tobacco Inspection Act (7 U.S.C. 511) requires that all tobacco sold at designated auction markets in the U.S. be inspected and graded. Provision is also made for interested parties to request inspection, pesticide testing and grading services on an ''as needed'' basis. The Act also provides for the establishment and maintenance of tobacco standards for U.S. grown types and the collection and dissemination of market news which are funded by appropriated money.

Need and Use of the Information: Information is collected through various forms and other documents for the inspection and certification process. Upon receiving request information from tobacco dealers and/or manufacturers, tobacco inspectors will pull samples and apply U.S. Standard Grades to tobacco samples providing the customer a Tobacco Inspection Certificate (TB–92). Also, samples can be submitted to a USDA laboratory for pesticide testing and a detailed analysis is provided to the customer.

Description of Respondents: Business or other for-profit.

Number of Respondents: 50.

Frequency of Responses: Recordkeeping; Reporting; On occasion.

Total Burden Hours: 3,651.

Agricultural Marketing Service

Title: Discharge and Delivery Survey Summary and Rate Schedule Forms.

OMB Control Number: 0581–0317.

Summary of Collection: The Food for Peace Act (specifically Pub. L. 480 Title II); Section 416(b) of the Agricultural Act of 1949; Food for Progress Act of 1985; 2002 and 2008 Farm Bills authorizing the McGovern-Dole International Food for Education Program; and Commodity Credit Corporation (CCC) Charter Act, all as amended, authorize the International Procurement Division to procure, sell, and transport, as well as sample, inspect and survey, agricultural commodities at both domestic and foreign locations for use in international food aid program. The Kansas City Commodity Office (KCCO) acting under the authority granted by these acts, purchase discharge survey services conducted at the foreign destinations to ensure count and condition of the commodities shipped. Agricultural Marketing Service (AMS) will collect information using forms KC–334, Discharge/Delivery Survey Summary and KC–337, Rate Schedule.

Need and Use of the Information: The information collected on the KC–334 form is a summary of the amount of cargo delivered versus manifested quantity, the amount and type of damage, etc. The KC–337 form is used to obtain rates that the survey companies charge to perform surveys, by country/region. Without the

information CCC could not meet program requirements.

Description of Respondents: Business or other for-profit; Not for-profit institutions.

Number of Respondents: 41.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly; Weekly; Semi-annually; Monthly; Annually.

Total Burden Hours: 234.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–13845 Filed 6–28–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0049]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Live Swine, Pork and Pork Products, and Swine Semen From the European Union

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the importation of live animals, animal germplasm, and animal products into the United States from the European Union.

DATES: We will consider all comments that we receive on or before August 28, 2023.

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

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Enter APHIS–2023–0049 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2023–0049, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *regulations.gov* or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the importation of animals and animal products into the United States from the European Union, contact Dr. Alexandra MacKenzie, Senior Veterinary Medical Officer, Live Animal Imports/Ruminants, Swine, Semen, and Embryos, Strategy and Policy, VS, APHIS, 4700 River Road, Unit 39, Riverdale, MD 20737; (301) 851–3411; email: *alexandra.mackenzie@usda.gov.* For more information on the information collection reporting process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2483; *joseph.moxey@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Importation of Live Swine, Pork and Pork Products, and Swine Semen From the European Union.

OMB Control Number: 0579–0218.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, among other things, has the authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict the import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease. Disease prevention is the most effective method for maintaining a healthy animal population and for enhancing APHIS' ability to compete in the world market of animal and animal product trade.

In connection with its disease prevention mission, APHIS regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases not present or prevalent in the United States. The regulations in 9 CFR parts 93, 94, and 98, prohibit or restrict the importation of specified animals, germplasm, and animal products to prevent the introduction of diseases such as classical swine fever (CSF), foot-and-mouth disease, swine vesicular disease, and African swine fever. In part 93, subpart E, among other things, provides importation requirements for live swine. Sections 94.2, 94.4, 94.8, 94.9, and 94.12 through 94.14 deal with the importation of pork and pork products from regions where these diseases exist. Section 94.10 addresses the requirements for the importation of live swine from regions where CSF exists. Section 94.13 concerns restrictions on the importation of pork or pork products from specified regions. Section 98.38 defines APHIS' requirements for the importation of swine semen.

APHIS determined that breeding swine, pork and pork products, and swine germplasm imported from specific regions of the European Union (EU) in accordance with other APHIS import requirements, pose a low risk of introducing foreign animal diseases into the United States. To further ensure that CSF is not introduced into the United States, regulations in parts 93, 94, and 98 allow, under specified conditions, the importation of live swine, pork and pork products, and swine germplasm from the APHIS-defined EU CSF region. These requirements necessitate the use of several information collection activities, including certification statements for the importation of pork, pork products, live swine, and swine germplasm.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.96 hours per response.

Respondents: Foreign animal health officials and importers of live swine, pork and pork products, and swine semen.

Estimated annual number of respondents: 16.

Estimated annual number of responses per respondent: 473.

Estimated annual number of responses: 7,566.

Estimated total annual burden on respondents: 7,230 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 23rd day of June 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–13803 Filed 6–28–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

International Trade Administration

TRADE AND DEVELOPMENT AGENCY

[Docket Number: 230615–0150]

Change in Deadline for Public Comments on Climate Adaptation Export Competitiveness Request for Information

AGENCY: U.S. Department of Commerce, International Trade Administration (ITA), U.S. Trade and Development Agency (USTDA).

ACTION: Notice and request for public comments; extension of comment period.

SUMMARY: On May 2, 2023, the International Trade Administration (ITA) and the U.S. Agency Trade and Development Agency (USTDA) published in the **Federal Register** a request for public comment on climate adaptation and resilience-related technologies and services to enhance the U.S. government's understanding of opportunities and challenges for U.S. exporters in these sectors. ITA and USTDA have determined that an extension of the comment period until July 28, 2023, is appropriate. Comments previously submitted need not be resubmitted and will be fully considered.

DATES: The comment period for the notice published on May 2, 2023, requesting public comments on climate adaptation export competitiveness, is extended from June 30, 2023, to July 28, 2023.

ADDRESSES: You may submit electronic comments, identified by Docket Number: 230417–0103 via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter Docket Number: 230417–0103 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

If you are unable to comment via *regulations.gov,* you may contact *climate@trade.gov* for instructions on submitting your comment.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by ITA or USTDA. Comments received before the deadline are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change.

Commenters should include the name of the person or organization filing the comment. All personal identifying information (for example, name, address) voluntarily submitted by the commenter may be publicly accessible. ITA and USTDA will not accept anonymous comments.

For those seeking to submit confidential business information (CBI) for government use only, please clearly mark such submissions as CBI and submit an accompanying redacted version to be made public.

FOR FURTHER INFORMATION CONTACT:

ITA, Anna Cron, International Trade Administration, 1401 Constitution Ave. NW, Washington, DC 20230; telephone: (202) 843–2376; email: *climate@trade.gov.* Please direct media inquiries to ITA's Office of Public Affairs (202) 482–3809 or *publicaffairs@trade.gov.*

USTDA, Eric Haxthausen, U.S. Trade and Development Agency; 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; telephone: (703) 875–4357; email: *climateadaptation@ustda.gov.* Please direct media inquiries to Paul Marin in USTDA's Office of Public Affairs at (703) 875–4357.

SUPPLEMENTARY INFORMATION: On May 2, 2023, ITA and USTDA published in the **Federal Register** a request for public comment on climate adaptation export competitiveness (88 FR 27552) to align U.S. government trade promotion and trade policy activities to those sectors and markets that present the greatest opportunities for exporters of climate adaptation and resilience-related technologies and services, as well as to address relevant trade barriers and promote U.S. industry competitiveness, as part of the initiative under Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad'' (86 FR 7619). E.O. 14008 puts climate considerations at the forefront of U.S. foreign policy and national security. The request for public comment stated that the comment period would close June 30, 2023. An extension of the comment period will provide additional opportunity for the public to prepare comments to address the questions posed by ITA and USTDA. Therefore, ITA and USTDA are extending the end of the comment period from June 30, 2023, to July 28, 2023. Comments previously submitted need not be resubmitted and will be fully considered.

Dated: June 21, 2023.

Man K. Cho,

Deputy Director, Office of Energy and Environmental Industries.

Eric M. Haxthausen,

Senior Advisor for Climate, Partnerships, and Innovation, U.S. Trade and Development Agency.

[FR Doc. 2023–13706 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Open Meetings of the Internet of Things Advisory Board

AGENCY: National Institute of Standards and Technology (NIST).

ACTION: Notice of open meetings.

SUMMARY: The Internet of Things (IoT) Advisory Board will meet August 22–23, 2023, and September 26–27, 2023, from 11 a.m. until 5 p.m., eastern time. All sessions will be open to the public.

DATES: The meetings will be held on August 22–23, 2023, and September 26–27, 2023, from 11 a.m. until 5 p.m., eastern time.

ADDRESSES: The meetings will be conducted virtually via Webex webcast hosted by the National Cybersecurity Center of Excellence (NCCoE) at NIST. Please note registration instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Barbara Cuthill, Information Technology Laboratory, National Institute of Standards and Technology, Telephone: (301) 975–3273, Email address: *barbara.cuthill@nist.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. 1001 *et seq.,* notice is hereby given that the IoT Advisory Board will hold open meetings on Tuesday, August 22 and Wednesday,

August 23, 2023; and Tuesday, September 26, 2023, and Wednesday, September 27, 2023, from 11 a.m. until 5 p.m., eastern time. All sessions will be open to the public. The IoT Advisory Board is authorized by section 9204(b)(5) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283) and advises the IoT Federal Working Group convened by the Secretary of Commerce pursuant to section 9204(b)(1) of the Act on matters related to the Federal Working Group's activities. Details regarding the IoT Advisory Board's activities are available at *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

The agendas for the August and September meetings are expected to focus on establishing consensus on the recommendations to be included in the IoT Advisory Board's report for the IoT Federal Working Group.

The recommendations and discussions are expected to focus on the specific focus areas for the report cited in the legislation and the charter:

- Smart traffic and transit technologies.
- Augmented logistics and supply chains.
- Sustainable infrastructure.
- Precision agriculture.
- Environmental monitoring.
- Public safety.
- Health care.

In addition, the IoT Advisory Board may discuss other elements that the legislation called for in the report:

- whether adequate spectrum is available to support the growing Internet of Things and what legal or regulatory barriers may exist to providing any spectrum needed in the future;
- policies, programs, or multi-stakeholder activities that—
  - promote or are related to the privacy of individuals who use or are affected by the Internet of Things;
  - may enhance the security of the Internet of Things, including the security of critical infrastructure;
  - may protect users of the Internet of Things; and
  - may encourage coordination among Federal agencies with jurisdiction over the Internet of Things.

Note that agenda items may change without notice. The final agendas will be posted on the IoT Advisory Board web page: *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Public Participation: Written comments from the public are invited and may be submitted electronically by email to Barbara Cuthill at the contact information indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice by 5 p.m. on August 15 for the August meeting, or by 5 p.m. on September 19 for the September meeting, for advance distribution to members.

Each IoT Advisory Board meeting agenda will include a period, not to exceed sixty minutes, for submitted comments from the public to be presented. Submitted comments from the public will be selected on a first-come, first-served basis and limited to five minutes per person for oral presentation if requested by the commenter.

Members of the public who wish to expand upon their submitted statements, those who had wished to submit a comment but could not be accommodated on the agenda, and those who were unable to attend the meeting via webinar are invited to submit written statements. In addition, written statements are invited and may be submitted to the IoT Advisory Board at any time. All written statements should be directed to the IoT Advisory Board Secretariat, Information Technology Laboratory by email to: *Barbara.Cuthill@nist.gov.*

Admittance Instructions: Participants planning to attend via webinar must register via the instructions found on the IoT Advisory Board's page *https://www.nist.gov/itl/applied-cybersecurity/nist-cybersecurity-iot-program/internet-things-advisory-board.*

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2023–13868 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–13–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; Marine Recreational Information Program Fishing Effort Survey

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on April 11, 2023 (88 FR 21628) during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA), Commerce.

Title: Marine Recreational Information Program, Fishing Effort Survey.

OMB Control Number: 0648–0652.

Form Number(s): None.

Type of Request: Regular submission (revision of a current information collection).

Number of Respondents: 183,333.

Average Hours per Response: 5 minutes.

Total Annual Burden Hours: 15,278.

Needs and Uses: This is a request for revision and extension of an approved information collection. The request includes a new pilot study to test a shorter reference period that will increase the utility of survey data and estimates for fisheries managers and stock assessment scientists by providing greater resolution and more timely access to survey products. Additionally, the Reporting Sensitivity Experiment survey has been completed and that collection will be removed from this control number.

Marine recreational anglers are surveyed to collect catch and effort data, fish biology data, and angler socioeconomic characteristics. These data are required to carry out provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), as amended, regarding conservation and management of fishery resources.

Marine recreational fishing catch and effort data are collected through a combination of mail surveys, telephone surveys, and on-site intercept surveys with recreational anglers. The Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES) is a self-administered, household mail survey that samples from a residential address frame to collect data on the number of recreational anglers and the number of recreational fishing trips. The survey estimates marine recreational fishing activity for all coastal states from Maine through Mississippi, as well as Hawaii and Puerto Rico. Currently, MRIP produces estimates for two-month reference waves. The proposed collection will include experimental work to evaluate shorter reference

periods that would more fully support fisheries management and stock assessment needs.

FES estimates are combined with estimates derived from complementary surveys of fishing trips, the Access-Point Angler Intercept Survey, to estimate total, state-level fishing catch, by species. These estimates are used in the development, implementation, and monitoring of fishery management programs by NOAA Fisheries, regional fishery management councils, interstate marine fisheries commissions, and state fishery agencies.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act.

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

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0652.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–13802 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD111]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Monkfish Research Set-Aside Working Group via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Monday, July 24, 2023, at 9 a.m.

ADDRESSES:

Webinar registration URL information: https://attendee.gotowebinar.com/register/5103572767688354907.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Monkfish Research Set-Aside (RSA) Working Group will meet to discuss any additional challenges to the Monkfish RSA program not previously identified. They will also discuss potential solutions to improve the Monkfish RSA program. For each potential solution, identify a concern/challenge that the solution addresses and any pros and cons for the potential solution. These will be further evaluated by working group members.

Other business may be discussed, as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: June 26, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–13872 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD115]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The MAFMC will hold a public meeting (webinar) of its Mackerel, Squid, and Butterfish (MSB) Advisory Panel. See **SUPPLEMENTARY INFORMATION** for agenda details.

DATES: The meeting will be held on Friday, July 14, 2023, from 9 a.m. to 12 p.m.

ADDRESSES: Webinar connection information will be posted to the calendar prior to the meeting at *www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The main purpose of the meeting is for the Advisory Panel (AP) to create Fishery Performance Reports that include advisor input on specifications and management measures for Atlantic mackerel and longfin squid, which have management track stock assessments underway. The AP will also review in-progress analyses being done to evaluate the historical performance of the Scup Gear Restricted Areas (GRAs), which impact squid fishing. Public comments will also be taken.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: June 26, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–13874 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD105]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Bluefish Monitoring Committee (MC) will hold a public meeting.

DATES: The meeting will be held on Wednesday, July 26, 2023, from 9 a.m. to 12:30 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar. Webinar connection, agenda items, and any additional information will be available at *www.mafmc.org/council-events.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331 or on their website at *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is for the Bluefish Monitoring Committee (MC) to recommend 2024–25 catch and landings limits as well as commercial and recreational management measures. To inform their recommendations, the MC will review recent catch and landings information, the Fishery Performance Report developed by the Advisory Panel, the 2024–25 ABC recommendation by the SSC, and other relevant information.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Spedden at the Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: June 26, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–13873 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD114]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic and New England Fishery Management Councils will hold a public meeting of their joint Northeast Trawl Advisory Panel.

DATES: The meeting will be held on Thursday, July 20, 2023, from 9 a.m. to 5 p.m. EDT. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: This meeting will be conducted in person with a virtual option available.

Meeting address: The meeting will be held at the Maritime Conference Center, 692 Maritime Boulevard, Linthicum Heights, MD 21090; telephone: 410–859–2893. Webinar registration details will be posted to the calendar at *www.mafmc.org* prior to the meeting.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Councils' Northeast Trawl Advisory Panel will meet to review recent developments related to relevant fishery surveys as well as discuss future priorities, research projects, and offshore wind fisheries monitoring surveys and survey mitigation.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shelley Spedden, (302) 526–5251 at least 5 days prior to the meeting date.

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

Dated: June 26, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–13880 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–C–2023–0009]

Study of the Patent Pro Bono Programs; Request for Comments; Extension of the Comment Period

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce.

ACTION: Request for comments; extension of the comment period.

SUMMARY: The United States Patent and Trademark Office (USPTO) recently sought public comments on topics related to the study of the patent pro bono programs identified in the Unleashing American Innovators Act of 2022. This study builds on the work the USPTO has conducted for over a decade, and has scaled during the Biden Administration, to bring more people in America into the innovation ecosystem. The USPTO believes that broadening access to the intellectual property system will create more jobs, foster economic prosperity, and promote the development of solutions for societal challenges. In response to stakeholder feedback, the USPTO is extending the comment period until August 11, 2023, to give interested members of the public additional time to submit comments.

DATES: Comments must be received by August 11, 2023.

ADDRESSES: For reasons of Government efficiency, comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–C–2023–0009 on the homepage and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this request for comments and click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Since comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone

number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery.

FOR FURTHER INFORMATION CONTACT: Will Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571–272–4097.

SUPPLEMENTARY INFORMATION: On April 12, 2023, the USPTO sought input from the public on the patent pro bono programs to evaluate the programs and make recommendations and improvements that will strengthen their reach and impact. See Study of the Patent Pro Bono Programs; Notice of Public Listening Sessions and Request for Comments, 88 FR 22012. The notice requested public comments by July 11, 2023.

In view of the importance of this effort, and in response to stakeholder feedback, the USPTO is extending the period for public comments on the patent pro bono programs until August 11, 2023. As stated in the April 12, 2023, notice, the USPTO seeks feedback from a broad range of stakeholders, including, but not limited to, inventors, small businesses, entrepreneurs, patent attorneys, patent agents, law firms, nonprofit organizations, academic institutions, public interest groups, and the general public. The USPTO desires feedback from stakeholders so it can, as appropriate, evaluate the programs and make recommendations to Congress regarding possible administrative and legislative actions. All other information provided in the April 12, 2023, notice remains unchanged. Previously submitted comments do not need to be resubmitted.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–13869 Filed 6–28–23; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Global Markets Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC) announces that on July 17, 2023, from 9 a.m. to 4 p.m. (Eastern Daylight Time), the Global Markets Advisory Committee (GMAC or Committee) will hold an in-person meeting for GMAC members at the New York Stock Exchange, 11 Wall Street, New York, New York, with options for the public to attend virtually. At this meeting, the GMAC will focus on topics related to U.S. Treasury market reforms, swap block thresholds, and tokenization of assets. The GMAC will also address procedural matters, including topics of discussion on a forward-looking basis.

DATES: The meeting will be held on July 17, 2023, from 9 a.m. to 4 p.m. (Eastern Standard Time). Members of the public who wish to submit written statements in connection with the meeting should submit them by July 24, 2023.

ADDRESSES: The meeting will take place at the New York Stock Exchange, 11 Wall Street, New York, New York, for GMAC members. Members of the public may attend the meeting virtually via teleconference or live webcast. You may submit public comments, identified by Global Markets Advisory Committee, through the CFTC website at *https://comments.cftc.gov.* Follow the instructions for submitting comments through the Comments Online process on the website. If you are unable to submit comments online, contact Brigitte Weyls, Designated Federal Officer, via the contact information listed below to discuss alternate means of submitting your comments. Any statements submitted in connection with the committee meeting will be made available to the public, including publication on the CFTC website, *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Brigitte Weyls, GMAC Designated Federal Officer, Commodity Futures Trading Commission, 77 West Jackson Blvd., Suite 800, Chicago, IL 60604; (312) 596–0700; or Gates S. Hurand, GMAC Alternate Designated Federal Officer, Commodity Futures Trading Commission, 290 Broadway, 6th Floor, New York, New York 10007 (646) 746–9700, *GMAC_Submissions@CFTC.gov.*

SUPPLEMENTARY INFORMATION: Members of the public may listen to the meeting by telephone by calling a domestic or international toll or toll-free number to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation. The meeting will also be open to the public via teleconference.

Domestic Toll and Toll-Free Numbers:

833 435 1820 U.S. Toll Free
833 568 8864 U.S. Toll Free
+1 669 254 5252 U.S. (San Jose)
+1 646 828 7666 U.S. (New York)
+1 646 964 1167 U.S. (U.S. Spanish Line)
+1 415 449 4000 U.S. (U.S. Spanish Line)
+1 551 285 1373 U.S.
+1 669 216 1590 US (San Jose)

International Toll- and Toll Free Numbers: Will be posted on the CFTC's website, *https://www.cftc.gov,* on the page for the meeting, under Related Links.

Call-In/Webinar ID: 161 909 7276.

Passcode/Pin Code: 284176.

Members of the public may also view a live webcast of the meeting via the *https://www.cftc.gov* website. The meeting agenda may change to accommodate other Committee priorities. For agenda updates, please visit *https://www.cftc.gov/About/AdvisoryCommittees/GMAC.*

After the meeting, a transcript of the meeting will be published through a link on the CFTC's website, *https://www.cftc.gov.* Persons requiring special accommodations to attend the meeting virtually or via teleconference because of a disability should notify the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Authority: 5 U.S.C. 1001 et seq.

Dated: June 26, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–13871 Filed 6–28–23; 8:45 am]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Agricultural Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC) announces that on July 19, 2023, from 9:00 a.m. to 10:45 a.m. (Eastern Daylight Time), the Agricultural Advisory Committee (AAC or Committee) will hold an in-person public meeting at the CFTC's Washington, DC headquarters with options for the public to attend virtually. At this meeting, the AAC will discuss topics related to the agricultural economy, including geopolitical and sustainability issues, as well as recent developments in the agricultural derivatives markets.

DATES: The meeting will be held on July 19, 2023, from 9:00 a.m. to 10:45 a.m. (Eastern Daylight Time). Members of the

public who wish to submit written statements in connection with the meeting should submit them by July 26, 2023.

ADDRESSES: The meeting will take place in the Conference Center at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581. You may submit public comments, identified by ''Agricultural Advisory Committee,'' through the CFTC website at *https://comments.cftc.gov.* Follow the instructions for submitting comments through the Comments Online process on the website. If you are unable to submit comments online, contact Swati Shah, Designated Federal Officer, via the contact information listed below to discuss alternate means of submitting your comments. Any statements submitted in connection with the committee meeting will be made available to the public, including publication on the CFTC website, *https://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Swati Shah, AAC Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC; (202) 418–5042; or *aac@cftc.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public with seating on a first-come, first-served basis. Members of the public may also listen to the meeting by telephone by calling a domestic or international toll or toll-free number to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation.

Domestic Toll-Free Number: 833–435–1820 or 833–568–8864.

Domestic Toll Number: 1–669–254–5252 or 1–646–828–7666 or 1–646–964–1167 or 1–551–285–1373 or 1–669–216–1590 or 1–415–449–4000.

International Toll- and Toll-Free Numbers: Will be posted on the CFTC's website, *https://www.cftc.gov,* on the page for the meeting, under Related Links.

Call-In/Webinar ID: 161 586 1406.

Pass Code/Pin Code: 609636.

Members of the public may also view a live webcast of the meeting via the *https://www.cftc.gov* website. The meeting agenda may change to accommodate other Committee priorities. For agenda updates, please visit *https://www.cftc.gov/About/AdvisoryCommittees/AAC.*

After the meeting, a transcript of the meeting will be published through a link on the CFTC's website, *https://www.cftc.gov.* Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person above.

(Authority: 5 U.S.C. 1009(a)(2).)

Dated: June 26, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023–13830 Filed 6–28–23; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0011]

Proposed Collection; Comment Request

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Army announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by August 28, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Army Headquarters Services, 9301 Chapek Road, Ft. Belvoir, VA 22060–5605, ATTN: Mr. Douglas Fravel, or call 571–515–0220.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: ArmyFit Program Azimuth Check Survey; OMB Control Number 0702–AFIT.

Needs and Uses: This collection supports the mission of the Army Resiliency Directorate (ARD), HQDA G–1, to improve the readiness of the force and quality of life for the soldiers. ARD owns the Army Fitness Platform (ArmyFit). ArmyFit hosts the Global Assessment Tool (GAT), which is an assessment promoting self-development through its user feedback and enables the creation of a customized ArmyFit profile that directs individuals to tailored self-development and training resources for soldiers, their families, and Army civilians. The Family GAT is a self-appraisal survey for assessing an individual's fitness in dimensions of strength: physical, emotional, social, spiritual, and family. It is a tool for building resilience. The survey is taken by all Soldiers and offered to family members, Department of the Army Civilians, and contractors.

Affected Public: Individuals or households.

Annual Burden Hours: 425.

Number of Respondents: 1,700.

Responses per Respondent: 1.

Annual Responses: 1,700.

Average Burden per Response: 15 minutes.

Frequency: On occasion.

Dated: June 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13810 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Research and Engineering, Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal advisory committee meeting of the Defense Science Board (DSB) will take place.

DATES: Closed to the public Wednesday, July 19, 2023 from 8:15 a.m. to 5:00 p.m. and Thursday, July 20, 2023 from 8:15 a.m. to 4:00 p.m.

ADDRESSES: The address of the closed meeting is the Executive Conference Center, 4075 Wilson Blvd., Floor 3, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Doxey, Designated Federal Officer (DFO), (703) 571–0081 (Voice), (703) 697–1860 (Facsimile), *kevin.a.doxey.civ@mail.mil* (Email). Mailing address is Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140. Website: *http://www.acq.osd.mil/dsb/.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of 5 United States Code (U.S.C.) chapter 10 (commonly known as the ''Federal Advisory Committee Act (FACA)''), 5 U.S.C. 552b(c) (commonly known as the ''Government in the Sunshine Act''), and sections 102–3.140 and 102–3.150 of title 41, Code of Federal Regulations (CFR).

Purpose of the Meeting: The mission of the DSB is to provide independent advice and recommendations on matters relating to the DoD's scientific and technical enterprise. The objective of the meeting is to obtain, review, and evaluate classified information related to the DSB's mission. DSB membership will meet to discuss the 2023 DSB Summer Study on Climate Change and Global Security (''the DSB Summer Study'').

Agenda: The meeting will begin on Wednesday, July 19, 2023 at 8:15 a.m. with administrative opening remarks from Mr. Kevin Doxey, DFO and Executive Director, and a classified overview of the objectives of the Summer Study from Dr. Eric Evans, the DSB Chair. Next, the DSB members will meet in a plenary session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. Following break, the DSB members will meet in a plenary session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. Next, members will meet in a breakout session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. The meeting will adjourn at 5:00 p.m. On Thursday, July 20, 2023, the DSB members will meet in a breakout session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. Next, the DSB members will meet in a plenary session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. Following break, the DSB members will meet in a plenary session to discuss classified strategies for anticipating the global stresses and possible conflict due to climate change. The meeting will adjourn at 4:00 p.m.

Meeting Accessibility: In accordance with 5 U.S.C. 1009(d) and 41 CFR 102–3.155, the DoD has determined that the DSB meeting will be closed to the public. Specifically, the Under Secretary of Defense for Research and Engineering, in consultation with the DoD Office of the General Counsel, has determined in writing that the meeting will be closed to the public because it will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is based on the consideration that it is expected that discussions throughout will involve classified matters of national security concern. Such classified material is so intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of the overall meetings. To permit the meeting to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the DSB's findings and recommendations to the Secretary of Defense and to the Under Secretary of Defense for Research and Engineering.

Written Statements: In accordance with 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration by the DSB at any time regarding its mission or in response to the stated agenda of a planned meeting. Individuals submitting a written statement must submit their statement to the DSB DFO at the email address provided in the **FOR FURTHER INFORMATION CONTACT** section at any point; however, if a written statement is not received at least three calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the DSB until a later date.

Dated: June 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13807 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–HA–0014]

Submission for OMB Review; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Health Related Behaviors Survey; OMB Control Number 0720–HRBS.

Type of Request: New.

Number of Respondents: 22,100.

Responses per Respondent: 1.

Annual Responses: 22,100.

Average Burden per Response: 20 minutes.

Annual Burden Hours: 7,367.

Needs and Uses: The Department of Defense's (DoD) Health Related Behaviors Survey (HRBS) is the largest population-based health survey of service members that collects self-report data on a number of important behavioral health issues affecting the wellbeing of active duty and reserve personnel. It provides a valuable snapshot of the overall behavioral health of the Force, both Active and

Reserve Components, and alerts DoD leadership to areas of success, as well as areas where more attention—resources and policies—may be needed.

The survey fulfills several DoD requirements. First, Department of Defense Instruction (DoDI) 1010.01, dated September 13, 2012, on the Military Personnel Drug Abuse Testing Program (MPDATP) states: ''Targeted and periodic surveys will be conducted of DoD MPDATP policy and guidance'' (p. 9); the HRBS is the survey used for that documentation and to assess the effectiveness of DoD's Drug Demand Reduction Program (DDRP). Second, the HRBS permits comparisons between military populations in health behaviors over time. Importantly and contrary to other similar total force surveys in the military, the HRBS is a confidential survey conducted external to the DoD by a Federally Funded Research and Development Center. Thus, the HRBS has the advantage of reducing the possibility of underreporting of health behavior concerns associated with possible career impacts such as substance misuse. The items in the HRBS are informed directly by stakeholders and workgroups across the DoD who use the findings and data to respond to a variety of requests related to frequency of health-related problems in their services and health topic areas. The HRBS also allows for comparisons between military and civilian populations and can be used to assess progress with respect to identified goals and objectives for population health and well-being. For roughly the past 40 years, the Office of Disease Prevention and Health Promotion has developed a set of evidence-based objectives aimed at improving the health of American citizens. Benchmarks are established for 10-year cycles and the current set of goals is outlined in Healthy People 2030 (HP2030). DoDI 1010.10 states that it is Department policy to ''Support the achievement of the Department of Health and Human Services' vision for improving the health of all Americans as outlined in Healthy People 2020.'' Data from the HRBS facilitate comparisons to the updated HP2030 objectives. The 2023 version of the HRBS will assess a number of topics, including substance use and abuse (*i.e.,* alcohol, tobacco, and illicit substances), physical and mental health, suicide, mental health service utilization, sexual health, and current topical issues affecting readiness.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: June 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13806 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0023]

Submission for OMB Review; Comment Request

AGENCY: Defense Finance and Accounting Service (DFAS), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Certificate for Child Annuitant; DD Form 2828; OMB Control Number 0730–0011.

Type of Request: Extension.

Number of Respondents: 240.

Responses per Respondent: 1.

Annual Responses: 240.

Average Burden per Response: 2 hours.

Annual Burden Hours: 480.

Needs and Uses: The information collection requirement is necessary to support an incapacitation occurring prior to age 18. The form provides the authority for the Defense Finance and Accounting Service (DFAS) to establish and pay a Retired Serviceman's Family Protection Plan (RSFPP) or Survivor Benefit Plan (SBP) annuity to the incapacitated individual.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: June 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13805 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0129]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Research and Engineering, (OUSD(R&E)), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Scholar Survey and Sponsoring Facilities (SF) Survey; OMB Control Number 0704–DSSS.

Type of Request: New.

SMART 2.0 Scholar Survey

Number of Respondents: 1,800.
Responses per Respondent: 1.
Annual Responses: 1,800.
Average Burden per Response: 30 minutes.
Annual Burden Hours: 900.

SMART 2.0 SF Survey

Number of Respondents: 60.
Responses per Respondent: 1.
Annual Responses: 60.
Average Burden per Response: 15 minutes.
Annual Burden Hours: 15.

Total Burden

Number of Respondents: 1,860.
Annual Responses: 1,860.
Annual Burden Hours: 915.

Needs and Uses: The information gathered through the ''Scholar Survey'' and ''Sponsoring Facilities Survey'' will inform the Department of Defense (DoD) on the Science, Mathematics and Research for Transformation (SMART) Scholarship for Service Program. The purpose of these surveys is to gain a better understanding of scholars' and sponsoring facilities' (SF) perspectives on the program and its impact on the scholar. Both surveys are part of a third-party evaluation of the SMART Program. The purpose of the scholar survey is to gain a deep perspective of SMART scholars who are participating or have participated in the program, understanding their perspective on how the SMART program operates, identifying program processes that are working well, suggesting what could be improved in the program, and determining the detailed outcomes of the program. The purpose of the SF survey is to gain a perspective of DoD facilities who are participating in the program, understanding their perspective on how the SMART program operates, identifying program processes that are working well, and suggesting what could be improved in the program. Both surveys aim to help improve the SMART Program.

Affected Public: Individuals or households.

Frequency: Once.

R*espondent's Obligation:* Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: June 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13804 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2023–HQ–0014]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Navy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by August 28, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Navy Bureau of Medicine and Surgery (BUMED), 7700 Arlington Blvd., Ste. 5113, Falls Church,

VA 22042–5113, ATTN: Ms. Dhara Trivedi, or call 703–681–8984.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Navy Health Care Records System Forms; OMB Control Number 0703–BMFM.

Needs and Uses: The Navy uses the medical forms to document treatment and deliver care to patients who receive or have received care at one or more Department of Defense (DoD) medical treatment facilities (MTFs). The submitted Navy Medicine forms facilitate healthcare operations and ensure optimal medical readiness. In addition, the Navy Medicine forms are used for the initiation and processing, including litigation, of affirmative claims against potential third party payers.

Affected Public: Individuals or households.

Annual Burden Hours: 50,891.

Number of Respondents: 563,054.

Responses per Respondent: 1.

Annual Responses: 563,054.

Average Burden per Response: 5.42 minutes.

Frequency: On occasion.

Dated: June 22, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13809 Filed 6–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2020–FSA–0145]

Privacy Act of 1974; Matching Program

AGENCY: Federal Student Aid, U.S. Department of Education.

ACTION: Notice of a new matching program.

SUMMARY: This document provides notice of a new matching program between the between the U.S. Department of Education (ED or Department), as the recipient agency, and the U.S. Department of the Treasury (Treasury), Internal Revenue Service (IRS) as the source agency.

DATES: The period of this matching program is estimated to cover the 18-month period from July 21, 2023 through January 20, 2025. However, the matching program will become applicable at the later of the following two dates: July 21, 2023, or 30 days after the publication of this notice, on June 29, 2023, unless comments have been received from interested members of the public requiring modification and republication of the notice. The matching program will continue for 18 months after the applicable date and may be extended for up to an additional 12 months, if the Data Integrity Boards (DIBs) of ED and Treasury determine that the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

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 submitted by fax or by email, or comments submitted after the comment period. To ensure that the Department does not receive duplicate copies, please submit your comments only once. In addition, 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 is generally to make comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov*. Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Zelma Barrett, Program and Budget Analyst, U.S. Department of Education, Federal Student Aid, Washington, DC 20202. Telephone: (202) 377–4308.

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

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988 and the Computer Matching and Privacy Protection Amendments of 1990 (Privacy Act) (5 U.S.C. 552a), and Office of Management and Budget (OMB) guidance on the conduct of matching programs, notice is hereby given of the establishment of a matching program between the U.S. Department of Education, as the recipient agency, and the U.S. Department of the Treasury, Internal Revenue Service, as the source agency, under the authority of the Fostering Undergraduate Talent by Unlocking Resources for Education Act (FUTURE Act), Public Law 116–91, 133 Stat. 1189–1197 (2019), as amended by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116–136, 134 Stat. 281–615 (2020), and the FAFSA Simplification Act, title VII of division FF of Public Law 116–260, 134 Stat. 3137–3201 (2020) (which is part of the Consolidated Appropriations Act, 2021), as amended by the FAFSA Simplification Act Technical Corrections Act, division R of Public Law 117–103, 136 Stat. 819–821 (2022) (which is part of the Consolidated Appropriations Act, 2022).

The FUTURE Act amended section 6103(l)(13) of the Internal Revenue Code (IRC) to authorize the IRS to disclose to ED certain Federal tax information (FTI) of an individual, upon approval being provided by the individual to ED, for the purpose of determining eligibility for, or repayment of obligations under, Income-Driven Repayment (IDR) plans under title IV of the Higher Education Act of 1965, as amended (HEA)(20 U.S.C. 1070 *et seq.*), with respect to loans under part D of title IV of the HEA; and determining eligibility for, and the amount of, Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA. The FTI that the IRS discloses to ED under sections 6103(l)(13)(A) and (C) of the IRC may also be used by ED for the purposes of: (a) reducing the net cost of improper payments: (i) under IDR plans and (ii) relating to awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA; (b) oversight by ED's Office of Inspector General (OIG) as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions; and (c) conducting analyses and forecasts for estimating costs related to: (i) IDR plans and (ii) awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA as set forth in section 6103(l)(13)(D) of the IRC. The FTI will not duplicated or redisclosed for these uses. However, the FTI may be redisclosed by ED, with the written consent of the taxpayer with respect to whom the FTI relates, in accordance with section 6103(l)(13)(D)(iii) of the IRC, solely for use in the application, award, and administration of financial aid awarded by the Federal government or certain persons described in sections 6103(l)(13)(D)(iii)(I)–(III) of the IRC to an

institution of higher education participating in a program under subpart 1 of part A, part C, or part D of title IV of the HEA, a State higher education agency, or a scholarship organization which is an entity designated by the Secretary of ED prior to December 19, 2019 under section 483(a)(3)(E) of the HEA.

In accordance with the Privacy Act, OMB ''Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988,'' published in the **Federal Register** on June 19, 1989 (54 FR 25818–25829), and OMB Circular No. A–108, notice is hereby provided of the establishment of a matching program between the IRS and ED pursuant to which the IRS will disclose to ED certain FTI of an individual, upon approval being provided by the individual to ED, for the purpose of determining eligibility for, or repayment obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA; and determining eligibility for, and amount of, Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA.

The FTI that the IRS discloses to ED under sections 6103(l)(13)(A) and (C) of the IRC may also be used by ED for the purposes of: (a) reducing the net cost of improper payments: (i) under IDR plans and (ii) relating to awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA; (b) oversight by ED's OIG as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions; and (c) conducting analyses and forecasts for estimating costs related to: (i) IDR plans and (ii) awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA, as set forth in section 6103(l)(13)(D) of the IRC. The FTI will not duplicated or redisclosed for these uses.

PARTICIPATING AGENCIES:

ED and IRS.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

This matching program is authorized by the FUTURE Act, as amended. The FUTURE Act amended section 6103(l)(13) of the IRC to authorize the IRS to disclose to ED certain FTI for the purposes set forth in the **SUPPLEMENTARY INFORMATION** section of this Notice provided certain conditions are satisfied. In addition, 5 U.S.C. 552a(b)(3) provides authority for the IRS to disclose Privacy Act-protected records to ED pursuant to a published routine use in an applicable system of records notice for a purpose that is compatible with the purposes for which the IRS collected the records. Further, ED is authorized to participate in the matching program pursuant to the HEA, including sections 483 and 494(a) and (b) of the HEA (20 U.S.C. 1090 and 1098h(a) and (b)) and the FUTURE Act.

PURPOSE(S):

The purpose of this matching program between the IRS and ED is for the IRS to disclose to ED certain FTI of an individual, upon approval being provided by the individual to ED, for determining eligibility for, or repayment obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA; and determining eligibility for, and amount of, Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA.

The FTI that the IRS discloses to ED under sections 6103(l)(13)(A) and (C) of the IRC may also be used by ED for the purposes of: (a) reducing the net cost of improper payments: (i) under IDR plans and (ii) relating to awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA; (b) oversight by ED's OIG as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions; and (c) conducting analyses and forecasts for estimating costs related to: (i) IDR plans and (ii) awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of the HEA, as set forth in section 6103(l)(13)(D) of the IRC. The FTI will not be duplicated or redisclosed for these uses.

The FTI information that ED will obtain as a result of this matching program effectuates the purpose of the HEA because it provides an efficient and comprehensive match to determine eligibility for, and the amount of, Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA, and eligibility for, or repayment obligations under, IDR plans for loans under the Federal Direct Loan Program.

CATEGORIES OF INDIVIDUALS:

This matching program covers students (including a student's spouse for an independent student and a student's parent(s) for dependent student) who apply for Federal student financial assistance under title IV of the HEA through the Free Application for Federal Student Aid (FAFSA®) and borrowers (including spouses of borrowers who are independent students) who have had a loan disbursed and are fully responsible to pay the loan and interest back to the loan holder under applicable Federal student loan programs administered under the authority of title IV of the HEA, or who have such a loan written off due to default. This matching program also includes as a ''borrower'' an individual who is responsible for completing a service obligation and fails to complete the service obligation in exchange for having received a grant under the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program authorized under subpart 9 of part A of title IV of the HEA.

CATEGORIES OF RECORDS:

This matching program covers the following categories of records:

(1) An applicant's information submitted to ED to determine the applicant's eligibility for Federal student financial assistance under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA;

(2) A borrower's information submitted to ED to determine the borrower's eligibility for, or repayment obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA;

(3) An applicant's approval and consent submitted to ED to process an application for determining eligibility for Federal student financial assistance under a program authorized under subpart 1 of part A, part C, or part D of aid under title IV of the HEA;

(4) A borrower's approval and consent submitted to ED to process an application for determining eligibility for, or repayment obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA; and

(5) FTI on individuals from the IRS' Customer Account Data Engine (CADE) Individual Master File.

More specifically, ED will transmit the following specific data elements to the IRS under the matching program:

(1) Social Security Number (SSN)/ Taxpayer Identification Number (TIN);

(2) Tax year for which FTI is required;

(3) Last name;

(4) Date of birth (DOB);

(5) Unique identifier; and

(6) Date/time stamp of the individual's approval for use of FTI in determining eligibility by ED.

In addition, in response to a valid request submitted by ED to the IRS pursuant to section 6103(l)(13)(A) of the IRC (IDR request) that matches a tax record for the requested SSN/TIN and tax year, the IRS will return the following specific data elements to ED:

(1) SSN/TIN (provided in the request);

(2) Tax year (associated with FTI provided);

(3) Last name;

(4) Filing status code;

(5) Adjusted gross income (AGI) amount;

(6) Total number of exemptions; and

(7) Total number of dependents.

Further, in response to a valid request submitted by ED to the IRS pursuant to section 6103(l)(13)(C) of the IRC (FAFSA request) that matches a tax record for the requested SSN/TIN and tax year, the IRS will return the following specific data elements to ED:

(1) SSN/TIN (provided in the request);

(2) Tax year (provided in the request);

(3) Last name (provided in the request);

(4) Filing status code;

(5) AGI amount;

(6) Total number of exemptions;

(7) Total number of dependents;

(8) Income earned from work (sum of wages, farm income, Schedule C income);

(9) Total amount of income tax paid;

(10) Total allowable education credits;

(11) Sum of untaxed IRA contributions and other payments to qualified plans;

(12) Total amount of untaxed IRA distributions;

(13) Tax exempt interest;

(14) Sum of untaxed pensions and annuities;

(15) Net profit/loss from Schedule C; and

(16) Indicator of filing for Schedules A, B, D, E, F, and H.

SYSTEM(S) OF RECORDS:

ED will disclose, with written consent, to the IRS information under this matching program from ED's systems of records notice entitled ''FUTURE Act System (FAS)'' (18–11–23), which will be published in the **Federal Register**.

The IRS will disclose to ED FTI under this matching program from the IRS's system of records notice entitled ''Customer Account Data Engine (CADE) Individual Master File (IMF)—Treasury/IRS'' (Treasury/IRS 24.030), published in the **Federal Register** on September 8, 2015 (80 FR 54082–54083).

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

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

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

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2023–13846 Filed 6–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0115]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Assessment of Educational Progress (NAEP) 2024 Amendment #2

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before July 31, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Assessment of Educational Progress (NAEP) 2024 Amendment #2.

OMB Control Number: 1850–0928.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Individuals and households.

Total Estimated Number of Annual Responses: 866,587.

Total Estimated Number of Annual Burden Hours: 486,305.

Abstract: The National Assessment of Educational Progress (NAEP), conducted by the National Center for Education Statistics (NCES), is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, technology, and engineering literacy (TEL), and the arts. The National Assessment of Educational Progress Authorization Act (Pub. L. 107–279 title III, section 303) requires the assessment to collect data on specified student groups and characteristics, including information organized by race/ethnicity, gender, socio-economic status, disability, and limited English proficiency. It requires

fair and accurate presentation of achievement data and permits the collection of background, noncognitive, or descriptive information that is related to academic achievement and aids in fair reporting of results. The intent of the law is to provide representative sample data on student achievement for the nation, the states, and subpopulations of students and to monitor progress over time. NAEP consists of two assessment programs: the NAEP long-term trend (LTT) assessment and the main NAEP assessment. The LTT assessments are given at the national level only and are administered to students at ages 9, 13, and 17 in a manner that is very different from that used for the main NAEP assessments. LTT reports mathematics and reading results that present trend data since the 1970s. In addition to the operational assessments, NAEP uses two other kinds of assessment activities: pilot assessments and special studies. Pilot assessments test items and procedures for future administrations of NAEP, while special studies (including the National Indian Education Study (NIES), the Middle School Transcript Study (MSTS), and the High School Transcript Study (HSTS)) are opportunities for NAEP to investigate particular aspects of the assessment without impacting the reporting of the NAEP results.

The initial request for clearance of NAEP 2024 received OMB approval in April 2023 (OMB# 1850–0928 v.28). Amendment #1 to the NAEP 2024 clearance package received OMB approval in June 2023 (OMB#1850–0928 v.29). Since that package's submission for public comment and OMB approval, changes have occurred to the scope of the 2024 NAEP administration, including the addition of: (1) Addition of Reading Router Pilot for grades 4 and 8, increasing costs, (2) Addition of School and District Technology Coordinator roles and SBE survey completion, increasing burden hours, (3) Addition of protocols for the health and safety of field staff, increasing costs, (4) Reduction in SQ burden time for students, teachers and schools since COVID–19 learning recovery items are no longer adding additional time to the SQs; rather, other items were dropped to accommodate these items, reducing burden hours; and (5) Addition of Field Trial for grades, 4, 8 and 12, increasing burden hours and costs. This revision updates Part A and Part B detailing the changes to scope and references to the communication materials and the amendment schedule, Appendix A, Appendix B, Appendix C, Appendix D (added communication materials), Appendix G, Appendix I, and Appendices J1, J2, J3, and J–S to include the operational survey questionnaires (SQs), COVID–19 Learning Recovery SQs, NIES SQs, and Pilot SQs.

Dated: June 26, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–13832 Filed 6–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities—National Center for Supporting School Building and Early Intervention Program Administrators To Effectively Implement IDEA and Improve Systems Serving Children With Disabilities

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for a new award for fiscal year (FY) 2023 for a National Center for Supporting School Building and Early Intervention Program (EIP) Administrators to Effectively Implement the Individuals with Disabilities Education Act (IDEA) and Improve Systems Serving Children with Disabilities, Assistance Listing Number 84.325Z. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: June 29, 2023.

Deadline for Transmittal of Applications: August 18, 2023.

Pre-Application Webinar Information: No later than July 5, 2023, the Office of Special Education and Rehabilitative Services will post details on pre-recorded informational webinars designed to provide technical assistance (TA) to interested applicants. Links to the webinars may be found at *https://www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html.*

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

FOR FURTHER INFORMATION CONTACT: Sarah Allen, U.S. Department of Education, 400 Maryland Avenue SW, Room 5135, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7875. Email: *Sarah.Allen@ed.gov.*

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

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of the program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants and toddlers, and youth with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research, to be successful in serving those children.

Priority: This competition includes one absolute priority. In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute (see sections 662 and 681 of IDEA; 20 U.S.C. 1462 and 1481).

Absolute Priority: For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

The National Center for Supporting School Building and EIP Administrators to Effectively Implement IDEA and Improve Systems Serving Children with Disabilities.

Background:

Nearly 50 years after the enactment and implementation of the Education for All Handicapped Children Act of 1975 (reauthorized as IDEA), which mandated that all children with disabilities have access to a free appropriate public education (FAPE) in the least restrictive environment (LRE), to the extent appropriate, the IDEA is still not being implemented fully and

consistently across all States and for all eligible children. Sections 616(d) and 642 of IDEA require the Secretary to make an annual determination as to the extent to which each State's Part B and Part C programs are meeting the requirements of IDEA. In FY 2022, only 37 percent of States and entities, or 22 of 60, met the Part B requirements of IDEA. Similarly, only 54 percent, or 30 of 56, States and entities met the Part C requirements of IDEA (U.S. Department of Education, 2022).

Under section 612(a)(11) of IDEA, the State educational agency (SEA) is responsible for ensuring that all local educational agencies (LEAs) within the State provide FAPE in the LRE to all children and youth with disabilities served under Part B (children with disabilities) within their local jurisdiction. Similarly, under section 635(a)(10) of IDEA, the State lead agency, either directly or through its early intervention service (EIS) providers under 34 CFR 303.12, is responsible for providing early intervention services to eligible infants and toddlers with disabilities and their families. School building administrators, including principals and vice principals, and EIP administrators (which may include administrators responsible for managing personnel in State lead agencies, EIS providers, and EIS programs) are on the front lines of IDEA implementation and are responsible for ensuring children with disabilities are provided the services and supports for which they are eligible under the IDEA as well as others intended to protect children with disabilities, including under Section 504 of the Rehabilitation Act. School building and EIP administrators help set high expectations for performance in schools and among EIS providers and ensure that the unique, individualized needs of each infant, toddler, or child with a disability are met consistent with their individualized education program (IEP) or individualized family service plan (IFSP).

School building and EIP administrators must manage resources, personnel, and a myriad of educational and other programs in their schools and EIPs and ensure compliance with multiple interacting laws protecting children with disabilities. Because these administrators are required to make decisions about the operations and financial support of the programs offered in their building, it is essential that these school building and EIP administrators have the knowledge, skills, and competencies to ensure, consistent with the IDEA requirements, the delivery of FAPE in the LRE for children with disabilities or the provision of early intervention services for infants and toddlers with disabilities and their families.

Given that school building and EIP administrators have complex roles, it is not surprising that those who are well trained handle the multi-faceted demands of the role better and tend to stay in their jobs longer (Herman et al., 2022). They are instrumental in supporting teachers and providers' practices, motivating school and EIP staff, maintaining a positive school or program climate, and ensuring inclusive settings are offered. High turnover of school building and EIP administrators can be disruptive to maintaining an environment that supports appropriate outcomes for children with disabilities. As a result, high administrator turnover can lead to higher teacher and provider turnover and lower child outcomes (*e.g.,* lower student achievement, lower gains in learning or development outcomes for young children) (Levin & Bradley, 2019). Access to professional learning opportunities is an important factor influencing job satisfaction and retention of administrators (Boyce & Bowers, 2016). In addition to covering essential research-based content on topics such as learning and teaching, instructional leadership, data-based decision making, and systems improvement, the structure of continued professional development for administrators also matters (Darling-Hammond et al., 2022; Leung-Gagne et al, 2022). Especially important to building the capacity of administrators is access to coordinated, continued professional development with structured learning opportunities such as through a cohort model, mentoring, one-on-one coaching, networking to build a professional community, applied learning opportunities, and problem solving related to the needs of individual children, including children with disabilities, children who are multilingual, and children from diverse socioeconomic backgrounds. In addition, we know that school and district-based administrators' greatest source of evidence-based practices and policy content are their national and state affiliate professional organizations. As such, partnering with these organizations, for the center and local administrators, would be an effective and efficient way to facilitate the dissemination of IDEA implementation information.

The goals of this national center are to (a) increase the capacity of school building and EIP administrators to meet the statutory and procedural requirements of IDEA to ensure that each child with a disability in their school or EIP receives FAPE consistent with the child's IEP or early intervention services consistent with the infant or toddler's IFSP; and (b) increase the capacity of school building and EIP administrators to improve services and outcomes for children with disabilities. The National Center for Supporting School Building and Early Intervention Program Administrators to Effectively Implement IDEA and Improve Systems Serving Children with Disabilities will (1) develop and provide high-quality professional development on IDEA requirements and implementation (*e.g.,* IDEA related professional competencies) and essential research-based content on topics such as learning and teaching, the structure of continued professional development, instructional leadership, data-based decision making, and systems improvement to school building and EIP administrators; (2) build and support partnerships needed to support and sustain the delivery of intensive professional development on IDEA requirements and implementation to school building and EIP administrators to improve the outcomes of children with disabilities; and (3) develop and implement customized professional development and TA to address the unique needs and context of individual States and local environments.

Priority:

The purpose of this priority is to fund a cooperative agreement to establish and operate a National Center for Supporting School Building and EIP Administrators to Effectively Implement IDEA and Improve Systems Serving Children with Disabilities (Center). The Center will help SEAs and Part C lead agencies effectively implement IDEA by building the capacity of school building and EIP administrators to meet the requirements of IDEA.

The Center must achieve, at a minimum, the following expected outcomes:

(a) Establish and maintain State-level partnerships [1] to help local administrators attain and maintain the essential IDEA-related professional competencies needed to ensure the delivery of FAPE in the LRE for children with disabilities and the provision of early intervention services for infants

[1] For the purpose of this priority, ''State-level partnerships'' refers to State affiliates of nationally recognized professional and family networks that form an infrastructure for policy development, dissemination of information, interaction, and learning with, among other entities, SEA and Part C lead agencies, local educational agencies and service providers, and institutions of higher education (''State-level partners'').

and toddlers with disabilities and their families;

(b) Identify the IDEA-related professional competencies required for school building and EIP administrators to ensure the delivery of FAPE in the LRE for children with disabilities and early intervention services for infants and toddlers with disabilities and their families;

(c) Develop and disseminate openly licensed products designed for adult learners to increase knowledge, build skills, and provide practice-based opportunities that focus on the IDEA-related professional competencies that school building and EIP administrators must master to effectively implement IDEA in their school or EIP in order to improve outcomes for children;

(d) Deliver high-quality professional learning programs using the Center's openly licensed products and other available products designed for adult learners to increase knowledge, build skills, and provide practice-based opportunities that focus on the IDEA-related professional competencies that school building and EIP administrators must master to effectively implement IDEA in their school or EIP in order to improve outcomes for children;

(e) Evaluate the effectiveness over the life of the grant of professional development products and services the Center designed to increase the capacity of school building and EIP administrators to effectively implement IDEA, by identifying specific school building and EIP administrators to participate in a structured professional development program; and

(f) Enhance the capacity of State-level partners to use Center products and deliver high-quality professional development designed to increase the capacity of school building and EIP administrators to effectively implement IDEA.

In addition to these programmatic requirements, to be considered for funding under this priority, applicants must meet the application and administrative requirements in this priority, which are:

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how the proposed project will—

(1) Address the need in the field for increased knowledge of the professional competencies needed by school building and EIP administrators to support effective implementation of IDEA. To meet this requirement, the applicant must—

(i) Demonstrate knowledge of common factors for why States do not meet the requirements of IDEA and strategies to address these challenges to improve outcomes for children;

(ii) Demonstrate knowledge of the professional competencies that school building and EIP administrators need to manage effective implementation of IDEA and its interaction with other Federal laws protecting the rights of children with disabilities; and

(iii) Demonstrate knowledge of effective approaches to forming or expanding and maintaining State-level partnerships to collaboratively develop or expand and deliver knowledge, teaching, and learning tools and resources that support leadership development for school building and EIP administrators managing special education programs and EIPs and that focus on the implementation of IDEA. The leadership development activities must focus on a variety of entities, including local educational and early intervention agencies; schools; EIS providers and programs; institutions of higher education (IHEs); other nonprofit organizations that provide special education, early intervention, or related services to children, infants, and toddlers with disabilities and their families; and other TA providers;

(2) Demonstrate knowledge of effective approaches to forming or expanding and maintaining State-level partnerships to collaboratively develop or expand and deliver evidence-based [2] professional development to a variety of entities, including local educational and early intervention agencies; schools; EIS providers and programs; IHEs; other nonprofit organizations that provide special education, early intervention, or related services to children, infants, and toddlers with disabilities and their families; and other TA providers; and

(3) Improve outcomes for children with disabilities and their families by supporting school building and EIP administrators to effectively implement IDEA and improve systems serving children with disabilities and early intervention services for infants and toddlers with disabilities and their families. To meet this requirement, the applicant must—

(i) Present information and data on the current capacity of LEAs and EIS providers, IHEs, and other entities to provide training and TA needed to build the professional competencies of school building and EIP administrators to support delivery of special education and early intervention services, as mandated by IDEA;

(ii) Present information and data on the current capacity of LEAs and EIS providers, IHEs, and other entities to provide training and TA needed to build the professional competencies of school building and EIP administrators to improve systems delivering special education and early intervention services, as mandated by IDEA; and

(iii) Indicate the likely magnitude or importance of the improvements that the project is expected to make.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the proposed project will—

(1) Ensure equal access and treatment for members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability;

(2) Identify the needs of the intended recipients for TA and information, specifically the needs of school building and EIP administrators to meet the statutory and procedural requirements of IDEA, and ensure that products and services meet the needs of the intended recipients;

(3) Achieve its goals, objectives, and intended outcomes. To meet this requirement, the applicant must provide—

(i) Measurable intended project outcomes; and

(ii) In Appendix A, the logic model (as defined in 34 CFR 77.1) by which the proposed project will achieve its intended outcomes that depicts, at a minimum, the goals, activities, outputs, and intended outcomes of the proposed project;

(4) Use a conceptual framework (and provide a copy in Appendix A) to develop project plans and activities, describing any underlying concepts, assumptions, expectations, beliefs, or theories, as well as the presumed relationships or linkages among these variables, and any empirical support for this framework;

Note: The following websites provide more information on logic models and conceptual frameworks: *https://osepideasthatwork.org/sites/default/files/2021-12/ConceptualFramework_Updated.pdf* and *www.osepideasthatwork.org/resources-grantees/program-areas/ta-ta/tad-project-logic-model-and-conceptual-framework.*

(5) Be based on current research and make use of evidence-based practices (EBPs). To meet this requirement, the applicant must describe—

(i) The current research on the professional competencies,

[2] For the purposes of this priority, ''evidence-based'' means, at a minimum, evidence that demonstrates a rationale (as defined in 34 CFR 77.1), where a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

implementation science, systems change, capacity building, and essential research-based content on topics such as learning and teaching, the structure of continued professional development, instructional leadership, data-based decision making, and systems improvement, for school building and EIP administrators of IDEA;

(ii) The current research about adult learning principles that will inform the proposed product development, training, and TA; and

(iii) How the proposed project will incorporate current research and EBPs in the development and delivery of its products and services;

(6) Develop products and provide services that are of high quality and sufficient intensity and duration to achieve the intended outcomes of the proposed project. To address this requirement, the applicant must describe—

(i) How it proposes to develop or expand the knowledge base that delineates the professional competencies (*i.e.,* knowledge, skills, and dispositions) that school building and EIP administrators need to effectively implement IDEA and comply with other Federal laws protecting the rights of children with disabilities, support the delivery of FAPE to children with disabilities and early intervention services to infants and toddlers with disabilities and their families, and improve systems serving children with disabilities and their families;

(ii) Its plan to collaborate with State-level partners to develop and disseminate products and services for building the capacity of school building and EIP administrators to effectively implement IDEA, which should include, at a minimum, activities focused on—

(A) Establishing a cohort of States to assist in planning and development of products, training, and technical assistance protocols using their State-level partnerships; and

(B) Building the capacity of school building and EIP administrators in States, or in LEAs or EIPs, that do not meet requirements based on the Secretary's annual determination under section 616(d) of IDEA;

(iii) Its proposed approach to universal, general TA,[3] which must identify the intended recipients, including the type and number of recipients, that will receive the products and services under this approach and must include, at minimum, activities focused on—

(A) Partnering with SEAs and Part C lead agencies to support their efforts to develop and disseminate products for effective implementation of IDEA, including adding State-specific policies and procedures to such products, that align with Federal mandates for the delivery of FAPE in the LRE to children with disabilities and early intervention services to infants and toddlers with disabilities and their families;

(B) Partnering with State-level partners to support dissemination and use of Center products in personnel preparation and continuing professional development, and increase the reach of Center products and services to all States, the District of Columbia, U.S. territories, and, for Part B only, the freely associated States; and

(C) Differentiating products and services to address the roles and responsibilities of school building and EIP administrators in policy relating to, and management of, resources, personnel, and programs needed for effective implementation of IDEA;

(iv) Its proposed approach to targeted, specialized TA,[4] which must identify—

(A) The intended recipients, including the type and number of recipients, that will receive the products and services, a description of the products and services that the Center proposes to make available, and the expected impact of those products and services under this approach;

(B) Its proposed approach to identify the need for and measure the readiness of potential TA recipients to work with the project, assessing, at a minimum, the State's current determination status, with priority given to States that do not meet IDEA requirements based on the Secretary's annual determination under section 616(d) of IDEA, infrastructure, available resources, and ability to build capacity at the local level; and

(C) Its proposed approach to partner with SEAs and Part C lead agencies and collaborate with State-affiliated partners and Office of Special Education Programs (OSEP)-funded centers to support dissemination of products, training, and TA designed to address the needs of school building and EIP administrators across policy, management, and service delivery roles and responsibilities; and

(v) Its proposed approach to intensive, sustained TA,[5] which must—

(A) Identify the intended participants, including by Year 2, school building and EIP administrators in States or LEAs or EIPs that do not meet IDEA requirements based on the Secretary's annual determination under section 616(d) of IDEA;

(B) Include a description of the products and services that the Center proposes to make available, and the expected impact of those products and service under this approach;

(C) Describe its proposed approach to measure the readiness of the SEAs and Part C lead agencies to partner with the project; and

(D) Include its proposed plan for assisting SEAs and Part C lead agencies to partner with State-affiliated partners and OSEP-funded centers to build or enhance training systems that include professional development based on adult learning principles and coaching for school building and EIP administrators;

(7) Develop products and implement services that maximize efficiency. To address this requirement, the applicant must describe—

(i) How the proposed project will use technology to achieve the intended project outcomes;

(ii) With whom the proposed project will collaborate and the intended outcomes of this collaboration; and

(iii) How the proposed project will use non-project resources to achieve the intended project outcomes; and

(8) Develop a dissemination plan that describes how the applicant will systematically distribute information, products, and services to varied intended audiences, using a variety of dissemination strategies, to promote awareness and use of the Center's products and services.

[3] ''Universal, general TA'' means TA and information provided to independent users through their own initiative, resulting in minimal interaction with TA Center staff and including one-time, invited, or offered conference presentations by TA Center staff. This category of TA also includes information or products, such as newsletters, guidebooks, or research syntheses, downloaded from the TA Center's website by independent users. Brief communications by TA Center staff with recipients, either by telephone or email, are also considered universal, general TA.

[4] ''Targeted, specialized TA'' means TA services based on needs common to multiple recipients and not extensively individualized. A relationship is established between the TA recipient and one or more TA Center staff. This category of TA includes one-time, labor-intensive events, such as facilitating strategic planning or hosting regional or national conferences. It can also include episodic, less labor-intensive events that extend over a period of time, such as facilitating a series of conference calls on single or multiple topics that are designed around the needs of the recipients. Facilitating communities of practice can also be considered targeted, specialized TA.

[5] ''Intensive, sustained TA'' means TA services often provided on-site and requiring a stable, ongoing relationship between the TA Center staff and the TA recipient. ''TA services'' are defined as negotiated series of activities designed to reach a valued outcome. This category of TA should result in changes to policy, program, practice, or operations that support increased recipient capacity or improved outcomes at one or more systems levels.

(c) In the narrative section of the application under ''Quality of the project evaluation,'' include an evaluation plan for the project as described in the following paragraphs. The evaluation plan must describe measures of progress in implementation, including the criteria for determining the extent to which the project's products and services have met the goals for reaching its target population; measures of intended outcomes or results of the project's activities in order to evaluate those activities; and how well the goals or objectives of the proposed project, as described in its logic model, have been met.

The applicant must provide an assurance that, in designing the evaluation plan, it will—

(1) Designate, with the approval of the OSEP project officer, a project liaison with sufficient dedicated time, experience in evaluation, and knowledge of the project to work in collaboration with the Center to Improve Program and Project Performance (CIPP),[6] the project director, and the OSEP project officer on the following tasks:

(i) Revise the logic model submitted in the application to provide for a more comprehensive measurement of implementation and outcomes and to reflect any changes or clarifications to the model discussed at the kick-off meeting;

(ii) Refine the evaluation design and instrumentation proposed in the application consistent with the revised logic model and using the most rigorous design suitable (*e.g.,* prepare evaluation questions about significant program processes and outcomes; develop quantitative or qualitative data collections that permit both the collection of progress data, including fidelity of implementation, as appropriate, and the assessment of project outcomes; and identify analytic strategies); and

(iii) Revise the evaluation plan submitted in the application such that it clearly—

(A) Specifies the evaluation questions, measures, and associated instruments or sources for data appropriate to answer these questions, suggests analytic strategies for those data, provides a timeline for conducting the evaluation, and includes staff assignments for completing the evaluation activities;

(B) Delineates the data expected to be available by the end of the second project year for use during the project's evaluation (3+2 review) for continued funding described under the heading *Fourth and Fifth Years of the Project;* and

(C) Can be used to assist the project director and the OSEP project officer, with the assistance of CIPP, as needed, to specify the project performance measures to be addressed in the project's annual performance report;

(2) Dedicate sufficient staff time and other resources during the first six months of the project to collaborate with CIPP staff, including regular meetings (*e.g.,* weekly, biweekly, or monthly) with CIPP and the OSEP project officer, to accomplish the tasks described in paragraph (c)(1) of this section; and

(3) Dedicate sufficient funds in each budget year to cover the costs of carrying out the tasks described in paragraphs (c)(1) and (2) of this section and revising and implementing the evaluation plan. Please note in your budget narrative the funds dedicated for this activity.

(d) Demonstrate, in the narrative section of the application under ''Adequacy of resources and quality of project personnel,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key project personnel, consultants, and subcontractors have the qualifications and experience to carry out the proposed activities and achieve the project's intended outcomes;

(3) The applicant and any key partners have adequate resources to carry out the proposed activities; and

(4) The proposed costs are reasonable in relation to the anticipated results and benefits.

(e) Demonstrate, in the narrative section of the application under ''Quality of the management plan,'' how—

(1) The proposed management plan will ensure that the project's intended outcomes will be achieved on time and within budget. To address this requirement, the applicant must describe—

(i) Clearly defined responsibilities for key project personnel, consultants, and subcontractors, as applicable; and

(ii) Timelines and milestones for accomplishing the project tasks;

(2) Key project personnel and any consultants and subcontractors will be allocated and how these allocations are appropriate and adequate to achieve the project's intended outcomes;

(3) The proposed management plan will ensure that the products and services provided are of high quality, relevant, and useful to recipients; and

(4) The proposed project will benefit from a diversity of perspectives, including those of families, educators, TA providers, researchers, and policy makers, among others, in its development and operation.

(f) Address the following application requirements. The applicant must—

(1) Include, in Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(2) Include, in the budget, attendance at the following:

(i) A one and one-half day kick-off meeting in Washington, DC, after receipt of the award, and an annual planning meeting in Washington, DC, with the OSEP project officer and other relevant staff during each subsequent year of the project period.

Note: Within 30 days of receipt of the award, a post-award teleconference must be held between the OSEP project officer and the grantee's project director or other authorized representative;

(ii) A two and one-half day project directors' conference in Washington, DC, during each year of the project period;

(iii) Two annual two-day trips to attend Department briefings, Department-sponsored conferences, and other meetings, as requested by OSEP; and

(iv) A one-day intensive 3+2 review meeting in Washington, DC, during the last half of the second year of the project period;

(3) Include, in the budget, a line item for an annual set-aside of 5 percent of the grant amount to support emerging needs that are consistent with the proposed project's intended outcomes, as those needs are identified in consultation with, and approved by, the OSEP project officer. With approval from the OSEP project officer, the project must reallocate any remaining funds from this annual set-aside no later than the end of the third quarter of each budget period;

(4) Maintain a high-quality website, with an easy-to-navigate design, that

[6] The major tasks of CIPP are to guide, coordinate, and oversee the design of formative evaluations for every large discretionary investment (*i.e.,* those awarded $500,000 or more per year and required to participate in the 3+2 process) in OSEP's Technical Assistance and Dissemination; Personnel Development; Parent Training and Information Centers; and Educational Technology, Media, and Materials programs. The efforts of CIPP are expected to enhance individual project evaluation plans by providing expert and unbiased TA in designing the evaluations with due consideration of the project's budget. CIPP does not function as a third-party evaluator.

meets government or industry-recognized standards for accessibility;

(5) Ensure that annual project progress toward meeting project goals is posted on the project website; and

(6) Include, in Appendix A, an assurance to assist OSEP with the transfer of pertinent resources and products and to maintain the continuity of services to States during the transition to this new award period and at the end of this award period, as appropriate.

Fourth and Fifth Years of the Project: In deciding whether to continue funding the project for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a), including—

(a) The recommendations of a 3+2 review team consisting of experts who have experience and knowledge in implementing IDEA and improving systems serving children with disabilities. This review will be conducted during a one-day intensive meeting that will be held during the last half of the second year of the project period;

(b) The timeliness with which, and how well, the requirements of the negotiated cooperative agreement have been or are being met by the project; and

(c) The quality, relevance, and usefulness of the project's products and services and the extent to which the project's products and services are aligned with the project's objectives and likely to result in the project achieving its intended outcomes.

Under 34 CFR 75.253, the Secretary may reduce continuation awards or discontinue awards in any year of the project period for excessive carryover balances or a failure to make substantial progress. The Department intends to closely monitor unobligated balances and substantial progress under this program and may reduce or discontinue funding accordingly.

References

Boyce, J. & Bowers, A.J. (2016). Principal turnover: Are there different types of principals who move from or leave their schools? A latent class analysis of the 2007–2008 Schools and Staffing Survey and the 2008–2009 Principal Follow-Up Survey. *Leadership and Policy in Schools, 15*(3), 237–272.

Darling-Hammond, L., Wechsler, M.E., Levin, S., Leung-Gagné, M., & Tozer, S. (2022). Developing effective principals: What kind of learning matters? [Report]. Learning Policy Institute. *https://doi.org/10.54300/641.201.*

Herman, R., Wang, E.L., Woo, A., Gates, S.M., Berglund, T., Schweig, J., Andrew, M., & Todd, I. (2022). Redesigning university principal preparation programs: A systemic approach for change and sustainability. *A Rand Principal Preparation Series, 3*(2). *www.wallacefoundation.org/knowledge-center/pages/redesigning-university-principal-preparation-programs-a-systemic-approach-for-change-and-sustainability.aspx.*

Leung-Gagné, M., Levin, S., & Wechsler, M.E. (2022). *Developing effective principals: What kind of learning matters?* [Technical supplement]. Learning Policy Institute. *https://learningpolicyinstitute.org/product/developing-effective-principals-report.*

Levin, S. & Bradley, K. (2019). *Understanding and addressing principal turnover: A review of the research.* National Association of Secondary School Principals. *https://learningpolicyinstitute.org/product/nassp-understanding-addressing-principal-turnover-review-research-report.*

U.S. Department of Education, Office of Special Education Programs. 2022. 43rd Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2021. *www.ed.gov/about/reports/annual/osep.*

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the absolute priority in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: $3,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2024 from the list of unfunded applications from this competition.

Maximum Award: We will not make an award exceeding $15,000,000 for a project period of 60 months or an award that exceeds $4,000,000 for any single budget period.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; IHEs; other public agencies, including State lead agencies; private nonprofit organizations; public agencies from the freely associated States and outlying areas; Indian Tribes or Tribal organizations; and for-profit organizations.

2.a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to the Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: IHEs, nonprofit organizations, and public agencies. The grantee may award subgrants to entities it has identified in an approved application or that it selects through a competition under procedures established by the grantee, consistent with 34 CFR 75.708(b)(2).

4. *Other General Requirements:* a. Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

b. Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to the absolute priority, involve individuals with disabilities, or parents

of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. However, under 34 CFR 79.8, we waive intergovernmental review in order to man an award by the end of FY 2023.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 70 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed below:

(a) *Significance (10 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(b) *Quality of project services (35 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(iii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(iv) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(v) The extent to which the TA services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(c) *Quality of the project evaluation (20 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(d) *Adequacy of resources and quality of project personnel (15 points).*

(1) The Secretary considers the adequacy of resources for the proposed project and the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel.

(ii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(iii) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(iv) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(v) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(e) *Quality of the management plan (20 points).*

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and

milestones for accomplishing project tasks.

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(iv) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that applications may be separated into two or more groups and ranked and selected for funding within specific groups for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

6. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, we have established a set of performance measures, including long-term measures, that are designed to yield information on various aspects of the effectiveness and quality of the Technical Assistance and Dissemination to Improve Services and Results for Children With Disabilities program, which apply to projects funded under this competition. Grantees are required to submit data on these measures as directed by OSEP. These measures are:

- *Program Performance Measure 1:* The percentage of Technical Assistance and Dissemination products and services deemed to be of high quality by an independent review panel of experts qualified to review the substantive content of the products and services.
- *Program Performance Measure 2:* The percentage of Special Education Technical Assistance and Dissemination products and services deemed by an independent review panel of qualified experts to be of high relevance to special education personnel preparation and professional development, or practice.
- *Program Performance Measure 3:* The percentage of all Special Education Technical Assistance and Dissemination products and services deemed by an independent review panel of qualified experts to be useful in improving special education personnel preparation and professional development, or practice.
- *Program Performance Measure 4:* The cost efficiency of the Technical Assistance and Dissemination Program, including the percentage of milestones achieved in the current annual performance report period and the percentage of funds spent during the current fiscal year.
- *Long-term Program Performance Measure:* The percentage of States receiving Special Education Technical Assistance and Dissemination services regarding scientifically or evidence-based practices for children and youth with disabilities that successfully promote the implementation of those practices in school districts and service agencies.

Grantees will be required to report information on their project's performance in annual and final performance reports to the Department (34 CFR 75.590).

The Department will also closely monitor the extent to which the products and services provided by the Center meet needs identified by stakeholders and may require the Center to report on such alignment in its annual and final performance reports.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package 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.

Glenna Wright-Gallo,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2023–13934 Filed 6–27–23; 4:15 pm]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0116]

Agency Information Collection Activities; Comment Request; Student Support Services Annual Performance Report

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before August 28, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0116. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information

collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Lavelle Wright, 202–453–7739.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Student Support Services Annual Performance Report.

OMB Control Number: 1840–0525.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Private sector.

Total Estimated Number of Annual Responses: 1,161.

Total Estimated Number of Annual Burden Hours: 17,821.

Abstract: Student Support Services (SSS) program grantees must submit the Annual Performance Report (APR) annually. The reports are used to evaluate grantees' performance for substantial progress, respond to Government Performance and Results Act requirements, and award prior experience points at the end of each project (budget) period. The Department also aggregates the data to provide descriptive information on the projects and to analyze the impact of the SSS program on the academic progress of participating students.

The form has been revised to include an additional field addressing the Higher Education Act provision that requires the Secretary to report comparable data on the performance of not only first-generation and low-income students but also on students with disabilities. This field adds a small amount of additional burden per grantee.

Dated: June 26, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–13878 Filed 6–28–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

Filings in Existing Proceedings

Docket Numbers: PR23–48–001.

Applicants: Spire Storage Salt Plains LLC.

Description: Amendment Filing: Salt Plains revised SOC June 2023 to be effective 4/1/2023.

Filed Date: 6/22/23.

Accession Number: 20230622–5066.

Comment Date: 5 p.m. ET 7/13/23.

Protest Date: 5 p.m. ET 8/21/23

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: June 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13837 Filed 6–28–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2742–039]

Copper Valley Electric Association, Inc.; Notice of Intent To File License Application, Filing of Pre-Application Document, and Approving Use of the Traditional Licensing Process

a. *Type of Filing:* Notice of Intent to File License Application and Request to Use the Traditional Licensing Process.

b. *Project No.:* 2742–039.

c. *Date Filed:* April 28, 2023.

d. *Submitted By:* Copper Valley Electric Association, Inc. (CVEA).

e. *Name of Project:* Solomon Gulch Hydroelectric Project.

f. *Location:* On Solomon Lake and Solomon Gulch Creek, in the Chugach Census Area, in Valdez, Alaska. The project occupies Federal lands under the jurisdiction of the U.S. Bureau of Land Management.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Potential Applicant Contact:* Coreen Palacios, Copper Valley Electric, P.O. Box 45, Mile 187 Glenn Highway, Glenallen, AK 99588; (907) 822–8301; email—*CPalacios@cvea.org*.

i. *FERC Contact:* Lauren Townson at (202) 502–8572; or email at *Lauren.Townson@ferc.gov*.

j. CVEA filed a request to use the Traditional Licensing Process on April 28, 2023. CVEA provided public notice of its request on April 27, 2023. In a letter dated June 23, 2023, the Director of the Division of Hydropower

Licensing approved CVEA's request to use the Traditional Licensing Process.

k. With this notice, we are initiating informal consultation with the U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR part 402; and NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.920. We are also initiating consultation with the Alaska State Historic Preservation Officer, as required by section 106, National Historic Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating CVEA as the Commission's non-Federal representative for carrying out informal consultation pursuant to section 7 of the Endangered Species Act and section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act; and consultation pursuant to section 106 of the National Historic Preservation Act.

m. CVEA filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD may be viewed and/or printed on the Commission's website (*http://www.ferc.gov*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

o. The licensee states its unequivocal intent to submit an application for a new license for Project No.2742–039. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by May 31, 2026.

p. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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: June 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13838 Filed 6–28–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2126–007; ER10–2126–006; EL23–9–000.

Applicants: Idaho Power Company, Idaho Power Company.

Description: Supplement to March 7, 2023, Idaho Power Company to Notice of Change in Status and Response to Letter Requesting Additional Information, et al.

Filed Date: 6/15/23.

Accession Number: 20230615–5178.

Comment Date: 5 p.m. ET 7/6/23.

Docket Numbers: ER18–2358–007.

Applicants: GridLiance High Plains LLC, Southwest Power Pool, Inc.

Description: Compliance filing: Southwest Power Pool, Inc. submits tariff filing per 35: GridLiance—Compliance Filing in Response to Order issued in ER18–2358 to be effective 11/1/2018.

Filed Date: 6/23/23.

Accession Number: 20230623–5055.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–1765–001.

Applicants: Duke Energy Florida, LLC.

Description: Tariff Amendment: DEF–CFOTD Amended NITSA SA 147 to be effective 4/1/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5128.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–1814–001.

Applicants: Public Service Company of Colorado.

Description: Tariff Amendment: 2023–06–23–CSU SISA–744–Errata Filing to be effective 7/1/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5086.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–1854–001.

Applicants: Public Service Company of Colorado.

Description: Tariff Amendment: 2023–06–23–GrndVly–Ute Hydro–DWA–734–Errata Filing to be effective 6/1/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5081.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–1856–001.

Applicants: Arizona Public Service Company.

Description: Tariff Amendment: Rate Schedule No. 217, Exhibit B Administrative Filing, Amendment No. 1 to be effective 11/15/2010.

Filed Date: 6/23/23.

Accession Number: 20230623–5143.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2217–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX–AP Sunray 2nd A&R System Upgrade Agreement to be effective 6/1/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5036.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2218–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA and ICSA, SA Nos. 6606 and 6607; Queue No. AD1–022 to be effective 9/2/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5047.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2219–000.

Applicants: Kentucky Utilities Company.

Description: § 205(d) Rate Filing: Revisions to Wholesale Requirements Contracts for Bardstown and Nicholasville to be effective 7/1/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5054.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2220–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2023–06–23_SA 4094 NIPSCO–Valpo Solar GIA (J1332) to be effective 8/23/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5067.

Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2221–000.

Applicants: Big Savage, LLC.

Description: § 205(d) Rate Filing: Normal filing 2023 name change to be effective 6/24/2023.

Filed Date: 6/23/23.

Accession Number: 20230623–5073.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2222–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 2881R16 City of Chanute, KS NITSA NOA to be effective 9/1/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5084.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2223–000.
Applicants: San Diego Gas & Electric Company.
Description: § 205(d) Rate Filing: Arizona Transmission System Participation Agreement to be effective 7/18/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5088.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2224–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1976R13 FreeState Electric Cooperative, Inc. NITSA and NOA to be effective 9/1/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5090.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2225–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6949; Queue No. NQ–173 to be effective 5/26/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5094
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2226–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3620R5 Kansas City Board of Public Utilities NITSA NOA to be effective 9/1/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5098.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2227–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, SA No. 6963; Queue No. AF2–150 to be effective 5/24/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5108.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2228–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1636R29 Kansas Electric Power Cooperative, Inc. NITSA and NOA to be effective 9/1/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5111.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2229–000.
Applicants: San Diego Gas & Electric Company.
Description: § 205(d) Rate Filing: Service Agreement No. 67 to be effective 6/24/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5116.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2230–000.
Applicants: Boulder Solar II, LLC.
Description: § 205(d) Rate Filing: Boulder SFA, Boulder Shared Facilities Agreement No. 1 to be effective 6/26/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5136.
Comment Date: 5 p.m. ET 7/14/23.

Docket Numbers: ER23–2231–000.
Applicants: Idaho Power Company.
Description: § 205(d) Rate Filing: IPC/PAC B2H Transmission Project Construction Funding Agreement to be effective 6/7/2023.
Filed Date: 6/23/23.
Accession Number: 20230623–5141.
Comment Date: 5 p.m. ET 7/14/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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: June 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13836 Filed 6–28–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0136; FRL–11049–01–OCSPP]

Pesticide Registration Review; Sulfuryl Fluoride Revised Mitigation and Response to Comments on the Draft Interim Re-Entry Mitigation Measures Memorandum; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Sulfuryl Fluoride Revised Mitigation and Response to Comments on the Draft Interim Re-Entry Mitigation Measures Memorandum, which is being issued to address human health concerns and in response to EPA's Office of Inspector General 2016 (OIG) Report, *Additional Measures Can Be Taken to Prevent Deaths and Serious Injuries from Residential Fumigations* (No. 17–P–0053). Sulfuryl flouride is currently in registration review which is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without causing unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment. EPA may pursue mitigation at any time during the registration review process if it finds that a pesticide poses unreasonable adverse effects to human health or the environment. EPA believes that the mitigation measures outlined in the Sulfuryl Fluoride Revised Mitigation and Response to Comments on the Draft Interim Re-Entry Mitigation Measures Memorandum are necessary to address identified human health risk concerns from the use of sulfuryl fluoride as a structural fumigant in residential use sites.

ADDRESSES: The docket for this action, identified under docket identification (ID) number EPA–HQ–OPP–2009–0136, is available online at *https://www.regulations.gov.* Additional instructions on visiting the docket,

along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information contact:* Moana Appleyard, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2220; email address: *appleyard.moana@epa.gov.*

For general questions on the registration review program, contact: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental and human health advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2009–0136, is available at *https://www.regulations.gov.*

II. Background

Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. The sulfuryl flouride decision document, which is ahead of the typical mitigation phase of Registration Review, is in response to the EPA Office of the Inspector General's (OIG) 2016 report entitled *Additional Measures Can Be Taken to Prevent Deaths and Serious Injuries From Residential Fumigations* (available at: *https://www.epa.gov/sites/production/files/2016-12/documents/_epaoig_20161212-17-p-0053.pdf*). The Agency issued the Sulfuryl Fluoride Draft Interim Re-Entry Mitigation Measures in May 2021 for public comment. During the comment period, comments were received that resulted in changes to the Agency's mitigation decision, including revising the aeration procedures. The purpose of the Sulfuryl Fluoride Revised Mitigation and Response to Comments on the Draft Interim Re-Entry Mitigation Measures Memorandum is to announce the final risk mitigation measures to address these recommendations from the OIG Report and provide responses to the comments received on the draft interim risk mitigation measures. EPA expects that the implementation of the mitigation measures described in this risk mitigation document will allow sulfuryl fluoride products to remain available to users while addressing the recommendations from the OIG report.

Once all the risk assessments are completed for all the uses of sulfuryl fluoride, EPA may propose additional mitigation to address potential risks, as part of the normal registration review process. EPA will solicit public input on any additional risk mitigation in a Proposed Interim Decision (PID). Through the registration review program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

III. Authority

EPA is conducting its registration review of the sulfuryl fluoride documents listed in Unit IV pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

IV. What action is the Agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's Sulfuryl Fluoride Revised Mitigation and Response to Comments on the Draft Interim Re-Entry Mitigation Measures, to finalize the Agency's early mitigation in response to the OIG Report.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed. Background on the registration review program is provided at: *https://www.epa.gov/pesticide-reevaluation.*

Authority: 7 U.S.C. 136 *et seq.*

Dated: June 26, 2023.

Mary Elissa Reaves,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2023–13879 Filed 6–28–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2013–0437; FRL–11114–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Emission Control System Performance Warranty Regulations and Voluntary Aftermarket Part Certification Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Emission Control System Performance Warranty Regulations and Voluntary Aftermarket Part Certification Program (EPA ICR Number 0116.13, OMB Control Number 2060–0060) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through June 30, 2023. Public comments were previously requested via the **Federal Register** on October 5, 2022 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before July 31, 2023.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OAR–2013–0437, to EPA online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Lynn Sohacki, Compliance Division, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 2000 Traverwood, Ann Arbor, Michigan 48105; telephone number: 734–214–4851; fax number 734–214–4869; email address: *sohacki.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through June 30, 2023. 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.

Public comments were previously requested via the **Federal Register** on October 5, 2022 during a 60-day comment period (87 FR 60393). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Under Section 206(a) of the Clean Air Act (42 U.S.C. 7521), on-highway engine and vehicle manufacturers may not legally introduce their products into U.S. commerce unless EPA has certified that their production complies with applicable emission standards. Per section 207(a), original vehicle manufacturers must warrant that vehicles are free from defects in materials and workmanship that would cause the vehicles not to comply with emission regulations during their useful life. Section 207(a) directs EPA to provide certification to those manufacturers or builders of automotive aftermarket parts that demonstrate that the installation and use of their products will not cause failure of the engine or result in the vehicle not complying with emission standards. An aftermarket part is any part offered for sale for installation in or on a motor vehicle after such vehicle has left the vehicle manufacturer's production line (40 CFR 85.2113(b)). Participation in the aftermarket certification program is voluntary. Due to the fact that EPA has received only two aftermarket part certification applications since 1989, the Agency does not expect to receive any applications in the next three years. The purpose of this ICR renewal is to preserve EPA's authority to receive such an application in the event that one is submitted. Consequently, for the purposes of this information collection request, EPA has assumed that one manufacturer will apply for aftermarket part certification during the three-year period covered by this collection.

Aftermarket part manufacturers or builders (manufacturers) electing to participate conduct emission and durability testing as described in 40 CFR part 85, subpart V, and submit data about their products and testing procedures. Any information submitted to the Agency for which a claim of confidentiality is made is safeguarded according to policies set forth in CFR title 40, chapter 1, part 2, subpart B—Confidentiality of Business Information (see 40 CFR part 2).

Form Numbers: None.

Respondents/affected entities: Manufacturers or builders of automotive aftermarket parts.

Respondent's obligation to respond: Required to obtain or retain a benefit (Clean Air Act.)

Estimated number of respondents: 1 (total).

Frequency of response: On occasion.

Total estimated burden: 547 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $37,208 (per year), which includes $1,955 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is no change in the total estimated respondent burden compared with the ICR currently approved by OMB.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2023–13799 Filed 6–28–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0790, OMB 3060–0859; FR ID 151041]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before August 28, 2023. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should

advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0790.

Title: Section 68.110 (b), Availability of Inside Wiring Information.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 200 respondents; 1,200 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: Recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Mandatory. Providers of wireline telecommunications services that willfully or repeatedly fail to comply with this rule are subject to forfeitures under 47 CFR 1.80. Statutory authority for this collection of information is contained in 47 U.S.C. 151, 154, 201–205, 218, 220 and 405 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,200 hours.

Total Annual Cost: $5,000.

Needs and Uses: Section 68.110(b) requires that any available technical information concerning carrier-installed wiring on the customer's side of the demarcation point, including copies of existing schematic diagrams and service records, shall be provided by the telephone company upon request of the building owner or agent thereof. The provider of wireline telecommunications services may charge the building owner a reasonable fee for this service, which shall not exceed the cost involved in locating and copying the documents. In the alternative, the provider may make these documents available for review and copying by the building owner or his agent. In this case, the wireline telecommunications carrier may charge a reasonable fee, which shall not exceed the cost involved in making the documents available, and may also require the building owner or his agent to pay a deposit to guarantee the documents' return. The information is needed so that building owners may choose to contract with an installer of their choice on inside wiring maintenance and installation services to modify existing wiring or assist with the installation of additional inside wiring.

OMB Control Number: 3060–0859.

Title: Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act of 1934, as amended.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities and State, local, or Tribal governments.

Number of Respondents and Responses: 24 respondents; 24 responses.

Estimated Time per Response: 63–125 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this information collection is contained in 47 U.S.C. 253 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,698 hours.

Total Annual Cost: No Cost.

Needs and Uses: The Commission will submit this extension to the OMB after this 60-day comment period in order to obtain the full three-year clearance from them. Although very few petitions for preemption under section 253 have been filed in the past few years, there is reason to believe that the current estimate is more likely to reflect future developments than a reduction in the number of estimated filings. The Commission published a Public Notice in November 1998 which established suggested guidelines for the filing of petitions for preemption pursuant to section 253 of the Communications Act of 1934, as amended, as well as suggested guidelines for the filing of comments opposing such requests for preemption. The Commission will use this information to resolve petitions for preemption of state or local statutes, regulations, or other state or local legal requirements that are alleged to prohibit or have the effect of prohibiting any entity from providing a telecommunications service. Section 253 of the Communications Act of 1934, as amended, which was added by the Telecommunications Act of 1996, requires the Commission, with certain important exceptions, to preempt (to the extent necessary) the enforcement of any state or local statute or regulation, or other state or local legal requirement that prohibits or has the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service. The Commission's consideration of preemption under section 253 typically begins with the filing of a petition by an aggrieved party. The Commission typically places such petitions on public notice and requests comment by interested parties. The Commission's decision is based on the public record, generally composed of the petition and comments. The Commission has considered a number of preemption items since the passage of the Telecommunications Act of 1996, and believes it is in the public interest to inform the public of the information necessary for full consideration of the issues likely to be involved in section 253 preemption proceedings. In order to render a timely and informed decision, the Commission expects petitioners and commenters to provide it with relevant information sufficient to describe the legal regime involved in the controversy and to provide the factual information necessary for a decision.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–13843 Filed 6–28–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1285; FR ID 150556]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business

concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before August 28, 2023. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1285.

Title: Compliance with the Non-IP Call Authentication Solution Rules; Robocall Mitigation Database (RMD).

Form Number: N/A.

Type of Review: Revision of a currently approved information collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 12,800 respondents; 12,800 responses.

Estimated Time per Response: 0.5–6 hours.

Frequency of Response: Recordkeeping requirement and on occasion reporting requirement.

Obligation to Respond: Mandatory and required to obtain or retain benefits. Statutory authority for these collections are contained in sections 227b, 251(e), and 227(e) of the Communications Act of 1934.

Total Annual Burden: 39,663 hours.

Total Annual Cost: No cost.

Needs and Uses: The Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act directs the Commission to require, no later than 18 months from enactment, all voice service providers to implement STIR/SHAKEN caller ID authentication technology in the internet protocol (IP) portions of their networks and implement an effective caller ID authentication framework in the non-IP portions of their networks. Among other provisions, the TRACED Act also directs the Commission to create extension mechanisms for voice service providers. On September 29, 2020, the Commission adopted its *Call Authentication Trust Anchor Second Report and Order. See Call Authentication Trust Anchor,* WC Docket No. 17–97, Second Report and Order, 36 FCC Rcd 1859 (adopted Sept. 29, 2020). The *Second Report and Order* implemented section 4(b)(1)(B) of the TRACED Act, in part, by requiring a voice service provider maintain and be ready to provide the Commission upon request with documented proof that it is participating, either on its own or through a representative, including third party representatives, as a member of a working group, industry standards group, or consortium that is working to develop a non-internet Protocol caller identification authentication solution, or actively testing such a solution. The *Second Report and Order* also implemented the extension mechanisms in section 4(b)(5) by, in part, requiring voice service providers to certify in the Robocall Mitigation Database that they have either implemented STIR/SHAKEN or a adopted a robocall mitigation program and describe that program in a filed plan. On May 19, 2022, the Commission adopted similar obligations for gateway providers. *See Advanced Methods to Target and Eliminate Unlawful Robocalls, Call Authentication Trust Anchor,* CG Docket No. 17–59, WC Docket No. 17–97, Sixth Report and Order *et al.,* FCC 22–27 (adopted May 19, 2022). Specifically, like voice service providers, gateway providers were required to maintain and be ready to provide the Commission upon request with documented proof that it is participating, either on its own or through a representative, including third party representatives, as a member of a working group, industry standards group, or consortium that is working to develop a non-internet Protocol caller identification authentication solution, or actively testing such a solution.

Gateway providers were also required to implement both STIR/SHAKEN on the IP portions of their networks as well as a robocall mitigation program. They must also certify to their implementation and describe their robocall mitigation program in the Robocall Mitigation Database. On March 16, 2023, the Commission adopted an Order imposing largely the same obligations that applied to gateway providers on a new class of providers: non-gateway intermediate providers. *See Call Authentication Trust Anchor,* Sixth Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 17–97, FCC 23–18 (adopted March 16, 2023). In that action, the Commission also required all voice service providers to adopt a robocall mitigation program and file a description of that program in the Robocall Mitigation Database as well as requiring all classes of providers to file additional information in the Robocall Mitigation Database. On May 18, 2023, the Commission adopted an Order modifying some of these requirements. *See Call Authentication Trist Anchor, et al.,* WC Docket No. 17–97 et al., Seventh Report and Order et al., FCC 23–37 (adopted May 18, 2023).

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–13840 Filed 6–28–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0917; OMB 3060–1270; FR ID 150641]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before July 31, 2023.

ADDRESSES: Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0917.

Title: CORES Registration Form, FCC Form 160.

Form Number: FCC Form 160.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities; individuals or households; not-for-profit institutions; and State, local, or Tribal governments.

Number of Respondents and Responses: 145,726 respondents; 145,726 responses.

Estimated Time per Response: 10 minutes (0.167 hours).

Frequency of Response: One-time reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in the Debt Collection Act of 1996 (DCCA), Public Law 104–134, chapter 10, section 31001.

Total Annual Burden: 24,336 hours.

Total Annual Costs: No cost.

Needs and Uses: Respondents use FCC Form 160 to register in FCC's Commission Registration System (CORES). Entities must register in CORES to do regulatory transactions with FCC, including receiving licenses, paying fees, participating in auctions, etc. Without this collection of information, FCC would not have a database of the identity and contact information of the entities it does regulatory business with.

OMB Control Number: 3060–1270.

Title: Protecting National Security Through FCC Programs.

Form Number: FCC Form 5640.

Type of Review: Revision of a currently-approved collection.

Respondents: Business or other for profit entities.

Number of Respondents and Responses: 3,500 respondents; 6,584 responses.

Estimated Time per Response: 0.5–12 hours.

Frequency of Response: Annual, semiannual, and recordkeeping requirements.

Obligation to Respond: Mandatory and required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1603–1604.

Total Annual Burden: 20,236 hours.

Total Annual Cost: $472,500.

Needs and Uses: The Communications Act of 1934, as amended, requires the ''preservation and advancement of universal service.'' 47 U.S.C. 254(b). The information collection requirements reported under this collection are the result of the Commission's actions to promote the Act's universal service goals.

On November 22, 2019, the Commission adopted the *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs,* WC Docket No. 18–89, Report and Order, Order, and Further Notice of Proposed Rulemaking, 34 FCC Rcd 11423 (2019) (*Report and Order*). The *Report and Order* prohibits future use of Universal Service Fund (USF) monies to purchase, maintain, improve, modify, obtain, or otherwise support any equipment or services produced or provided by a company that poses a national security threat to the integrity of communications networks or the communications supply chain.

On March 12, 2020, the President signed into law the Secure and Trusted Communications Networks Act of 2019 (Secure Networks Act), Public Law 116–124, 133 Stat. 158 (2020) (codified as amended at 47 U.S.C. 1601–1609), which, among other measures, directs the FCC to establish the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program). This program is intended to provide funding to providers of advanced communications service for the removal, replacement and disposal of certain communications equipment and services that poses an unacceptable national security risk (*i.e.,* covered equipment and services) from their networks. The Commission has designated two entities—Huawei Technologies Company (Huawei) and ZTE Corporation (ZTE), along with their affiliates, subsidiaries, and parents—as covered companies posing such a national security threat. *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs—Huawei Designation,* PS Docket No. 19–351, Memorandum Opinion and Order, 35 FCC Rcd 14435 (2020); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs—ZTE Designation,* PS Docket No. 19–352, Memorandum Opinion and Order, DA 20–1399 (PSHSB rel. Nov. 24, 2020).

On December 10, 2020, the Commission adopted the Second Report and Order implementing the Secure Networks Act, which contained new information collection requirements. *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs,* WC Docket No. 18–89, Second Report and Order, 35 FCC Rcd 14284 (2020) (*Second Report and Order*). These requirements allow the Commission to receive, review and make eligibility determinations and funding decisions on applications to participate in the

Reimbursement Program that are filed by certain providers of advanced communications service. These information collection requirements also assist the Commission in processing funding disbursement requests and in monitoring and furthering compliance with applicable program requirements to protect against waste, fraud, and abuse. Participation in the Reimbursement Program is voluntary, but compliance with the information collection requirements is required to obtain Reimbursement Program support.

On August 3, 2021, the Wireline Competition Bureau (Bureau) released a Public Notice adopting procedures for filing and processing applications submitted for the Reimbursement Program. These procedures largely tracked the procedural rules previously adopted by the Commission in the *Second Report and Order,* but also adopted a new requirement that Reimbursement Program participants notify the Commission of changes in ownership, to ensure accurate information is on file for participants and to help protect the Reimbursement Program against waste, fraud, and abuse.

This submission proposes to revise this currently-approved collection by deleting an existing question on FCC Form 5640 and replacing it with a more detailed query. The new question will ask program participants to describe in detail how they have spent Reimbursement Program funds. The addition of this question will allow the Bureau to satisfy its statutory obligations to collect information about how Reimbursement Program funds have been spent, including detailed accounting of the covered communications equipment and services permanently removed and disposed of, and the replacement equipment or services purchased, rented, leased, or otherwise obtained using Reimbursement Program funds, as well as to combat waste, fraud, and abuse, as required under the Secure Networks Act. The Bureau determined that FCC Form 5640 required this revision in order to elicit the information necessary for the Bureau to better satisfy its statutory obligations.

This proposed addition will increase the information collected, and will impose an additional burden on respondents, which will vary with the number of invoices respondents submit during the relevant reporting period. However, this submission also reflects a decrease in the estimated total annual responses, total annual burden hours, and total annual costs for this collection. These adjustments are due to a reduction of the number of respondents for several categories of information to be collected on Form 5640, based on the Bureau's experience with the Reimbursement Program since this collection was first approved.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–13841 Filed 6–28–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1167; FR ID 150753]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before August 28, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1167.

Title: Accessible Telecommunications and Advanced Communications Services and Equipment.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households; businesses or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 3,541 respondents; 42,106 responses.

Estimated Time per Response: .50 hours (30 minutes) to 40 hours.

Frequency of Response: Annual, one-time, and on occasion reporting requirements; recordkeeping requirement; third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in sections 1–4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act, as amended, 47 U.S.C. 151–154, 255, 303(r), 403, 503, 617, 618, and 619.

Total Annual Burden: 120,999 hours.

Total Annual Cost: $17,800.

Needs and Uses: In 2011, in document FCC 11–151, published at 76 FR 82354, December 30, 2011, the FCC adopted rules to implement sections 716 and 717 of the Communications Act of 1934 (the Act), as amended, which were added to the Act by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). *See* Public Law 111–260, 104. Section 716 of the Act requires providers of advanced communications services and manufacturers of equipment used for advanced communications services to make their services and equipment accessible to individuals with disabilities, unless doing so is not achievable. 47 U.S.C. 617. Section 717 of the Act established new recordkeeping requirements and enforcement procedures for service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act. 47 U.S.C. 618. Section 255 of the Act requires telecommunications and interconnected VoIP services and equipment to be accessible to individuals with

disabilities, if readily achievable. 47 U.S.C. 255. Section 718 of the Act requires internet browsers built into mobile phones to be accessible to and usable by individuals who are blind or have a visual impairment, unless doing so is not achievable. 47 U.S.C. 619.

In document FCC 11–151, the Commission adopted rules relating to the following:

(a) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must ensure that the information and documentation that they provide is accessible to individuals with disabilities.

(b) Service providers and equipment manufacturers may seek waivers from the accessibility obligations of section 716 of the Act for services or equipment that are designed for multiple purposes, including advanced communications services, but are designed primarily for purposes other than using advanced communications services.

(c) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must maintain records of their efforts to implement those sections.

(d) Service providers and equipment manufacturers that are subject to sections 255, 716, and 718 of the Act must certify annually to the Commission that records are kept in accordance with the recordkeeping requirements. The certification must include contact details of the person(s) authorized to resolve accessibility complaints and the agent designated for service of process.

(e) The Commission established procedures to facilitate the filing of formal and informal complaints alleging violations of sections 255, 716, or 718 of the Act. Those procedures include a nondiscretionary pre-filing notice procedure to facilitate dispute resolution, that is, as a prerequisite to filing an informal complaint, complainants must first request dispute assistance from the Consumer and Governmental Affairs Bureau's Disability Rights Office.

In 2013, in document FCC 13–57, published at 78 FR 30226, May 22, 2013, the FCC adopted rules to implement section 718 of the Act.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–13842 Filed 6–28–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–1180]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''Airline and Vessel Traveler Information Collection'' to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on April 27, 2023, to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Airline and Vessel Traveler Information Collection (OMB Control No. 0920–1180, Exp. 6/30/2023)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The rapid speed and tremendous volume of international travel, commerce, and human migration enable infectious disease threats to disperse worldwide in 24 hours—less time than the incubation period of most communicable diseases. These and other forces intrinsic to modern technology and ways of life favor the emergence of new communicable diseases and the reemergence or increased severity of known communicable diseases.

Stopping a communicable disease outbreak—whether it is naturally occurring or intentionally caused—requires the use of the most rapid and effective public health tools available. Basic public health practices, such as collaborating with airlines in the identification and notification of potentially exposed travelers, are critical tools in the fight against the introduction, transmission, and spread of communicable disease in the United States. The collection of timely, accurate, and complete conveyance and traveler information enables CDC to notify state and local health departments, in order for them to make contact with individuals who may have been exposed to a communicable disease during travel, or due to an outbreak of disease in a geographic location and identify appropriate next steps.

Section 361 of the Public Health Service Act (42 U.S.C. 264) authorizes the Secretary of the Department of Health and Human Services to make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States, or from one State or possession into any other State or possession. Regulations that implement federal quarantine authority are currently

promulgated in 42 CFR parts 70 and 71. Part 71 contains regulations to prevent the introduction, transmission, and spread of communicable diseases into the states and possessions of the United States.

Passenger and crewmember manifests are used to collect travelers' information from airlines and vessels after travel has been completed and when a disease is confirmed or there is a suspected exposure. Manifests include locating and contact information, as well as information concerning where passengers sat while aboard an airline or their location (*e.g.,* cabin numbers) and activities aboard a vessel. Manifests collect the following data elements:

- Full name (last, first, and, if available, middle or others);
- Date of birth;
- Sex;
- Country of residence;
- If a passport is required; passport number, passport country of issuance, and passport expiration date;
- If a travel document, other than a passport is required, travel document type, travel document number, travel document country of issuance and travel document expiration date;
- Address while in the United States (number and street, city, state, and zip code), except that U.S. citizens and lawful permanent residents will provide address of permanent residence in the U.S. (number and street, city, state, and zip code; as applicable);
- Primary contact phone number to include country code;
- Secondary contact phone number to include country code;
- Email address;
- Airline name;
- Flight number;
- City of departure;
- Departure date and time;
- City of arrival;
- Arrival date and time; and
- Seat number for all passengers.
- CDC also requests seat configuration for the requested contact area (example: AB/aisle/CDE/aisle/FG, bulkhead in front of row 9), identification on the manifest of the crew and what zone crew were assigned to, the identification of any babes-in-arms, and finally CDC requests the total number of passengers on board if measles is the cause of the investigation, due to the highly infectious nature of the disease.

CDC then uses this passenger and crew manifest information to coordinate with state and local health departments or International Health Regulation (IHR) National Focal Points (NFPs) so they can follow-up with residents who live or are currently located in their jurisdiction. In most cases, the manifests are issued for air travel and state and local health departments or IHR NFPs are responsible for the contact investigations; airlines and vessels may take responsibility for follow-up of crew members. In rare cases, CDC may use the manifest data to perform the contact investigation directly.

CDC requests OMB approval for an estimated 875 annual burden hours. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Airline Medical Officer or Equivalent/ Analysist/Travel Specialist/Manager Equivalent.	International Manifest Template/Informal Manifest Request Template.	350	1	150/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–13897 Filed 6–27–23; 11:15 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–266]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by August 28, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number:_____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–R–266 Medicaid Disproportionate Share Hospital (DSH) Annual Reporting Requirements

Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires Federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Disproportionate Share Hospital (DSH) Annual Reporting Requirements; *Use:* States are required to submit an annual report that identifies each disproportionate share hospital (DSH) that received a DSH payment under the state's Medicaid program in the preceding fiscal year and the amount of DSH payments paid to that hospital in the same year along with other information that the Secretary determines necessary to ensure the appropriateness of DSH payments; *Form Number:* CMS–R–266 (OMB control number: 0938–0746); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 51; *Total Annual Hours:* 2,142. (For policy questions regarding this collection contact Rich Cuno at 410–786–1111.)

Dated: June 26, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–13877 Filed 6–28–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Voluntary Acknowledgment of Paternity and Required Data Elements for Paternity Establishment Affidavits

AGENCY: Office of Child Support Services, Administration for Children and Families, United States Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Office of Child Support Services (OCSS), Administration for Children and Families (ACF), United States Department of Health and Human Services, is requesting a three-year extension of the Voluntary Acknowledgment of Paternity and Required Data Elements for Paternity Establishment Affidavits (OMB #0970–0171, expiration 1/31/2024). No changes are proposed.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *infocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Section 466(a)(5)(C) of the Social Security Act requires States to enact laws ensuring a simple civil process for voluntarily acknowledging paternity via an affidavit. The development and use of an affidavit for the voluntary acknowledgment of paternity would include the minimum requirements of the affidavit specified by the Secretary under section 452(a)(7) of the Social Security Act and give full faith and credit to such an affidavit signed in any other State according to its procedures. The State must provide that, before a mother and putative father can sign a voluntary acknowledgment of paternity, the mother and putative father must be given notice, orally, or through the use of video equipment, and in writing, of the alternatives to, the legal consequences of, and the rights (including any rights, if one parent is a minor, due to minority status) and responsibilities of acknowledging paternity. The affidavits will be used by hospitals, birth record agencies, and other entities participating in the voluntary paternity establishment program to collect information from the parents of nonmarital children.

Respondents: The parents of nonmarital children, State and Tribal agencies operating child support programs under Title IV–D of the Social Security Act, hospitals, birth record agencies, and other entities participating in the voluntary paternity establishment program.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Training	130,240	1	1	130,240
Paternity Acknowledgment Process	1,618,412	1	0.17	275,130
Data Elements	54	1	1	54
Ordering Brochures	2,604,802	1	.08	208,384

Estimated Total Annual Burden Hours: 613,808.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the

information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 666(a)(5)(C) and 652(a)(7).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–13855 Filed 6–28–23; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Tribal Consultation Meetings

AGENCY: Office of Head Start (OHS), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of meetings.

SUMMARY: Pursuant to the Head Start Act, notice is hereby given of two tribal consultation sessions to be held between HHS/ACF OHS leadership and the leadership of tribal governments operating Head Start and Early Head Start programs. The purpose of these consultation sessions is to discuss ways to better meet the needs of American Indian and Alaska Native (AI/AN) children and their families, taking into consideration funding allocations, distribution formulas, and other issues affecting the delivery of Head Start services in their geographic locations. Two tribal consultations will be held as part of HHS/ACF or ACF Tribal Consultation Sessions.

DATES:

Wednesday, September 13, 2023
Tuesday, December 5, 2023

ADDRESSES:

- September 13, 2023—1–4 p.m. ET (Virtual)
- December 5, 2023—2–5 p.m. PT (Hilton Costa Mesa, 3050 Bristol Street, Costa Mesa, CA 92626)

FOR FURTHER INFORMATION CONTACT: Todd Lertjuntharangool, Regional Program Manager, Region XI/AIAN, Office of Head Start, email *Todd.Lertjuntharangool@acf.hhs.gov,* or phone (866) 763–6481. Additional information and online meeting registration will be forthcoming.

SUPPLEMENTARY INFORMATION: In accordance with section 640(l)(4) of the Head Start Act, 42 U.S.C. 9835(1)(4), ACF announces OHS Tribal Consultation Sessions for leaders of tribal governments operating Head Start and Early Head Start programs.

The agenda for the scheduled OHS Tribal Consultations reflects the statutory purposes of Head Start tribal consultations related to meeting the needs of AI/AN children and families. OHS will also highlight the progress made in addressing issues and concerns raised in the previous OHS Tribal Consultations.

The consultation sessions include elected or appointed leaders of Tribal governments and their designated representatives. Designees must have a letter from the Tribal government authorizing them to represent the Tribe. Tribal governments must submit the designee letter at least 3 days before the consultation sessions to Todd Lertjuntharangool at *Todd.Lertjuntharangool@acf.hhs.gov*. Other representatives of tribal organizations and Native nonprofit organizations are welcome to attend as observers.

Within 45 days of the consultation sessions, a detailed report of each consultation session will be available for all tribal governments receiving funds for Head Start and Early Head Start programs. Tribes can submit written testimony for the report to Todd Lertjuntharangool at *Todd.Lertjuntharangool@acf.hhs.gov* prior to each consultation session or within 30 days of each meeting. OHS will summarize oral testimony and comments from the consultation sessions in each report without attribution, along with topics of concern and recommendations.

Megan E. Steel,

ACF Certifying Officer.

[FR Doc. 2023–13793 Filed 6–28–23; 8:45 am]

BILLING CODE 4184–40–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–3657]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Accreditation Scheme for Conformity Assessment Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by July 31, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0889. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Accreditation Scheme for Conformity Assessment Program

OMB Control Number 0910–0889—Revision

Section 514 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360d) provides for the establishment of performance standards, authorizing the Accreditation Scheme for Conformity Assessment Program (ASCA Program) under section 514(d). On September 25, 2020 (85 FR 60471), we announced the

implementation of a pilot program under which testing laboratories may be accredited by ASCA-recognized accreditation bodies meeting criteria specified by FDA to assess the conformance of a device to certain FDA-recognized standards. These testing laboratories then receive ASCA Accreditation from FDA. Determinations by ASCA-accredited testing laboratories that a device conforms with an eligible standard included as part of the program are accepted by FDA for the purposes of demonstrating conformity unless FDA finds that a particular such determination shall not be so accepted.[1] The statute provides that FDA may review determinations by accredited testing laboratories, including by conducting periodic audits of such determinations or processes of accreditation bodies or testing laboratories.[2]

Following such a review, or if FDA becomes aware of information materially bearing on safety or effectiveness of a device tested by an ASCA-accredited testing laboratory, FDA may take additional measures as determined appropriate, including suspension or withdrawal of ASCA Accreditation of a testing laboratory, withdrawal of ASCA Recognition of an accreditation body, or a request for additional information regarding a specific device.[3] The establishment of the goals, scope, procedures, and a suitable framework for the voluntary ASCA Program supports the Agency's continued efforts to use its scientific resources effectively and efficiently to protect and promote public health. FDA believes the voluntary ASCA Program may further encourage international harmonization of medical device regulation because it incorporates elements, where appropriate, from a well-established set of international conformity assessment practices and standards (*e.g.,* ISO/IEC 17000 series). The voluntary ASCA Program does not supplant or alter any other existing statutory or regulatory requirements governing the decision-making process for premarket submissions.

We are revising the information collection to reflect recent legislative changes. In accordance with amendments made to section 514 by the FDA Reauthorization Act of 2022 (FDARA),[4] and as part of the enactment of the Medical Device User Fee Amendments of 2022 (MDUFA V),[5] the ''pilot'' language and sunset clause was removed from the section, allowing FDA to conclude the pilot and continue to operate the program consistent with the amended section 514(d) of the FD&C Act. In accordance with these updates and as included in the Center for Devices and Radiological Health Proposed Guidances for Fiscal Year 2023,[6] we intend to update the applicable guidance documents.

Finally, to assist testing laboratories and accreditation bodies in submitting information to FDA, we are developing webforms for applying for ASCA Accreditation and ASCA Recognition, respectively.

Under the ASCA Program's conformity assessment scheme, ASCA-recognized accreditation bodies accredit testing laboratories using ISO/IEC 17025:2017: ''General requirements for the competence of testing and calibration laboratories'' and the ASCA program specifications associated with each eligible standard and test method included in the ASCA Program. ASCA-accredited testing laboratories may conduct testing to determine conformance of a device with at least one of the standards eligible for inclusion in the ASCA Program. When an ASCA-accredited testing laboratory conducts such testing, it provides a complete test report and an ASCA Summary Test Report to the device manufacturer. A device manufacturer who utilizes an ASCA-accredited testing laboratory to perform testing in accordance with the provisions of the ASCA Program can then include a declaration of conformity with supplemental documentation (including an ASCA Summary Test Report) as part of a premarket submission to FDA. Testing performed by an ASCA-accredited testing laboratory can be used to support a premarket submission for any device if the testing was conducted using a standard included in the ASCA Program and in accordance with the ASCA program specifications for that standard.

The ASCA Program includes participation from accreditation bodies, testing laboratories, device manufacturers, and FDA staff. Each of these entities plays a critical role in the ASCA Program to ensure that patients and healthcare providers have timely and continued access to safe, effective, and high-quality medical devices.

To participate in the ASCA Program, accreditation bodies and testing laboratories apply to FDA to demonstrate that they have the qualifications for their respective roles within the program. An application includes agreement to terms of participation. For example, a participating accreditation body or testing laboratory agrees to attend training, regularly communicate with FDA, and support periodic FDA audits. FDA will identify the scope of ASCA Recognition (for accreditation bodies) and ASCA Accreditation (for testing laboratories) for specific standards and test methods to which each participant may accredit or test as part of the ASCA Program.

During the ASCA Program, FDA generally will accept test results from ASCA-accredited testing laboratories to support conformity of a medical device to a particular standard and does not intend to review complete test reports from ASCA-accredited testing laboratories in support of a declaration of conformity submitted with a premarket submission except in certain circumstances.

Note that ASCA Accreditation is separate from any accreditation that an accreditation body may provide to a testing laboratory for purposes other than the ASCA Program.

The ASCA Program does not address specific content for a particular premarket submission. Information collections associated with premarket submissions have been previously approved.

We plan to issue draft guidance updates to the three published ASCA Pilot guidance documents[7] to improve and streamline the ASCA Program. The guidance updates are being issued to discuss the lessons learned during ASCA's pilot phase and to help

[1] *See* section 514(d)(1)(B) of the FD&C Act.

[2] *See* section 514(d)(2)(A) of the FD&C Act.

[3] *See* section 514(d)(2)(A)–(B) of the FD&C Act.

[4] *See* Public Law 117–180, section 2005.

[5] *See also* MDUFA V Commitment Letter: *https://www.fda.gov/media/158308/download*.

[6] *See* CDRH Proposed Guidances for Fiscal Year 2023, B-list: *https://www.fda.gov/medical-devices/guidance-documents-medical-devices-and-radiation-emitting-products/cdrh-proposed-guidances-fiscal-year-2023-fy2023#b*.

[7] The Accreditation Scheme for Conformity Assessment (ASCA) Pilot Program (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/accreditation-scheme-conformity-assessment-asca-pilot-program*). Basic Safety and Essential Performance of Medical Electrical Equipment, Medical Electrical Systems, and Laboratory Medical Equipment—Standards Specific Information for the Accreditation Scheme for Conformity Assessment (ASCA) Pilot Program (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/basic-safety-and-essential-performance-medical-electrical-equipment-medical-electrical-systems-and*). Biocompatibility Testing of Medical Devices—Standards Specific Information for the Accreditation Scheme for Conformity Assessment (ASCA) Pilot Program (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/biocompatibility-testing-medical-devices-standards-specific-information-accreditation-scheme*).

facilitate the transition from a pilot to a permanent program. As a result of these guidance updates, there is minimal adjustment to the burden estimate.

Respondents are accreditation bodies (ABs) and testing laboratories (TLs). In tables 1 through 3, these abbreviations are used.

In the **Federal Register** of January 19, 2023 (88 FR 3419), we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours [2]
Application by AB for ASCA Recognition	8	1	8	6	48
Request by AB to continue ASCA Recognition	2	1	2	6	12
Request by AB for ASCA Recognition (subsequent to withdrawal).	1	1	1	6	6
Request by AB to expand scope of ASCA Recognition	1	1	1	6	6
AB annual status report	8	1	8	3	24
AB notification of change	8	1	8	1	8
Application by TL for ASCA Accreditation	150	1	150	4	600
Request by TL to continue ASCA Accreditation	75	1	75	4	300
Request by TL for ASCA Accreditation (subsequent to withdrawal or suspension).	5	1	5	4	20
Request by TL to expand scope of ASCA Accreditation	75	1	75	4	300
TL annual status report	150	1	150	1.5	225
TL notification of change	5	1	5	1	5
Request for withdrawal or suspension of ASCA Accreditation (TLs) or request for withdrawal of ASCA Recognition (ABs).	6	1	6	0.08 (5 minutes).	1
Feedback questionnaire (ABs and TLs)	158	1	158	0.5 (30 minutes).	79
Total					1,634

[1] Totals have been rounded to the nearest hour.
[2] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
AB setup documentation standard operating procedures (SOPs) & training (one-time burden)	3	1	3	25	75
TL setup documentation SOPs & training (one-time burden)	20	1	20	25	500
AB record maintenance	8	1	8	1	8
TL record maintenance	150	1	150	1	150
Total					733

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

Activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Request for Accreditation (TLs requesting accreditation from ABs).	150	1	150	0.5 (30 minutes).	75
Review/Acknowledgement of accreditation request (ABs)	8	22	176	40	7,040
Test Reports (TLs)	880	1	880	1	880
Total					7,995

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimate of eight ABs is based on the number of International Laboratory Accreditation Cooperation signatories in the U.S. economy. We estimate that approximately 150 testing labs will seek ASCA Accreditation. Our estimate of Test Reports is based on the number of premarket submissions we expect per year with testing from an ASCA-accredited testing laboratory.

Our estimates for the number of respondents and average burden per

response, recordkeeping, and disclosure are based on our experience with the pilot program.

Our estimated burden for the information collection reflects an overall decrease of 3,129 hours and an increase of 94 responses/records. We attribute this adjustment to a decrease in the one-time burden for accreditation bodies and testing laboratories training and SOPs because much of this activity was completed during the pilot. In addition, there is an increase in the annual responses/records because there is an increase in renewal requests (by accreditation bodies to continue ASCA Recognition and by testing laboratories to continue ASCA Accreditation) since the pilot program was initiated.

Dated: June 26, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13860 Filed 6–28–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2017–N–0366]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food and Drug Administration Advisory Committee Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by July 31, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0833. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

FDA Advisory Committee Regulations

OMB Control No. 0910–0833—Revision

This information collection helps support implementation of FDA regulations found in part 14 (21 CFR part 14). These regulations govern procedures applicable to presenting information and views before an FDA advisory committee in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2 and 3, Pub. L. 92–463). FACA is designed to assure that Congress and the public are kept informed with respect to the purpose, membership, and activities of advisory committees. It does not specify the manner in which advisory committee members and staff must be appointed.

Public advisory committee regulations in part 14 set forth requirements governing the administrative procedures to follow for the operation of advisory committees. Agency regulations in part 14, subpart A (§§ 14.1 through 14.15) identify scope of coverage, applicable definitions, and establish general provisions. The regulations in part 14, subpart B (§§ 14.20 through 14.39) set forth content and format requirements along with required schedules for submission of information. The regulations in part 14 subparts C, D, and E (§§ 14.40 through 14.95) set forth requirements governing advisory committee establishment, recordkeeping, and maintenance, respectively.

FDA will also require that nominees to serve on advisory committees submit a consent form authorizing FDA to post, without removing or redacting any information, to FDA's public website (*http://www.fda.gov/AdvisoryCommittees*) the curriculum vitae (CV) submitted as part of their nomination materials if the nominee is selected to serve on an advisory committee. The consent form requires that the nominee affirm that the CV does not include any confidential information, including information pertaining to third parties, that the nominee is not permitted to disclose. A nominee will be required to submit a signed consent form as a part of the nomination package for the nomination to be considered complete.

All nominations for new advisory committee members will be required to be submitted through FDA's website at *http://accessdata.test.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm,* or any successor system, and the submission will be required to be accompanied by the consent form, on or after the date of OMB approval for this information collection. Although we are developing collection instruments, as communicated on our website, respondents may submit information to: Advisory Committee Oversight and Management Staff, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Silver Spring, MD 20993, 800–741–8138 or 301–443–0572.

In the **Federal Register** of February 13, 2023 (88 FR 9294), FDA published a 60-day notice requesting public comment on the proposed collection of information. Four comments were received but were not responsive to the information collection topics solicited under the PRA. On our own initiative, we are clarifying the scope of coverage for the information collections.

We estimate the burden of the collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR part 14	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Subpart E—Members of Advisory Committees					
Advisory Committee Membership Nominations	308	1	308	0.25 (15 minutes).	77
Member Submission of Updated Information	452	1	452	0.25 (15 minutes).	113
Total					190

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: June 26, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13863 Filed 6–28–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–2474]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; New Animal Drugs for Minor Use and Minor Species

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by July 31, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0605. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

New Animal Drugs for Minor Use and Minor Species

OMB Control Number 0910–0605—Revision

This information collection supports FDA regulations that implement sections 572 and 573 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360ccc–1 and 21 U.S.C. 360ccc–2) which establish an index of legally marketed unapproved new animal drugs for minor species and requirements for the designation of minor use or minor species new animal drugs, respectively. Agency regulations are codified in part 516 (21 CFR part 516) and include recordkeeping and reporting requirements. The purpose of these regulations is to encourage the development of these new animal drugs, while still ensuring appropriate safeguards for animal and human health. The general provisions in part 516, subpart A, set forth its purpose, scope, and applicable definitions.

Our regulations in part 516, subpart B, provide for designation status for Minor Use and Minor Species (MUMS) drugs prior to their approval or conditional approval. MUMS-drug designation makes the sponsor eligible for incentives to support the approval or conditional approval of the designated use and is completely optional for drug sponsors. The regulations describe how to apply for designation, what needs to be submitted, and other information pertaining to this option. Sponsors of designated new animal drugs are required to demonstrate due diligence toward approval or conditional approval through submission of annual reports documenting their progress for each designated use. We use this information to allow for determining eligibility for designation and the associated incentives and benefits, including a 7-year period of exclusive marketing rights, as provided by section 573 of the FD&C Act. It enables us to process requests for MUMS-drug designation, requests to amend MUMS-drug designation, changes in sponsorship, termination of MUMS-drug designation, requirements for annual reports from sponsors, and provisions for insufficient quantities of MUMS-designated drugs.

Regulations in part 516, subpart C, are intended to make more medications legally available to veterinarians and animal owners for the treatment of minor animal species. In some cases, a minor species drug is intended for use in species that are too rare or too varied to be the subject of adequate and well-controlled studies in support of a drug approval. In such cases, FDA may add the drug to the public index listing of legally marketed unapproved new animal drugs for minor species animals (Index), as provided for by section 572 of the FD&C Act. Within limitations established by the statute, such indexing provides a basis for legally marketing an unapproved new animal drug intended for use in a minor species. Our regulations in part 516, subpart C, specify, among other things, the criteria and procedures for requesting eligibility for indexing and for requesting addition to the Index, as well as the annual reporting requirements for holders of an index listing. The administrative procedures and criteria for indexing a new animal drug for use in a minor species, as well as modifications and removal of a drug from the Index are also set forth. FDA uses the information for the activities described above.

In the **Federal Register** of August 1, 2022 (87 FR 46961), FDA published a 60-day notice requesting public

comment on the information collection requirements related to designation status for MUMS drugs. No comments were received. We are revising the information collection to add the information collection requirements associated with the index listing of legally marketed unapproved new animal drugs for minor species, for efficiency of Agency operations.

Description of Respondents: The respondents to this information collection are pharmaceutical companies that sponsor new animal drugs for designation or requesters wishing to add a new animal drug to the Index.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses [2]	Average burden per response (hours)	Total hours [3]
Designated New Animal Drugs for Minor Use and Minor Species, Part 516, Subpart B					
516.20, 516.26, 516.27, 516.29, 516.30, and 516.36; Reporting burden associated with drug designation requests and termination of designation	26	~2.65	69	4	276
Index of Legally Marketed Unapproved New Animal Drugs for Minor Species, Part 516, Subpart C					
516.119, 516.121, 516.123, 516.125, 516.141, 516.143, 516.145; 516.161, 516.163, and 516.165; Reporting burden associated with requests for index listing and modifying indexed drugs	30	~10.33	310	~16.954	5,256
Total					5,532

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Decimal rounded.
[3] Rounded up.

Burden we attribute to reporting activities is assumed to be distributed among the individual elements and averaged among respondents. Our estimate of the burden per disclosure (4 and 16.954 hours, respectively) reflect what we believe is the average burden based on the reporting required by the information collection.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section, activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Designated New Animal Drugs for Minor Use and Minor Species, Part 516, Subpart B					
One-time recordkeeping burden associated with reading and understanding the rule [2].	474	1	474	0.68 (~41 minutes) [3].	323
Index of Legally Marketed Unapproved New Animal Drugs for Minor Species, Part 516, Subpart C					
516.141 and 516.165; recordkeeping associated with panel deliberations and the information pertinent to the safety and effectiveness from foreign sources.	40	2	80	0.625 (37.5 minutes).	50
Total					373

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Direct Final Rule, ''Defining 'Small Number of Animals' for Minor Use Determination; Periodic Reassessment'' (September 15, 2022; 87 FR 56583). Preliminary Regulatory Impact Analysis (*https://www.regulations.gov/document/FDA-2022-N-1128-0007*).
[3] Rounded up.

Burden we attribute to recordkeeping activities for the indexing provisions is assumed to be distributed among the individual elements and averaged among respondents. Our estimate of the burden per record (0.625 hours) reflects what we believe is the average burden based on the recordkeeping required by the information collection.

For efficiency of Agency operations, we are consolidating the related information collection activities currently approved in OMB control numbers 0910–0605 and 0910–0620 into a single collection request. The burden estimates reflect our current experience with the information collection and requests received by respondents over the past 3 years. We also include burden that may be attributable to rulemaking (RIN 0910–A146), which became effective on December 14, 2022. Although the rulemaking revised the definition of ''small number of animals,'' for purposes of determining whether a particular intended use of a drug in a major species qualifies as a minor use, we believe only nominal adjustments in burden associated with designation status for MUMS drugs may result, other than a one-time recordkeeping burden. In addition, upon review of the previous information collection submission related to

indexing, we include burden associated with recordkeeping to address a data-entry error in the RISC/ORIA Combined Information System (ROCIS system). Cumulatively, these changes and adjustments reflect an overall increase of 5,905 hours and a corresponding increase of 864 responses, annually, to the information collection.

Dated: June 26, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13853 Filed 6–28–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Rural Communities Opioid Response Program Performance Measures—OMB No. 0906–0044—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email *paperwork@hrsa.gov* or call Samantha Miller, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Rural Communities Opioid Response Program Performance Measures—OMB No. 0906–0044—Revision.

Abstract: HRSA administers the Rural Communities Opioid Response Program (RCORP), which is authorized by section 711(b)(5) of the Social Security Act (42 U.S.C. 912(b)(5)) and is a multi-initiative program that aims to: (1) support treatment for and prevention of substance use disorder (SUD), including opioid use disorder (OUD); and (2) reduce morbidity and mortality associated with SUD, to include OUD, by improving access to and delivering prevention, treatment, and recovery support services to high-risk rural communities. To support this purpose, RCORP grant initiatives include:

- RCORP—Implementation grants to fund established networks and consortia to deliver SUD/OUD prevention, treatment, and recovery activities in high-risk rural communities;
- RCORP—Neonatal Abstinence Syndrome grants to reduce the incidence and impact of Neonatal Abstinence Syndrome in rural communities by improving systems of care, family supports, and social determinants of health;
- RCORP—Psychostimulant Support grants to strengthen and expand prevention, treatment, and recovery services for individuals in rural areas who misuse psychostimulants; to enhance their ability to access treatment and move toward recovery;
- RCORP—Medication Assisted Treatment (MAT) Access grants aim to establish new access points in rural facilities where none currently exist; and
- RCORP—Behavioral Health Care support grants aim to expand access to and quality of behavioral health care services at the individual-, provider-, and community-levels.
- Note that additional grant initiatives may be added pending fiscal year 2024 and future fiscal year appropriations.

HRSA currently collects information about RCORP grants using approved performance measures. HRSA developed separate performance measures for RCORP's new MAT Access and Behavioral Health Care Support grants and seeks OMB approval for the new collection.

A 60-day notice published in the **Federal Register** on April 23, 2023, vol. 88, No. 63; pp. 19651–52. There were no public comments.

Need and Proposed Use of the Information: Due to the growth in the number of grant initiatives included within RCORP, as well as emerging SUD and other behavioral health trends in rural communities, HRSA is submitting a revised ICR that includes measures for RCORP's new MAT Access and Behavioral Health Care Support grants. For this program, performance measures were developed to provide data on each RCORP initiative and enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act of 1993. These measures cover the principal topic areas of interest to the Federal Office of Rural Health Policy, including: (a) provision of, and referral to, rural behavioral health care services, including SUD prevention, treatment and recovery support services; (b) behavioral health care, including SUD prevention, treatment, and recovery, process and outcomes; (c) education of health care providers and community members; (d) emerging trends in rural behavioral health care needs and areas of concern; and (e) consortium strength and sustainability. All measures will speak to the Federal Office of Rural Health Policy's progress toward meeting the goals set.

Likely Respondents: The respondents will be recipients of the RCORP grants.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent (annually)	Total responses	Average burden per response (in hours)	Total burden hours
Rural Communities Opioid Response Program—Implementation/Neonatal Abstinence Syndrome/MAT Expansion	290	2	580	1.24	719.20
Rural Communities Opioid Response Program—Psychostimulant Support	15	1	15	1.30	19.50
Rural Communities Opioid Response Program—MAT Access—NEW	11	1	11	1.95	21.45
Rural Communities Opioid Response Program—Behavioral Health Care Support—NEW	58	1	58	2.02	117.16
Total	374	.....	664	.....	877.31

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–13827 Filed 6–28–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Questionnaire and Data Collection Testing, Evaluation, and Research for the Health Resources and Services Administration, OMB No. 0915–0379 Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Questionnaire and Data Collection Testing, Evaluation, and Research for HRSA—OMB No. 0915–0379—Revision.

Abstract: The purpose of information collections under this generic umbrella ICR package is to allow HRSA to continue collecting feedback from members of the public for HRSA to use when developing new questions, questionnaires, and tools; pilot/pre-test instruments to be deployed by HRSA; and to identify problems in instruments currently in use. This generic clearance is limited to data collection for the development or revision of HRSA tools and data collection instruments, as well as reports for internal decision-making and development purposes. Information collected under this generic clearance will not be used for data collection, reports, or policy documents to be released to the public. It is anticipated that data collection approved under this generic clearance will rely heavily on qualitative techniques and not the collection of numerical data. In general, these activities are not designed to yield results that meet generally accepted standards of statistical rigor but designed to obtain information to develop clearer and more effective and efficient data collection tools that will yield more accurate results and decrease public non-response. The forms submitted under this generic clearance will be voluntary, low-burden, and uncontroversial.

HRSA originally developed this generic umbrella ICR to support similar needs across HRSA's bureaus and offices as reflected in their specific activities informed by their specific authorizing statutes. The purpose is to collect qualitative data from small groups of people in response to short questionnaires, using questions posed on HRSA's website, through focus groups and individual interviews of HRSA staff and members of the public. The abbreviated clearance process of the generic clearance helps ensure timely data gathering on current issues HRSA is addressing (*e.g.,* allows program offices to gather a suitable pool of candidates for piloting future instruments).

HRSA seeks to extend OMB approval of this ICR and existing ICRs that fall under it while including a slight increase in the burden estimate to account for HRSA's implementation of Executive Order 13985, which calls on agencies to advance racial equity and support for underserved communities through identifying and addressing barriers to equal opportunity that underserved communities may face; HRSA will likely conduct additional information collection requests so that HRSA may effectively implement this Executive Order.

A 60-day notice published in the **Federal Register** on April 13, 2023, vol. 88, No. 71; pp. 22459–61. There were no public comments.

Need and Proposed Use of the Information: HRSA conducts interviews, focus groups, usability tests, and field tests/pilot interviews for data collection instrument development and evaluation (including assessment of response errors in data collection instruments). HRSA staff use various techniques to evaluate interviewer-administered, self-administered, telephone, Computer Assisted Personal Interviewing, Computer Assisted Self-Interviewing, Audio Computer-Assisted Self-Interviewing, and web-based questionnaires.

Each information collection under this generic clearance will specify the specific testing and evaluation procedures to be used. Participation will be fully voluntary, and non-participation will not affect eligibility for, or receipt of, future HRSA health services research activities or grant awards, recruitment, or participation. Appropriate consent procedures will be customized and used for each information collection activity and any collection of personal, privacy-protected information will be handled in accordance with all applicable federal requirements. If HRSA wishes to record the encounter, the respondent's permission to record will be obtained before beginning the interview. If consent is not provided, the interview either will not be recorded or not be conducted. When screening is used (*e.g.,* quota sampling), the screening will be as brief as possible, and the screening questionnaire will be provided to OMB for review.

Collection methods—The particular information collection methods used will vary, but may include the following:

- Individual in-depth interviews—In-depth interviews will commonly be used to ensure that the respondent understands the meaning of a questionnaire or strategy. When in-depth interviewing is used, the interview guide will be provided to OMB for review.
- Focus groups—Focus groups will be used to obtain insights into beliefs and understandings of the target audience early in the development of a questionnaire or tool. When focus groups are used, the focus group discussion guide will be provided to OMB for review.
- Expert/Gatekeeper review of tools—In some instances, medical providers or other gatekeepers may review tools to provide feedback on the acceptability and usability of a particular tool. This will usually be in addition to an individual user pretesting the tool.
- Record abstractions—On occasion, the development of a tool or other information collection requires review and interaction with records, rather than individuals.
- ''Dress rehearsal'' of a specific protocol—In some instances, the proposed pre-testing will constitute a walkthrough of the intended data collection procedure. In these cases, the request will mirror what is expected to occur for the larger scale data collection.

Professionally recognized procedures are followed in each information collection activity to ensure collection of high-quality information. Examples of these procedures could include the following:

- Monitoring by supervisory staff of some telephone interviews;
- Conducting interviews using methods including ''think-aloud'' techniques and debriefings;
- Computerizing data-entry from mail or paper-and-pencil surveys using scannable forms or double-key entry (*i.e.,* two people input the data from mail or paper-and-pencil surveys into an electronic format, and then comparing the two sets of entries for anomalies);
- Monitoring by observers of focus groups and recording (*e.g.,* video recording, audio recording) of focus group proceedings (subject to participant consent); and
- Employing commonly used statistical validation techniques to ensure accuracy (such as disallowing out-of-range values) of data submitted through on-line surveys.

HRSA is requesting approval for generic information collections previously approved by OMB. These include:

- Health Center Workforce Well-Being Survey: Listening Sessions
- Health Center Workforce Well-Being Survey: Cognitive Sessions
- Health Center Workforce Well-Being Survey: Pilot Testing
- Health Center Workforce Survey Evaluation and Technical Assistance: Pilot Survey
- Fast Track Interviews with National Hypertension Control Initiative Group 2 Participants

HRSA notes that the previously approved collections are mostly unchanged, except that they may have updates to include any advances in burden estimation or information collection protocols. HRSA also anticipates conducting additional collections as the agency implements Executive Order 13985. To identify areas for improvement, HRSA anticipates collecting and aggregating data by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables, while protecting individual privacy, so that HRSA can use the information to help increase equity in its programs for people from a robust range of demographic groups.

Likely Respondents: Participation in any collections under this clearance will be entirely voluntary, and the privacy of respondents will be preserved to the extent requested by participants and as permitted by law.

Respondents will be recruited by means of advertisements in public venues or through techniques that replicate prospective data collection activities that are the focus of the project. For instance, a survey on physician communication, designed to be administered following an office visit, might be pretested using the same procedure. Each ICR will specify the recruitment procedure to be used.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Type of information collection	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Mail/email [1]	1,000	1	1,000	0.26	260
Telephone	1,000	1	1,000	0.26	260
Web-based	1,200	1	1,200	0.25	300
Focus Groups	925	1	925	1.00	925
In-person	250	1	250	1.00	250
Automated [2]	500	1	500	1.00	500

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of information collection	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Cognitive Testing	700	1	700	1.41	987
Total	5,575		5,575		3482

[1] May include telephone non-response follow-up in which case the burden will not change.
[2] May include testing of database software, Computer Assisted Personal Interviewing software, or other automated technologies.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–13829 Filed 6–28–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Information Collection Request; Application for Federally Supported Health Centers Assistance Act/Federal Tort Claims Act Particularized Determination of Coverage, 0906–XXXX, New

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR must be received no later than July 31, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Application for Federally Supported Health Centers Assistance Act/Federal Tort Claims Act Particularized Determination of Coverage. OMB No. 0906–XXXX–New.

Abstract: Section 224(g)–(n) of the Public Health Service (PHS) Act (42 U.S.C. 233(g)–(n)), as amended, authorizes the Secretary to ''deem'' entities receiving funds under section 330 of the PHS Act (HRSA's Health Center Program) as PHS employees for the purposes of establishing eligibility for liability protections under the Federally Supported Health Centers Assistance Act (FSHCAA) including Federal Tort Claims Act (FTCA) coverage, for covered activities and individuals. Health centers submit deeming applications annually to HRSA's Bureau of Primary Health Care, which administers the Health Center Program and the Health Center FTCA Program, in the prescribed form and manner to obtain deemed PHS employee status for this purpose.

FSHCAA and 42 CFR 6.6(d) authorize FTCA coverage for the provision of medical services to non-health center patients in certain situations. Section 224(g)(1)(C) of the PHS Act and 42 CFR 6.6(d) explain the criteria by which the Secretary will determine whether FSHCAA's liability protections, including FTCA coverage, will extend to the provision of medical care to individuals who are not patients of the health center. 42 CFR 6.6(e) identifies examples that are approvable for FTCA coverage under 42 CFR 6.6(d) and section 224(g)(1)(B)(ii) of the PHS Act if there is compliance with all other coverage requirements under FSHCAA. 42 CFR 6.6(e)(4) provides examples of specific activities that the Department has determined are eligible for FSCHAA's liability protections, including FTCA coverage, without the need for a specific application for a coverage determination. As indicated in 42 CFR 6.6(e)(4), if any element of an activity or arrangement does not fit squarely into the examples listed in 42 CFR 6.6(e), the covered entity should request a particularized determination of coverage. Acts and omissions related to services provided to individuals who are not patients of a covered entity that do not fit squarely within the examples in 42 CFR 6.6(e)(4) will be covered only if the Secretary makes a coverage determination under 42 CFR 6.6(d). The FTCA program uses a web-based application system within HRSA's Electronic Handbooks (EHB) system for deeming applications. These electronic application forms decrease the time and effort required to complete the older, paper-based approved deeming application forms. HRSA is proposing a new paper application that will be transitioned into an electronic application within the EHB system for Particularized Determinations (PD). PDs extend liability protections under FSCHAA, including FTCA coverage, for certain medical services provided to individuals who are not patients of a covered entity. This application will help ensure health centers provide all the necessary information required to make determinations appropriately and efficiently in response to their requests. By including the application within the EHBs, health centers will have access to all information from prior applications and have that information readily available if making future requests. The paper form of the application is an interim solution to support health centers until the electronic application becomes available in the FTCA module of the EHBs. After the electronic application is available in the EHBs, all PD requests will be submitted

electronically, and the paper application will no longer be used for submissions.

A 60-day notice published in the **Federal Register** on March 8, 2023, Vol. 88, No. 45; pp. 14377, received no public comments.

Need and Proposed Use of the Information: PDs of coverage applications are provided in compliance with 42 CFR 6.6 and must address certain specified criteria for coverage determinations to be issued. The application provides the Bureau of Primary Health Care with the information that is essential for evaluation of compliance with legal requirements and making a deeming determination of coverage under 42 CFR 6.6.

Likely Respondents: Respondents include recipients of Health Center Program funds with deemed PHS employee status under section 224(g)–(n) of the PHS Act (42 U.S.C. 233(g)–(n)).

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Application for Federally Supported Health Center Assistance Act (FSHCAA)/Federal Tort Claims Act (FTCA) Particularized Determination	12	1	12	2	24
Total	12	1	12	24	24

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–13822 Filed 6–28–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Secretary's Advisory Committee on Human Research Protections

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, notice is hereby given that the Secretary's Advisory Committee on Human Research Protections (SACHRP) will hold a meeting that will be open to the public. Information about SACHRP, the full meeting agenda, and instructions for linking to public access will be posted on the SACHRP website at *http://www.dhhs.gov/ohrp/sachrp-committee/meetings/index.html.*

DATES: The meeting will be held on Wednesday, July 19, 2023 from 11:00 a.m. until 5:00 p.m., and Thursday, July 20, 2023, from 11:00 a.m. until 5:00 p.m. (times are tentative and subject to change). The confirmed times and agenda will be posted on the SACHRP website as this information becomes available.

ADDRESSES: This meeting will be held via webcast. Members of the public may also attend the meeting via webcast. Instructions for attending via webcast will be posted at least one week prior to the meeting at *https://www.hhs.gov/ohrp/sachrp-committee/meetings/index.html.*

FOR FURTHER INFORMATION CONTACT: Julia Gorey, J.D., Executive Director, SACHRP; U.S. Department of Health and Human Services, 1101 Wootton Parkway, Suite 200, Rockville, Maryland 20852; telephone: 240–453–8141; fax: 240–453–6909; email address: *SACHRP@hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the authority of 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended, SACHRP was established to provide expert advice and recommendations to the Secretary of Health and Human Services, through the Assistant Secretary for Health, on issues and topics pertaining to or associated with the protection of human research subjects.

The Subpart A Subcommittee (SAS) was established by SACHRP in October 2006 and is charged with developing recommendations for consideration by SACHRP regarding the application of subpart A of 45 CFR part 46 in the current research environment.

The Subcommittee on Harmonization (SOH) was established by SACHRP at its July 2009 meeting and charged with identifying and prioritizing areas in which regulations and/or guidelines for human subjects research adopted by various agencies or offices within HHS would benefit from harmonization, consistency, clarity, simplification and/or coordination.

The SACHRP meeting will open to the public at 11:00 a.m., on Wednesday, July 19, 2023, followed by opening remarks from Julie Kaneshiro, Acting Director of OHRP and Dr. Douglas Diekema, SACHRP Chair. The meeting will begin with a discussion of IRB effectiveness, topic #4 of the recently published GAO report #GAO–23–104721, Institutional Review Boards: Actions Needed to Improve Federal Oversight and Examine Effectiveness. This will be followed by commentary on the FDA draft guidance, Decentralized Clinical Trials for Drugs, Biological Products, and Devices, in addition to discussion of recommendations that address the ethical conduct of decentralized clinical trials in human subjects research more broadly.

Discussion of both topics will continue on July 20, in addition to commentary on the recently released

draft HHS guidance, *Frequently Asked Questions: Limited Institutional Review Board Review and Related Exemptions.* Other topics may be added; for the full and updated meeting agenda, see *http://www.dhhs.gov/ohrp/sachrp-committee/meetings/index.html.* The meeting will adjourn by 5:00 p.m. July 20, 2023.

Time will be allotted for public comment on both days of the meeting. The public may submit written public comment in advance to *SACHRP@hhs.gov* no later than midnight July 12, 2023, ET. Written comments will be shared with SACHRP members and may be read aloud during the meeting. Public comment must be relevant to topics being addressed by the SACHRP.

Dated: June 12, 2023.

Julia G. Gorey,

Executive Director, SACHRP, Office for Human Research Protections.

[FR Doc. 2023–13833 Filed 6–28–23; 8:45 am]

BILLING CODE 4150–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Yiorgos (Georgios) I. Laliotis, M.D. (Respondent), who was a Postdoctoral Fellow, Department of Cancer Biology and Genetics, College of Medicine, The Ohio State University (OSU), and Postdoctoral Fellow, Department of Oncology, Johns Hopkins University (JHU). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Cancer Institute (NCI), National Institutes of Health (NIH), grants R01 CA186729, R01 CA198117, P30 CA016058, K22 CA245487, and R21 CA252530 and included in grant applications submitted for PHS funds, specifically R01 CA186729–07 and R01 CA198117–05 submitted to NCI, NIH. The administrative actions, including supervision for a period of three (3) years, were implemented beginning on June 12, 2023, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Sheila Garrity, JD, MPH, MBA, Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Yiorgos (Georgios) I. Laliotis, M.D., The Ohio State University and Johns Hopkins University: Based on the reports of inquiries conducted by OSU and JHU, admissions by Respondent, and analysis conducted by ORI in its oversight review, ORI found that Yiorgos (Georgios) I. Laliotis, M.D., former Postdoctoral Fellow, Department of Cancer Biology and Genetics, College of Medicine, OSU, and former Postdoctoral Fellow, Department of Oncology, JHU, engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically NCI, NIH, grants R01 CA186729, R01 CA198117, P30 CA016058, K22 CA245487, and R21 CA252530 and included in grant applications submitted for PHS funds, specifically R01 CA186729–07 and R01 CA198117–05 submitted to NCI, NIH.

ORI found that Respondent engaged in research misconduct by intentionally and knowingly falsifying and/or fabricating data, methods, results, and conclusions by representing a fabricated Exon 2 splice variant of *U2AF2,* which would translate as a Serine-Arginine-Rich deficient U2AF65 isoform, leading to the repression of lung adenocarcinomas and by enhancing the role of splicing in mutant *PIK3CA* breast cancer cell lines in the following three (3) published papers, two (2) NIH grant applications, and two (2) unpublished manuscripts:

- AKT3-mediated IWS1 phosphorylation promotes the proliferation of EGFR-mutant lung adenocarcinomas through cell cycle-regulated *U2AF2* RNA splicing. *Nat. Commun.* 2021 Jul 30; 12(1):4624. doi: 10.1038/s41467–021–24795–1 (hereafter referred to as ''*Nat. Commun.* 2021''). Retraction in: *Nat. Commun.* 2022 Jun 28;13(1):3711. doi: 10.1038/s41467–022–31445–7.
- Phosphor-IWS1-dependent *U2AF2* splicing regulates trafficking of CAR–E-positive intronless gene mRNAs and sensitivity to viral infection. *Commun. Biol.* 2021 Oct 11; 4(1):1179. doi: 10.1038/s42003–021–02668-z (hereafter referred to as ''*Commun. Biol.* 2021''). Retraction in: *Commun. Biol.* 2021 Dec 15;4(1):1419. doi: 10.1038/s42003–021–02941–1.
- Overexpression of the SETD2 WW domain inhibits the phosphor-IWS1/SETD2 interaction and the oncogenic AKT/IWS1 RNA splicing program. *bioRxiv* 2021.08.12.454141. doi: 10.1101/2021.08.12.454141 (hereafter referred to as ''*bioRxiv* 2021''). Withdrawn. The manuscript also was submitted to *Commun. Biol.* in 2021 but was withdrawn prior to completion of peer review.
- R01 CA186729–07, ''The role of IWS1-dependent alternative RNA splicing in lung cancer,'' submitted to NCI, NIH, on November 5, 2020.
- R01 CA198117–05, ''The role of IWS1 in development and tumorigenesis,'' submitted to NCI, NIH, on June 3, 2019.
- The transcriptomic landscape of oncogenic P13K reveals key functions in splicing and gene expression regulation. Manuscript submitted to *Cancer Res.* (hereafter referred to as the ''*Cancer Res.* manuscript'').
- Interpretable deep learning for chromatin-informed inference of transcriptional programs driven by somatic alterations across cancers. Manuscript in preparation (hereafter referred to as ''Manuscript 2021'').

Specifically, ORI finds that Respondent knowingly and intentionally:

- falsified the sequencing data in Figure 1g of *Nat. Commun.* 2021 by splicing two sequencing chromatograms together to falsely represent a novel identification of a previously undescribed *U2AF2* RNA transcript lacking Exon 2
- falsified conclusions about the fabricated *U2AF2* splice variant in RT–PCR results in Figures 1f, 2a, 2b, 2c, 3d, 4a, 4b, 4c, 4e, 5h, 6f, 6i, and 7c of *Nat. Commun.* 2021
- falsified conclusions about the fabricated *U2AF2* splice variant as the source of two endogenous protein isoforms in immunoblot panels in Figures 5c and 5g of *Nat. Commun.* 2021 and Figure 2 of R01 CA186729–07
- falsified the experimental conditions of p-ERK1/2 (Y202/T204), p-CDK1 (Y15), CDK1, and Cyclin B1 immunoblot panels in Figure 5g of *Nat. Commun.* 2021 and Figure 2 of R01 CA186729–07 by using shControl or shIWS1 instead of the samples as reported in the figure labels to falsely represent the immunoblots as the result of *U2AF2* containing spliced Exon 2
- falsified the experimental conditions of the α-actinin immunoblot panel in Figure 1e of *Commun. Biol.* 2021 by using shIWS1 instead of shISWS1/U2AF65β-V5 as reported in the figure label
- in *Commun. Biol.* 2021, *bioRxiv* 2021, R01 CA186729–07, and R01 CA198117–05, reported falsified conclusions highlighting the role of the fabricated *U2AF2* RNA transcript lacking Exon 2 from *Nat. Commun.* 2021

- fabricated and/or falsified the dose response curves in Figures 3k and S5N of the *Cancer Res.* manuscript by treating the MCF7 and T47D cells lines with DMSO or Alpelisib instead of treating with the presence or absence of splicing inhibitors H3B–8800 or E7070 as reported in the figure legend
- fabricated and/or falsified the quantitative RNA immunoprecipitation qPCR data in Figures S4c and S4d of the *Cancer Res.* Manuscript
- fabricated and/or falsified the qPCR data in Figure 6 of Manuscript 2021 to show changes in gene expression between control and inhibitor treatment
- fabricated and/or falsified the experimental methods described in the legend of Figure 6 of Manuscript 2021 by using CREB1 as a control gene instead of ACTIN as reported in the figure legend

Respondent entered into a Voluntary Settlement Agreement (Agreement) and voluntarily agreed to the following:

(1) Respondent will have his research supervised for a period of three (3) years beginning on June 12, 2023 (the ''Supervision Period''). Prior to the submission of an application for PHS support for a research project on which Respondent's participation is proposed and prior to Respondent's participation in any capacity in PHS-supported research, Respondent will submit a plan for supervision of Respondent's duties to ORI for approval. The supervision plan must be designed to ensure the integrity of Respondent's research. Respondent will not participate in any PHS-supported research until such a supervision plan is approved by ORI. Respondent will comply with the agreed-upon supervision plan.

(2) The requirements for Respondent's supervision plan are as follows:

i. A committee of 2–3 senior faculty members at the institution who are familiar with Respondent's field of research, but not including Respondent's supervisor or collaborators, will provide oversight and guidance for a period of three (3) years from the effective date of the Agreement. The committee will review primary data from Respondent's laboratory on a quarterly basis and submit a report to ORI at six (6)-month intervals setting forth the committee meeting dates and Respondent's compliance with appropriate research standards and confirming the integrity of Respondent's research.

ii. The committee will conduct an advance review of each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved. The review will include a discussion with Respondent of the primary data represented in those documents and will include a certification to ORI that the data presented in the proposed application, report, manuscript, or abstract are supported by the research record.

(3) During the Supervision Period, Respondent will ensure that any institution employing him submits, in conjunction with each application for PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported and not plagiarized in the application, report, manuscript, or abstract.

(4) If no supervision plan is provided to ORI, Respondent will provide certification to ORI at the conclusion of the Supervision Period that his participation was not proposed on a research project for which an application for PHS support was submitted and that he has not participated in any capacity in PHS-supported research.

(5) During the Supervision Period, Respondent will exclude himself voluntarily from serving in any advisory or consultant capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee.

Dated: June 26, 2023.

Sheila Garrity,

Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2023–13847 Filed 6–28–23; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Global Affairs: Stakeholder Listening Session in Preparation for the G20 Health Working Group Ministers Meeting

ACTION: Notice of public listening session; request for comments.

Time and Date: The listening session will be held on Wednesday, August 9, 2023, from 12 to 2:00 p.m., Eastern Daylight Time.

Place: The session will be held virtually, with online and dial-in information shared with registered participants.

Status: This meeting is open to the public but requires RSVP to *oga.rsvp@hhs.gov* by August 4, 2023. See RSVP section below for details.

SUPPLEMENTARY INFORMATION:

Purpose: The U.S. Department of Health and Human Services (HHS), with support from relevant health-related U.S. Government offices, is charged with leading the U.S. delegation to the Group of 20 (G20) Health Working Group Ministers' Meeting and will convene an informal Stakeholder Listening Session.

The Stakeholder Listening Session is designed to seek input from stakeholders and subject matter experts to help inform and prepare for U.S. government engagement with the G20 Health Ministers. The G20 comprises 19 countries (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom and United States) and the European Union. The G20 members represent around 85% of the global GDP, over 75% of the global trade, and about two-thirds of the world population. The G20 is the premier forum for international economic cooperation and plays an important role in shaping and strengthening global architecture and governance on all major international economic issues.

Each year, a different member country holds the presidency of the group and hosts the meetings. The presidency proposes the group's priorities for the year and hosts discussions to work towards consensus positions and actions on those priorities. This year's G20 presidency is India, which will be hosting the Health Working Group Ministers' Meeting on August 18 and 19, 2023.

Matters to be Discussed: The Stakeholder Listening Session will cover priority areas expected to be addressed at the G20 Health Working Group Ministers Meeting. The following have been identified as priorities for the G20 Health Working Group:

Priority I: Health emergencies' prevention, preparedness and response (including a focus on a One Health approach & antimicrobial resistance).

Priority II: Strengthening cooperation on availability of and access to safe, effective, quality and affordable medical countermeasures during health emergencies.

Priority III: Digital health innovations and solutions to aid universal health coverage and improve health care service delivery.

Participation is welcome from all stakeholder communities.

RSVP: Persons seeking to speak at the listening session must register by Friday, August 4, 2023. Persons seeking to attend the listening session in a listen-only capacity must register by Monday, August 7, 2023.

Registrants must include their full name and organization, if any, and indicate whether they are registering as a listen-only attendee or as a speaker participant to *oga.rsvp@hhs.gov.*

Requests to participate as a speaker must include:

1. The name and email address of the person desiring to participate.
2. The organization(s) that person represents, if any.
3. Identification of the primary topic of interest.

Other Information: Written comments should be emailed to *oga.rsvp@hhs.gov* with the subject line ''Written Comment Re: Stakeholder Listening Session in preparation for the G20 Health Working Group Ministers Meeting'' by Friday, August 11, 2023.

We look forward to your comments on U.S. engagement with the G20 Health Working Group Ministers Meeting.

Dated: June 9, 2023.

Susan Kim,

Principal Deputy Assistant Secretary for Global Affairs.

[FR Doc. 2023–13798 Filed 6–28–23; 8:45 am]

BILLING CODE 4150–38–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: Basic Translational Cancer.

Date: July 25, 2023.

Time: 12 to 5 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: Angela Y. Ng, Ph.D., MBA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 710–C, MSC 7806, Bethesda, MD 20892, (301) 435–1715, *nga@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Medical Imaging Investigations.

Date: July 26, 2023.

Time: 9 a.m. to 8 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: Yuanna Cheng, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4138, MSC 7814, Bethesda, MD 20892, (301) 435–1195, *Chengy5@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Physiology and Pathobiology of Cardiovascular and Respiratory Systems.

Date: July 27–28, 2023.

Time: 9 a.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Kimm Hamann, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118A, MSC 7814, Bethesda, MD 20892, 301–435–5575, *hamannkj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Endocrinology and Metabolism.

Date: July 27, 2023.

Time: 10 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, 301–435–1154, *dianne.hardy@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; AREA/REAP: Respiratory, Cardiac and Circulatory Sciences.

Date: July 27, 2023.

Time: 1 to 5 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: Kirk Edward Dineley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 806E, Bethesda, MD 20892, (301) 867–5309, *dineleyke@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular Transducers of Physical Activity Consortium (MoTrPAC) Clinical Centers and Coordinating Center.

Date: July 27, 2023.

Time: 12:30 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: Heidi B. Friedman, Ph.D., Senior Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 907–H, Bethesda, MD 20892, (301) 379–5632, *hfriedman@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular Biology and Hematology.

Date: July 28, 2023.

Time: 10 a.m. to 8 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: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, Bethesda, MD 20892, (301) 408–9497, *zouai@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Prevention and Therapeutics.

Date: July 28, 2023.

Time: 12:30 to 7 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*.

(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: June 23, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–13796 Filed 6–28–23; 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 inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. to achieve expeditious commercialization of results of federally-funded research and development.

FOR FURTHER INFORMATION CONTACT: Licensing information may be obtained by emailing the indicated licensing contact at the National Heart, Lung, and Blood, Office of Technology Transfer and Development Office of Technology Transfer, 31 Center Drive, Room 4A29, MSC2479, Bethesda, MD 20892–2479; Michael Shmilovich; *shmilovm@nih.gov;* telephone: 301–435–5019. A signed Confidential Disclosure Agreement may be required to receive any unpublished information.

SUPPLEMENTARY INFORMATION: Technology description follows.

Cannabinoid Receptor Modulating Compounds

Available for licensing and commercial development are potentially therapeutic compounds for metabolic, inflammatory and fibrotic disorders. The filed patent applications includes extensive descriptions of the exemplary molecules and their various constituents. The cannabinoid receptor mediating compounds can be neutral antagonists. A CB_1 inverse agonist is a drug that on its own produces an effect opposite to that of a CB_1 agonist, and is also able to block the effect of a CB_1 agonist. In contrast, a CB_1 neutral antagonist can only do the latter (*i.e.,* blocking the effect of a CB_1 agonist), but has no effect on its own. CB_1 inverse agonism is usually documented by the ability of a drug to decrease GTPγS binding and/or to increase adenylate cyclase activity. The compounds may show functional bias for GTPγS or β-Arrestin or activity for both GTPγS and β-Arrestin. Secondary targets could include, but not limited to, the enzyme inducible nitric oxide synthase (iNOS) or adenosine monophosphate kinase (AMPK), as suggested by findings that inhibition of iNOS or activation of AMPK improves insulin resistance, and reduces fibrosis and inflammation. The rights pursued claim compounds, pharmaceutical compositions, and methods of use.

Potential Commercial Applications

- Pharmaceuticals
- Cancer therapy
- Anti-fibrotic therapy
- Inflammatory and autoimmune disease

Development Stage

- Early stage

Inventors: Malliga R. Iyer, Ph.D.; Pinaki Bhattacharjee, Ph.D.; Resat Cinar, PharmD, MBA; George Kunos, M.D., Ph.D.; Szabolcs Dvoracsko Ph.D., (all of NIAAA).

Intellectual Property: HHS Reference No. E–189–2021–0; U.S. Provisional Patent Application No. 63/319,642 filed March 14, 2022; International Patent Application PCT/U2023/014846 filed March 8, 2023.

Licensing Contact: Michael Shmilovich; 301–435–5019; *michael.shmilovich@nih.gov*.

This notice is in accordance with 35 U.S.C. 209 and 37 CFR part 404 to achieve expeditious commercialization of results of federally-funded research and development.

Dated: June 23, 2023.

Michael A. Shmilovich,

Senior Licensing and Patenting Manager, National Heart, Lung, and Blood Institute, Office of Technology Transfer and Development.

[FR Doc. 2023–13792 Filed 6–28–23; 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: National Heart, Lung, and Blood Institute Special Emphasis Panel; Clinical Trials SEP (UG3, U24).

Date: July 27, 2023.

Time: 2:00 p.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: Zhihong Shan, Ph.D., MD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 205–J, Bethesda, MD 20892, (301) 827–7085, *zhihong.shan@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: June 26, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–13854 Filed 6–28–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–0361.

Project: SAMHSA Generic Clearance for Grant Program Monitoring Activities

To carry out OMB Circular A–102 [1] and 2 CFR part 215.51,[2] SAMHSA must collect grant program information necessary to ensure compliance with Federal and programmatic requirements. The Generic Clearance for Grant Program Monitoring Activities allows SAMHSA to collect standardized information from its grant recipients necessary to perform agency program oversight activities such as monitoring progress on recipient activities and determining and responding to

[1] Circular A–102: *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A102/a102.pdf.*

[2] 2 CFR part 215.51: *https://www.govinfo.gov/content/pkg/CFR-2012-title2-vol1/pdf/CFR-2012-title2-vol1-subtitleA.pdf.*

recipient's training and technical assistance (T/TA) needs. SAMHSA currently manages grant programs that provide prevention, treatment, recovery support services, and T/TA for substance use treatment and mental health providers along the continuum of care including prevention, harm reduction, treatment, and recovery.

SAMHSA's grant recipients are currently required to submit various types of performance reports in accordance with their individual program requirements. The data collections will be designed to standardize program monitoring and performance reports of SAMHSA's grants. Program offices will use information collected under this generic clearance to monitor funding recipient activities and to provide support or take appropriate action, as needed.

A generic clearance would provide SAMHSA's program offices the flexibility to create and use tailored information collection templates based on current program reporting requirements. This is important to allow for SAMHSA's:

- Monitoring of compliance with federal practice, guidelines, and requirements,
- Oversight of the implementation of the scope of the grant activities with the grant recipients' proposed project,
- Assessment of the efficiency and efficacy of recipient activities,
- Quick understanding of and remediation to national, regional, and/or site-specific issues,
- Provision of additional support and technical assistance, as needed,
- Documentation of promising practices, innovative services, and program strengths, and
- Flexible and responsive oversight of federal funds.

A variety of performance reports will be used for collection. Program offices will use information collected under this generic clearance to monitor funding recipient activities and to provide support or take appropriate action, as needed.

A variety of instruments and platforms will be used to collect information from respondents. The annual burden hours requested (180,000) are based on the number of collections we expect to conduct over the requested period for this clearance.

The estimated annual hour burden is as follows:

Type of respondent	Number of respondents	Responses per respondent	Total responses	Hours per response	Total annual burden hours	Hourly wage cost	Total hour cost
Progress Report Template (Annual)	4,000	1	4,000	8	32,000	$26	$832,000
Progress Report (Interim)	2,500	2	5,000	6	30,000	26	780,000
Grant Closeouts	1,000	1	1,000	10	10,000	26	260,000
Site Visit Report Template	4,000	1	4,000	6	24,000	26	624,000
Other	4,000	1	4,000	6	24,000	26	624,000
Total	20,000	.....	28,000	.....	180,000	.....	3,120,000

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 information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Alicia Broadus,

Public Health Advisor.

[FR Doc. 2023–13844 Filed 6–28–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0092]

Agency Information Collection Activities; Revision of a Currently Approved Collection: E-Verify Program

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 28, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0092 in the body of the letter, the agency name and Docket ID USCIS–2007–0023. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0023.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2007–0023 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that

is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* E-Verify Program.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No Agency Form Number; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. E-Verify is a web-based system which allows employers to electronically confirm the employment eligibility of newly hired employees.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection E-Verify Program for New Users Entry (Employer Enrollment) is 66,330 and the estimated hour burden per response is 2.26 hours; the estimated total number of respondents for the information collection E-Verify Program for New User Training is 66,330 and the estimated hour burden per responses is 1 hour; the estimated total number of respondents for the information collection E-Verify Program for Existing User Annual Training is 358,670 and the estimated hour burden per responses is 0.5 hours; the estimated total number of respondents for the information collection E-Verify Program for Queries and Initial Cases is 235,985 and the estimated hour burden per responses is 0.121 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,966,051 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $1,887,000.

Dated: June 23, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13794 Filed 6–28–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0047]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Employment Eligibility Verification

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 28, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0047 in the body of the letter, the agency name and Docket ID USCIS–2006–0068. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2006–0068.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2006–0068 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated,

electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Employment Eligibility Verification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–9; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Business or other for-profit; Not-for-profit institutions. The Form I–9 was developed to facilitate compliance with Section 274A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, making employment of unauthorized aliens unlawful and diminishing the flow of illegal workers in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–9 Employers is 62,063,950 and the estimated hour burden per response is 0.35 hours; the estimated total number of respondents for the information collection I–9 Employees is 62,063,950 and the estimated hour burden per response is 0.15 hours; the estimated total number of respondents for the information collection by Record Keeping is 27,200,000 and the estimated hour burden per response is 0.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 35,655,976 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0. Any requirements to support the verification process are already available through other approved collections of information that may be employment related or occur as a part of the hiring process. There is no submission to USCIS of materials which eliminates mailing and photocopying costs.

Dated: June 23, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13789 Filed 6–28–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–NEW]

Agency Information Collection Activities; New Collection: E-Verify NextGen, I–9NG

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 28, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–NEW in the body of the letter, the agency name and Docket ID USCIS–2023–0011. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2023–0011.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Background

With this demonstration project, called ''E-Verify NextGen,'' USCIS intends to further integrate the Form I–9, Employment Eligibility Verification, process with the E-Verify electronic employment eligibility confirmation process to create a more secure and less burdensome employment eligibility verification process overall for employees and employers. This integrated internet-based project will permit employees to create their own secure account, resolve E-Verify tentative non-confirmations (also referred to as ''mismatches'') in advance and directly with the government, instead of through their employer, and then receive an electronic verification response that they can use and update with subsequent employers.

The current employment eligibility verification process relies on employer participation to ensure both employees and employers correctly enter information on the Form I–9 and then subsequently transfer that information into the E-Verify system. This employer intervention with employee-related information is less secure and sometimes results in data entry errors with the cases created in E-Verify. These cases can result in E-Verify mismatches that may require additional actions by the employer, the employee, the Social Security Administration, and DHS, to complete an employment eligibility verification. The burden of initiating this resolution process currently falls mostly on employers. If an employer does not correctly follow the E-Verify steps needed to communicate the mismatch resolution processes to employees, including failing to notify the employee of the mismatch, the employees and the government have difficulty resolving the mismatch, and the employees and employers may not receive timely and appropriate confirmation of their employment eligibility. Employees who are not notified of their mismatch may not have an opportunity to resolve it and can face termination if their E-Verify case results in a final nonconfirmation.

The goal of E-Verify NextGen is to streamline the employment eligibility verification and confirmation process for employers and employees by:

- Resolving E-Verify mismatches and electronically issuing an employment authorized result to individuals who E-Verify finds to be work authorized, which will expedite future E-Verify

checks and make an employee's employment eligibility verification easier for future employment.

• Giving employees more direct control over their data privacy and a more direct stake in their employment eligibility verification process by creating a secure, individual account for employment eligibility verification. This better protects personally identifiable information and helps improve data accuracy.

• Allowing employees to receive notification of and resolve E-Verify mismatches directly with the government without requiring the employer to be an intermediary to print and distribute forms, which is a more secure and private process that can speed up case resolution.

• Removing the employer's primary role in the mismatch resolution process. While employers would be informed about their employee's mismatch, this process removes employers as the intermediary to communicate a mismatch to the employee, as affected employees are instead notified directly and provided the instructions required to resolve the mismatch.

The demonstration project will be built upon the existing USCIS and E-Verify web services capabilities and will be enhanced by two electronic applications for the employee and employer, respectively, each of which will have its own terms of service. USCIS will conduct detailed internal assessments of the demonstration project and intends to provide necessary reports and briefings on the project status as required by law. USCIS now welcomes comments to the proposed collection of information associated with these new functionalities.

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2023–0011 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov*.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* E-Verify NextGen.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–9NG; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Business or other for-profit; Not-for-profit institutions. E-Verify NextGen, I–9NG, was developed as a demonstration project to further integrate the Form I–9, Employment Eligibility Verification, process with the E-Verify electronic employment eligibility confirmation process to create a more secure and less burdensome employment eligibility verification process overall for employees and employers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–9NG Employers, Recruiters and Referrers for a fee, and State Employment Agencies is 189,015 and the estimated hour burden per response is 0.05 hours; the estimated total number of respondents for the information collection I–9NG Employees (New User Account Creation) is 11,668,584 and the estimated burden per response is 0.17 hours; the estimated total number of respondents for the information collection I–9NG Employees (Employment Eligibility Verification, Form I–9NG) is 13,231,050 and the estimated burden per response is 0.08 hours; the estimated total number of respondents for the information collection by Record Keeping and Audits is 13,248,648 and the estimated burden per response is 0.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 5,955,966 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0. This is a voluntary program. Any requirements to support the verification process are already available through other approved collections of information that may be employment related or occur as a part of the hiring process.

Dated: June 23, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13786 Filed 6–28–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0075]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: I–864, Affidavit of Support Under Section 213A of the INA; I–864A, Contract Between Sponsor and Household Member; I–864EZ, Affidavit of Support Under Section 213A of the INA; I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In

accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 28, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0075 in the body of the letter, the agency name and Docket ID USCIS–2007–0029. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0029.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2007–0029 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) Type of Information Collection: Extension, Without Change, of a Currently Approved Collection.

(2) Title of the Form/Collection: I–864, Affidavit of Support Under Section 213A of the INA; I–864A, Contract Between Sponsor and Household Member; I–864EZ, Affidavit of Support Under Section 213A of the INA; I–864W, Request for Exemption for Intending Immigrant's Affidavit of Support.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I–864; I–864A; I–864EZ; I–864W; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. USCIS uses the data collected on Form I–864 to determine whether the sponsor has the ability to support the sponsored immigrant under section 213A of the Immigration and Nationality Act. This form standardizes evaluation of a sponsor's ability to support the sponsored immigrant and ensures that basic information required to assess eligibility is provided by sponsors.

Form I–864A is a contract between the sponsor and the sponsor's household members. It is only required if the sponsor used income of their household members to reach the required 125 percent of the Federal poverty guidelines. The contract holds these household members jointly and severally liable for the support of the sponsored immigrant. The information collection required on Form I–864A is necessary for public benefit agencies to enforce the Affidavit of Support in the event the sponsor used income of their household members to reach the required income level and the public benefit agencies are requesting reimbursement from the sponsor.

USCIS uses Form I–864EZ in exactly the same way as Form I–864; however, USCIS collects less information from the sponsors as less information is needed from those who qualify in order to make a thorough adjudication.

USCIS uses Form I–864W to determine whether the intending immigrant meets the criteria for exemption from section 213A requirements. This form collects the immigrant's basic information, such as name and address, the reason for the exemption, and accompanying documentation in support of the immigrant's claim that they are not subject to section 213.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–864 is 453,345 and the estimated hour burden per response is 6 hours; the estimated total number of respondents for the information collection Form I–864A is 215,800 and the estimated hour burden per response is 1.75 hours; the estimated total number of respondents for the information collection Form I–864EZ is 100,000 and the estimated hour burden per response is 2.5 hours; the estimated total number of respondents for the information collection Form I–864W is 98,119 and the estimated hour burden per response is 1 hour.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 3,445,839 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $159,608,680.

Dated: June 23, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13801 Filed 6–28–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7070–N 35]

30-Day Notice of Proposed Information Collection: Housing Counseling Notice of Funding Opportunity (NOFO) OMB Control No.: 2502–0621

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* July 31, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 21, 2023, at 87 FR 17000.

A. Overview of Information Collection

Title of Information Collection: Housing Counseling Notice of Funding Opportunity (NOFO).

OMB Approval Number: 2502–0621.

OMB Expiration Date: June 30, 2023.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD–9906–L; HUD–9906–P; NOFO 9906 Charts (A, B, E); HUD 424–CB; HUD–2880; SF–424; SF–LLL.

Description of the need for the information and proposed use: This is a revision of the collection because minor and clarifying revisions were made to the Form 9906 and its supplemental charts. This information is collected in connection with HUD's Housing Counseling Program and will be used by HUD to determine that the Housing Counseling grant applicant meets the requirements of the Notice of Funding Opportunity (NOFO). Information collected is also used to assign points for awarding grant funds on a competitive and equitable basis. HUD's Office of Housing Counseling will also use the information to provide housing counseling services through private or public organizations with special competence and knowledge in counseling low and moderate-income families. The information is collected from housing counseling agencies that participate in HUD's Housing Counseling Program. The information is collected via the Form 9906 (grant application chart) and its supplemental charts.

Respondents: Not-for-profit institutions; State, Local or Tribal government.

Estimated Number of Respondents: 300.

Estimated Number of Responses: 300.

Frequency of Response: 1.

Average Hours per Response: 40.

Total Estimated Burden: 12,000.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2023–13713 Filed 6–28–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036096; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Beloit College, Logan Museum of Anthropology, Beloit, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Beloit College, Logan Museum of Anthropology (LMA) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from Yell County, AR.

DATES: Repatriation of the human remains in this notice may occur on or after July 31, 2023.

ADDRESSES: Nicolette B. Meister, Logan Museum of Anthropology, 700 College Street, Beloit, WI 53511, telephone (608) 363–2305, email *meistern@beloit.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including

the results of consultation, can be found in the inventory or related records held by the LMA.

Description

Human remains representing, at minimum, one individual were removed from Havana in Yell County, AR. Sometime between 1915 and 1926, these human remains (catalog number 1872) were purchased by the LMA from Warren K. Moorehead. Moorehead was Curator (1901–1924) and Director (1924–1938) of the Phillips Academy Department of Archaeology. No known individual was identified. No associated funerary objects are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following type of information was used to reasonably trace the relationship: geographical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the LMA has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Caddo Nation of Oklahoma; Quapaw Nation; and The Osage Nation.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after July 31, 2023. If competing requests for repatriation are received, the LMA must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: June 21, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–13815 Filed 6–28–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036095; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Beloit College, Logan Museum of Anthropology, Beloit, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Beloit College, Logan Museum of Anthropology (LMA) has completed an inventory of human remains and an associated funerary object and has determined that there is no cultural affiliation between the human remains and associated funerary object and any Indian Tribe. The human remains and associated funerary object were removed from Logan County, Kentucky.

DATES: Disposition of the human remains and associated funerary object in this notice may occur on or after July 31, 2023.

ADDRESSES: Nicolette B. Meister, Logan Museum of Anthropology, 700 College Street, Beloit, WI 53511, telephone (608) 363–2305, email *meistern@beloit.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the LMA. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the LMA.

Description

Human remains representing, at minimum, five individuals were removed from mounds in Lewisburg in Logan County, KY. These human remains (lot numbers 1851; 1852; 1853; 1854; 1855; 1856; 1857; 1858; 1859; 1860; 1861) were purchased from Warren K. Moorehead in 1926. Moorehead was Curator (1901–1924) and Director (1924–1938) of the Phillips Academy Department of Archaeology. Lot 1860 is currently missing. No known individuals were identified. The one associated funerary object (15488) is a plainware jar removed from a mound in Lewisburg in Logan County, KY.

Aboriginal Land

The human remains and associated funerary object in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission or the United States Court of Claims, a treaty, Act of Congress, or Executive Order.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the LMA has determined that:

- The human remains described in this notice represent the physical remains of five individuals of Native American ancestry.
- The one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and any Indian Tribe.
- The human remains and associated funerary object described in this notice were removed from the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Cherokee Nation; Eastern Band of Cherokee Indians; Eastern Shawnee Tribe of Oklahoma; Miami Tribe of Oklahoma; Quapaw Nation; Shawnee Tribe; The Osage Nation; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Requests for Disposition

Written requests for disposition of the human remains and associated funerary object in this notice must be sent to the Responsible Official identified in

ADDRESSES. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary object described in this notice to a requestor may occur on or after July 31, 2023. If competing requests for disposition are received, the LMA must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary object are considered a single request and not competing requests. The LMA is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: June 21, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–13814 Filed 6–28–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036099; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: The Filson Historical Society, Louisville, KY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Filson Historical Society has completed an inventory of human remains and has determined that there is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from Muhlenberg County, KY.

DATES: Disposition of the human remains in this notice may occur on or after July 31, 2023.

ADDRESSES: Kelly Hyberger, The Filson Historical Society, 1310 South 3rd Street, Louisville, KY 40208, telephone (502) 635–5083, email *khyberger@filsonhistorical.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Filson Historical Society. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Filson Historical Society.

Description

Human remains representing, at minimum, two individuals were removed from Muhlenberg County, KY. Sometime around 1910, Otto A. Rothert collected these human remains from site 15Mu3, a mound south of the town of Greenville and near Buckner's Stack, in Muhlenberg County, KY. In 1929, Rothert donated these human remains to the Filson Historical Society. No known individuals were identified. No associated funerary objects are present.

Aboriginal Land

The human remains in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a treaty.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the Filson Historical Society has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- No relationship of shared group identity can be reasonably traced between the human remains and any Indian Tribe.
- The human remains described in this notice were removed from the aboriginal land of the Cherokee Nation; Eastern Band of Cherokee Indians; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Requests for Disposition

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES.** Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after July 31, 2023. If competing requests for disposition are received, the Filson Historical Society must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. The Filson Historical Society is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: June 21, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–13818 Filed 6–28–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036097; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State University Chico (CSU Chico) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Butte County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after July 31, 2023.

ADDRESSES: Dawn Rewolinski, California State University, Chico, 400 W 1st Street, Chico, CA 95929, telephone (530) 898–3090, email *drewolinski@csuchico.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of CSU Chico The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by CSU Chico.

Description

Accession 47

Human remains representing, at minimum, 14 individuals were removed from site CA–BUT–323 in Butte County, CA. This site was first recorded by John R. Sterling in 1962. It was re-recorded by M. Boyton of Chico State College (now CSU Chico) in 1971, by which time it had been nearly destroyed. Collections records indicate that artifacts and human remains were collected by Chico State College in 1971. The 8,800 associated funerary objects are three antler awls, two charcoal samples, 4,655 fragments of debitage, 98 modified faunal elements, 33 modified shells, 182 modified stone tools, nine oversized stone tools, 115 projectile points, 10 soil samples, five clay samples, 3,316 unmodified faunal elements, 220 unmodified shell fragments, and 152 organics.

Accession 48

Human remains representing, at minimum, 67 individuals were removed from the Cana Highway site (CA–BUT–288) in Butte County, CA. This site was first recorded by Dorothy Hill and Keith Johnson in 1966. From 1971 to 1974, it was excavated by a CSU Chico field class supervised by Professor Makato Kowta. The 7,513 associated funerary objects are 13 organics, 3,165 lots consisting of debitage, 948 modified stones, 150 projectile points, 332 unmodified shells, 32 modified shells, 145 ash samples, 246 charcoal samples, 35 soil samples, 386 faunal remains, 97 modified faunal remains, 157 clay samples, and 1,807 pieces of modified clay.

Accession 79

Human remains representing, at minimum, eight individuals were removed from Butte County, CA. In 1974, after four burials were exposed by land levelling operations, these human remains were collected from The Carmen Ranch Site by John Furry, who was likely a student at CSU Chico. The collection has been at CSU Chico since that time. The 18 associated funerary objects are one bone awl, one stone core, 10 modified stones, five unmodified animal bones, and one antler wedge.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, CSU Chico has determined that:

- The human remains described in this notice represent the physical remains of 89 individuals of Native American ancestry.
- The 16,331 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Mechoopda Indian Tribe of Chico Rancheria, California and the Paskenta Band of Nomlaki Indians of California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after July 31, 2023. If competing requests for repatriation are received, CSU Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. CSU Chico is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: June 21, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–13816 Filed 6–28–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036098; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State University Chico (CSU Chico) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Butte and Glenn Counties, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after July 31, 2023.

ADDRESSES: Dawn Rewolinski, California State University, Chico, 400 W 1st Street, Chico, CA 95929, telephone (530) 898–3090, email *drewolinski@csuchico.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of CSU Chico. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including

the results of consultation, can be found in the inventory or related records held by CSU Chico.

Description

CA–BUT–1

Human remains representing, at minimum, 58 individuals were removed from the Patrick site (CA–BUT–1) in Butte County, CA. This site was first recorded in 1947 by T. D. McCown, University of California, Berkeley, for the U.S. Archeological Survey. In 1965 and 1966, excavations at the Patrick site were led by Donald S. Miller, University of California, Los Angeles (UCLA), and Keith R. Johnson, CSU Chico. Between 1966 and 1969, the collection was at UCLA for storage and analysis. At an unknown point, some of the materials and records were moved to CSU Chico. The 874 associated funerary objects are 55 organics, two lots consisting of debitage, two projectile points, 518 fragments of shell, 25 samples of soil, 239 lots consisting of faunal remains, and 33 fragments of ochre.

Accession 4

Human remains representing, at minimum, eight individuals were removed from the Finch site (CA–BUT–12) in Butte County, CA. This site was first recorded by A. Pilling in 1949 and was rerecorded by Dorothy Hill in 1963. In the summer of 1963, Francis Riddell led a Chico State College (now CSU Chico) field class in excavations at the site, and in the spring of 1964, Professor Keith Johnson, accompanied by Riddell, led a second excavation at the site, again with a Chico State College field class. In the summer of 1967, Joseph Chartkoff (then at UCLA) led an excavation at the site (the 1967 collections are not under the control of CSU Chico). In the spring of 1983 and the spring of 1984, Professor Makoto Kowta led a CSU Chico field class in excavations at the site. The 12,302 associated funerary objects are 373 organics, 7,708 lots consisting of debitage, 272 modified stone fragments, 234 projectile points, 160 unmodified shells, 410 modified shell beads, five lots of ash, 196 samples of charcoal, one piece of petrified wood, 56 lots of soil, 2,479 unmodified faunal elements, 370 modified faunal elements, 23 clay fragments, 14 modified clay fragments, and one ochre fragment.

Accession 10

Human remains representing, at minimum, three individuals were removed from the Sycamore Canyon Rock shelter site (CA–BUT–473) in Butte County, CA. This site was first recorded by Keith Johnson and two Chico State College (now CSU Chico) students in 1964, and in 1965, it was excavated by a Chico State College field class led by Keith Johnson. The 251 associated funerary objects are five organics, 17 lots consisting of debitage, 48 modified stone fragments, 57 projectile points, 114 unmodified shell fragments, three modified shell beads, three unmodified faunal elements, and four modified faunal elements.

Accession 19

Human remains representing, at minimum, 66 individuals were removed from the Llano Seco site in Butte County, CA. This site was first recorded in 1965 by G. Yamamoto, and it was rerecorded by Dorothy Hill and Keith Johnson of Chico State College (now CSU Chico) in 1966. From 1966 to 1968, excavations were conducted at the site by Keith Johnson and the Chico State College field school. The 3,498 associated funerary objects are 190 organics, 1,387 lots consisting of debitage, 504 modified stone fragments, 192 projectile points, three unmodified shells, 439 modified shell fragments, two lots of ash, 96 samples of charcoal, one piece of petrified wood, five lots of soil, 525 unmodified faunal elements, 131 modified faunal elements, and 23 clay fragments.

Accession 21

Human remains representing, at minimum, two individuals were removed from the Rock Creek Levee Mound site in Butte, County, CA. This site was first recorded by Dorothy Hill of CSU Chico. She indicated that the site had been partially destroyed by levelling activities and the creation of a cut for a levee. Collections records suggest that cultural items and human remains were collected at that time and no further collection took place. The three associated funerary objects are modified stone fragments.

Accession 25

Human remains representing, at minimum, one individual were removed from the M&T Ranch site (CA–BUT–434) in Butte County, CA. This site was first recorded by Dorothy Hill of Chico State College (now CSU Chico) in 1962 after a burial was found eroding into the Sacramento River. Collections records indicate that the burial and affiliated artifacts were excavated by Dorothy Hill in 1967. The 283 associated funerary objects are 278 modified shell fragments and five modified faunal elements.

Accession 26

Human remains representing, at minimum, one individual were removed from the Chico Rancheria Cemetery site (CA–BUT–574) in Butte County, CA. This site is a historic Mechoopda cemetery that lies within the city of Chico. In 1967, three burials in cedar caskets were exposed when a septic tank was installed. Burials One and Two were heavily disturbed. Collections records indicate that only human remains and affiliated burial objects from Burial One were brought to CSU Chico, where they are currently housed. Some artifacts and human remains from these burials were removed by construction workers, and their current location is unknown. Burial Three was intact and the contents were reburied on site. The 1,667 associated funerary objects are 315 modified shells, 1,350 glass beads, one modified stone, and one coffin fragment.

Accession 32

Human remains representing, at minimum, 147 individuals were removed from the Wurlitzer Ranch site in Butte County, CA. This site was first recorded by Dorothy Hill in 1968, though it had been known to locals for many years. Chico State College field schools archeologically investigated the site from 1969 to 1971. The collection was formally donated to CSU Chico in 1981. The 4,201 associated funerary objects are five organics, 1,590 lots consisting of debitage, 1,660 modified stone fragments, 454 projectile points, six unmodified shell fragments, 76 modified shell fragments, three lots of ash, 19 samples of soil, 230 faunal elements, 76 modified faunal elements, 77 clay fragments, and five ochre fragments.

Accession 33

Human remains representing, at minimum, one individual were removed from the Whiskey Dog site (CA–BUT–300) in Butte County, CA. This site was first recorded in 1969 by CSU Chico under the direction of Chico State College faculty. The 70 associated funerary objects are seven lots consisting of debitage, 27 modified stone fragments, nine projectile points, 19 samples of charcoal, five modified faunal elements, two clay fragments, and one modified clay fragment.

Accessions 40–44

Human remains representing, at minimum, six individuals were removed from the Richardson Springs site (CA–BUT–7) in Butte County, CA. This site was first located and recorded in 1949 by A. R. Pilling and was rerecorded in 1971. In 1970, it was excavated by a joint Chico State College and Queens College, City University of

New York field school. In 1973, Richardson Springs was listed on the National Register of Historic Places under the name Mud Creek Canyon. The 7,777 associated funerary objects are 89 lots of organics, 3,033 lots consisting of debitage, 1,254 modified stone fragments, 347 projectile points, 398 lots consisting of unmodified shell fragments, 163 modified shell fragments, one sample of ash, 443 samples of charcoal, 11 pieces of petrified wood, 132 samples of soil, 1,849 lots consisting of faunal elements, 42 modified faunal elements, 14 clay fragments, and one ochre fragment.

Accession 52

Human remains representing, at minimum, one individual were removed from the Wilson Landing Road site (CA–BUT–529) in Butte County, CA. This site was first identified by Dorothy Hill at an unknown date. In 1971, after reports of a burial removed by a worker discing the site in preparation for planting, it was recorded by Makato Kowta and M. Boyton, at which time cultural items and human remains were collected. The 22 associated funerary objects are four lots consisting of debitage, one oversized stone tool, and 17 modified stones.

Accession 55

Human remains representing, at minimum, 22 individuals were removed from the Ellsworth Whyler site (CA–GLE–101) in Glenn County, CA. This site was first recorded by Keith Johnson of CSU Chico in 1971. In the summer of 1972, it was excavated by a CSU Chico field class under the supervision of Keith Johnson. The 1,348 associated funerary objects are one organic, 160 lots consisting of debitage, 60 modified stone fragments, 54 projectile points, 14 unmodified shell fragments, six modified shell fragments, 23 ash samples, one soil sample, 926 faunal elements, 100 modified faunal elements, and three modified clay fragments.

Accession 68

Human remains representing, at minimum, six individuals were removed from Site CA–GLE–105 in Glenn County, CA. This site was originally recorded by Keith Johnson in 1973. Johnson noted that potentially 50% of the site had already eroded into the Sacramento River. In the Spring of 1973, Keith Johnson and the CSU Chico field class excavated portions of the site. In 1986, the site was determined to be adversely affected by a planned U.S. Army Corps of Engineers Riverbank Stabilization Project. Consequently, in 1987, the Army Corps of Engineers contracted CSU Chico archeologists to further excavate the site to determine its eligibility for the National Register of Historic Places. The 1987 excavations included removal of three burials. The 844 associated funerary objects are eight organics, 391 lots consisting of debitage, 25 modified stones, 12 projectile points, 34 fragments of shell, 63 samples of soil, five samples of charcoal, 293 faunal elements, three modified faunal elements, and 10 pieces of clay.

Accession 123

Human remains representing, at minimum, three individuals were removed from Site CA–BUT–563 in Butte County, CA. This site was excavated by CSU Chico-affiliated archeologists in the spring of 1977 and the collection has been housed at CSU Chico since that time. The 7,495 associated funerary objects are 15 organics, 5,086 lots consisting of debitage, 486 modified stone fragments, 16 projectile points, 308 fragments of shell, six fragments of modified shell, 21 samples of ash, 343 samples of charcoal, four pieces of petrified wood, 70 samples of soil, 1,133 faunal elements, two modified faunal elements, three pieces of clay, and two ochre fragments.

Accession 148

Human remains representing, at minimum, two individuals were removed from Site CA–GLE–19 in Glenn County, CA. This site was first recorded in 1972 while part of the site was eroding into the Sacramento River. In March of 1979, CSU Chico-affiliated archeologists collected human remains and artifacts from that portion of the site exposed by erosion, and between March and September of 1979, they conducted a complete excavation. All excavated materials have been housed at CSU Chico since their removal from the site. The 826 associated funerary objects are 151 lots consisting of debitage, 26 modified stone fragments, 21 modified shell fragments, three samples of charcoal, five pieces of petrified wood, 63 faunal elements, and 557 ochre fragments.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, CSU Chico has determined that:

- The human remains described in this notice represent the physical remains of 327 individuals of Native American ancestry.
- The 41,461 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Mechoopda Indian Tribe of Chico Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after July 31, 2023. If competing requests for repatriation are received, CSU Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. CSU Chico is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: June 21, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–13817 Filed 6–28–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0008; DS63644000 DRT000000.CH7000 234D1113RT; OMB Control Number 1012–0006]

Agency Information Collection Activities; Suspensions Pending Appeal and Bonding

AGENCY: Office of Natural Resources Revenue, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (''PRA''), the Office of Natural Resources Revenue (''ONRR'') is proposing to renew an information collection. Through this Information Collection Request renewal (''ICR''), ONRR seeks renewed authority to collect information related to the paperwork requirements necessary to post a bond or other surety, or to demonstrate financial solvency to suspend compliance with an order or to stay the assessment or accrual of civil penalties.

DATES: Submit written comments on or before July 31, 2023.

ADDRESSES: All comment submissions must (1) reference ''OMB Control Number 1012–0006'' in the subject line; (2) be sent to ONRR before the close of the comment period listed under **DATES**; and (3) be sent using the following method:

Electronically via the Federal eRulemaking Portal: Please visit *https://www.regulations.gov.* In the Search Box, enter the Docket ID Number for this ICR renewal (''ONRR–2011–0008'') and click ''search'' to view the publications associated with the docket folder. Locate the document with an open comment period and click the ''Comment Now!'' button. Follow the prompts to submit your comment prior to the close of the comment period.

Docket: To access the docket folder to view the ICR **Federal Register** publications, go to *https://www.regulations.gov* and search ''ONRR–2011–0008'' to view renewal notices recently published in the **Federal Register**, publications associated with prior renewals, and applicable public comments received for this ICR. ONRR will make the comments submitted in response to this notice available for public viewing at *https://www.regulations.gov.*

OMB ICR Data: OMB also maintains information on ICR renewals and approvals. You may access this information at *https://www.reginfo.gov/public/do/PRASearch.* Please use the following instructions: Under the ''OMB Control Number'' heading enter ''1012–0006'' and click the ''Search'' button located at the bottom of the page. To view the ICR renewal or OMB approval status, click on the latest entry (based on the most recent date). On the ''View ICR—OIRA Conclusion'' page, check the box next to ''All'' to display all available ICR information provided by OMB.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact Kimberly Werner, Financial Services, ONRR, by telephone at (303) 231–3801 or email to *Kimberly.Werner@onrr.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: Pursuant to the PRA, 44 U.S.C. 3501, *et seq.,* and 5 CFR 1320.5, all information collections, as defined in 5 CFR 1320.3, require approval by OMB. ONRR 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.

As part of ONRR's continuing effort to reduce paperwork and respondent burdens, ONRR is inviting the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information in accordance with the PRA and 5 CFR 1320.8(d)(1). This helps ONRR to assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand ONRR's information collection requirements and provide the requested data in the desired format.

ONRR is especially interested in public comments addressing the following:

(1) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of ONRR's 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.

On January 13, 2023, the Bureau of Indian Affairs (''BIA'') published a proposed rule (88 FR 2430) to amend its regulations to allow ONRR to issue certain types of orders relating to the Osage Nation mineral estate in Osage County, Oklahoma (''Osage Mineral Estate''). The proposed rule would allow a person adversely affected by an ONRR order concerning the Osage Mineral Estate to post a surety instrument to suspend compliance with the order during an appeal (*see* 88 FR 2498–99). On January 19, 2023, ONRR published a 60-day notice (88 FR 3430) proposing to both renew this ICR and expand it to include ONRR's additional surety information collections for Osage Mineral Estate orders if the BIA's proposed amendments become final.

Because the BIA has not published a final rule as of this date, ONRR is not seeking in this 30-day notice to expand this ICR to include Osage Mineral Estate information collections. Accordingly, this 30-day notice only seeks renewed authority to collect information related to the surety and financial solvency paperwork requirements under 30 CFR part 1243. ONRR may later seek to expand this ICR to include surety information collections for Osage Mineral Estate orders if the BIA adopts its proposed amendments.

ONRR did not receive any comments in response to the **Federal Register** 60-day notice available at *www.regulations.gov.* However, ONRR reached out to members of industry to solicit comments and received four comments in response to this information collection request renewal. Three of those comments agreed with the content of this ICR. One commenter disagreed with the amount of time that ONRR uses to calculate the burden hours. ONRR acknowledged and provided responses to all commenters accordingly.

Comments that you submit in response to this 30-day notice are a matter of public record. ONRR will include or summarize each comment in its 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 ONRR in your comment to withhold your personal

identifying information from public review, ONRR cannot guarantee that it will be able to do so.

Abstract: (a) General Information: ONRR issues orders and assesses civil penalties in performing mineral revenue management responsibilities for the Secretary of the Interior. *See* U.S. Department of the Interior Departmental Manual, 112 DM 34.1 (Sept. 9, 2020). A person who timely appeals an ONRR order may post a bond or other surety instrument pursuant to 30 CFR part 1243, or, for Federal leases, demonstrate financial solvency pursuant to 30 CFR part 1243, subpart C, to suspend its compliance with the order during the appeal. *See* 30 CFR 1243.1. Similarly, if an administrative law judge determines that a stay is warranted, the recipient of a civil penalty notice who timely requests a hearing may post a surety instrument or demonstrate financial solvency under these same subparts to stay the assessment or accrual of penalties pending a hearing on the record and decision by the administrative law judge. *See* 30 CFR 1241.11.

(b) Information Collections: ONRR accepts the following surety types: Form ONRR–4435, Administrative Appeal Bond; Form ONRR–4436, Letter of Credit; Form ONRR–4437, Assignment of Certificate of Deposit; Self-bonding; and U.S. Treasury Securities. *See* 30 CFR 1210.157. Instructions for submitting these surety instruments or self-bonding are located at *https://www.onrr.gov/document/SuretyInst.pdf.* This ICR covers the burden hours associated with submitting surety instruments and self-bonding pursuant to 30 CFR part 1243 as follows:

(1) Form ONRR–4435, Administrative Appeal Bond: A person using this form of surety supplies various information on the form ONRR–4435, such as its contact information, surety company name and address, and surety amount. The bond must be issued by a qualified surety company approved by the U.S. Department of the Treasury (*see* Department of the Treasury Circular No. 570, revised periodically in the **Federal Register**). ONRR maintains the bond in a secure facility.

(2) Form ONRR–4436, Letter of Credit: A person using this form of surety must complete the form ONRR–4436, with no modifications. The person supplies various information on the form, such as bank name and address, bank ABA number, and effective date. ONRR maintains the letter of credit in a secure facility. The person submitting the letter of credit is responsible for verifying that the bank provides a current Fitch rating to ONRR.

(3) Form ONRR–4437, Assignment of Certificate of Deposit: A person seeking to use a Certificate of Deposit (CD) as surety must submit a written request to ONRR to do so. A person using this form of surety supplies various information on the form ONRR–4437, such as the CD number, CD amount, and bank name. ONRR will accept only a book-entry CD that explicitly assigns the CD to ONRR's Director.

(4) U.S. Treasury Securities: A person seeking to use a U.S. Treasury Security (''TS'') as surety must submit a written request to ONRR to do so. The TS must be a U.S. Treasury note or bond with maturity equal to or greater than one year. The TS must equal 120 percent of the appealed amount plus 1 year of estimated interest (necessary to protect ONRR against interest rate fluctuations). ONRR only accepts a book-entry TS.

(5) Self-bonding: For Federal oil and gas leases only (not Indian leases), 30 CFR 1243.201 provides that no surety instrument is required when a person periodically demonstrates, to the satisfaction of ONRR, that it is financially solvent or otherwise able to pay the obligation. ONRR requires the person to submit a consolidated balance sheet, subject to annual audit. In some cases, ONRR also requires copies of the most recent tax returns (up to three years).

In addition, the person must annually submit financial statements, subject to audit, to support its net worth. If the person does not have a consolidated balance sheet documenting its net worth, or if it does not meet the $300 million net worth requirement, ONRR will select a business information or credit reporting service to provide information concerning its financial solvency. ONRR charges a $50 fee each time it reviews data from a business information or credit reporting service. The fee covers ONRR's cost to determine financial solvency.

Title of Collection: Suspensions Pending Appeal and Bonding.

OMB Control Number: 1012–0006.

Form Number: Forms ONRR–4435, ONRR–4436, and ONRR–4437.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Businesses.

Total Estimated Number of Annual Respondents: 105 Federal or Indian appellants.

Total Estimated Number of Annual Responses: 105.

Estimated Completion Time per Response: 2 hours.

Total Estimated Number of Annual Burden Hours: 210.

Respondent's Obligation: Mandatory.

Frequency of Collection: Annual and on occasion.

Total Estimated Annual Non-hour Burden Cost: There are no additional recordkeeping costs associated with this information collection. However, ONRR estimates 5 appellants per year will pay a $50 fee to obtain credit data from a business information or credit reporting service, which is a total ''non-hour'' cost burden of $250 per year (5 appellants per year $50 = $250).

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 PRA (44 U.S.C. 3501 *et seq.*).

Howard Cantor,

Director, Office of Natural Resources Revenue.

[FR Doc. 2023–13867 Filed 6–28–23; 8:45 am]

BILLING CODE 4335–30–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1330 (Review)]

Dioctyl Terephthalate From South Korea

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on dioctyl terephthalate from South Korea would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on July 1, 2022 (87 FR 39556) and determined on October 4, 2022 that it would conduct a full review (87 FR 75067, December 7, 2022). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on December 22, 2022 (87 FR 78708). Since one party requested cancellation of a hearing and no other parties requested a hearing, the

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

public hearing in connection with the review, originally scheduled for April 27, 2023, was cancelled (88 FR 26598, April 25, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on June 26, 2023. The views of the Commission are contained in USITC Publication 5433 (June 2023), entitled *Dioctyl Terephthalate from South Korea: Investigation No. 731–TA–1330 (Review).*

By order of the Commission.

Issued: June 26, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–13862 Filed 6–28–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1197]

Importer of Controlled Substances Application: Irvine Labs, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Irvine Labs, Inc. has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before July 31, 2023. Such persons may also file a written request for a hearing on the application on or before July 31, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on April 20, 2023, Irvine Labs, Inc. 7305 Murdy Circle, Huntington Beach, California 92647–3533, applied to be registered as an importer of the following basic class(es) of controlled substance(s).

Controlled substance	Drug code	Schedule
Lysergic acid diethylamide	7315	I
Marihuana Extract	7350	I
Marihuana	7360	I
Tetrahydrocannabinols	7370	I
Mescaline	7381	I
Peyote	7415	I
Diethyltryptamine	7434	I
Dimethyltryptamine	7435	I
Psilocybin	7437	I
Psilocyn	7438	I

The company plans to import the bulk substances to support internal research, clinical trials, analytical purposes, and distribution to their customers. In reference to drug codes 7360 (Marihuana), 7350 (Marihuana Extract), and 7370 (Tetrahydrocannabinols) the company plans to import a raw plant material and extracts. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Matthew Strait,

Deputy Assistant Administrator.

[FR Doc. 2023–13812 Filed 6–28–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

[OMB Control No. 1240–0021]

Proposed Extension of Existing Collection; Comment Request

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Request for public comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance request for comment 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 request 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. Currently, OWCP is soliciting comments on the information collection for the Provider Enrollment Form (PE–1168).

DATES: All comments must be received on or before August 28, 2023.

ADDRESSES: You may submit comment as follows. Please note that late, untimely filed comments will not be considered.

Written/Paper Submissions: Submit written/paper submissions in the following way:

• *Mail/Hand Delivery*: Mail or visit DOL–OWCP, Office of Workers' Compensation Programs, U.S. Department of Labor, 200 Constitution Ave. NW, Room S–3323, Washington, DC 20210.

• OWCP will post your comment 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: Anjanette Suggs, Office of Workers' Compensation Programs, at *suggs.anjanette@dol.gov* (email) or by telephone at (202) 354–9660 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background: The Office of Workers' Compensation Programs (OWCP) is the agency responsible for administration of the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.,* the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.,* and the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), 42 U.S.C. 7384 *et seq.* These statutes require OWCP to pay for appropriate medical and vocational rehabilitation services provided to beneficiaries. In order for OWCP's billing contractor to pay providers of these services with its automated bill processing system, providers must ''enroll'' with one or more of the OWCP programs that administer the statutes by submitting certain profile information, including identifying information, tax I.D. information, and whether they possess specialty or sub-specialty training. Form OWCP–1168 is used to obtain this information from each provider. This information collection is currently approved for use through December 31, 2023.

II. Desired Focus of Comments: OWCP is soliciting comments concerning the proposed information collection (ICR) titled ''Provider Enrollment Form'', PE–1164. The Department of Labor is particularly interested in comments which:

• 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 in the estimate;

• 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 submissions of responses.

Background documents related to this information collection request are available at *https://regulations.gov* and at DOL–OWCP located at 200 Constitution Avenue NW, Room S3323, Washington, DC 20210. 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 the Provider Enrollment Form, PE–1164. OWCP has updated the data with respect to the number of respondents, responses, burden hours, and burden costs supporting the information collection requests from the previous information request.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Provider Enrollment Form.

OMB Number: 1240–0021.

Agency Number: OWCP–1168.

Affected Public: Businesses or other for-profit.

Total Respondents: 23,318.

Total Responses: 23,318.

Time per Response: 25 minutes.

Estimated Total Burden Hours: 9,719.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $201,601.81.

Comments submitted in response to this notice will be summarized in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record and will be available at *https://reginfo.gov.*

Anjanette C. Suggs,

Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.

[FR Doc. 2023–13813 Filed 6–28–23; 8:45 am]

BILLING CODE 4510–CR–P

NATIONAL CREDIT UNION ADMINISTRATION

[NCUA–2023–0070]

Minority Depository Institution Preservation Program

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed interpretive ruling and policy statement.

SUMMARY: The NCUA Board is issuing proposed revisions to Interpretive Ruling and Policy Statement 13–1, regarding the Minority Depository Institution Preservation Program for credit unions.

DATES: Comments must be received on or before August 28, 2023.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

• *Federal eRulemaking Portal: https://www.regulations.gov/.* Follow the instructions for submitting comments for Docket Number NCUA–2023–XXXX.

• *NCUA website:* Rulemakings and Proposals for Comment | NCUA. Follow the instructions for submitting comments.

• *USPS/Hand Delivery/Courier:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *https://www.regulations.gov,* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Supervisory Program Manager Kristi Kubista-Hovis or Program Manager Pamela Williams, Office of Credit Union Resources and Expansion, 703–518–6610 or *CUREMDI@ncua.gov.*

I. Background

Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in response to the savings and loan industry crisis.[1] FIRREA included provisions designed to encourage Federal financial regulators to preserve

[1] Public Law 101–73, 103 Stat. 183 (1989).

and promote minority depository institutions.[2] Specifically, FIRREA section 308 required the Secretary of the Treasury to consult with the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC) on best methods to achieve the following goals:

- Preserving the number of minority depository institutions;
- Preserving the minority character of a minority depository institution involved in a merger or acquisition;
- Providing technical assistance to prevent the insolvency of minority depository institutions;
- Encouraging the formation of new minority depository institutions; and
- Providing training, technical assistance, and educational programs to minority depository institutions.[3]

Those agencies developed various initiatives aimed at preserving federally insured banks and savings institutions that meet FIRREA's definition of a minority depository institution (MDI).[4]

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[5] Section 367(4)(A) of the Dodd-Frank Act expanded FIRREA section 308 to require the Secretary of the Treasury to consult with the National Credit Union Administration (NCUA) and the Board of Governors of the Federal Reserve System (Fed), in addition to the FDIC and the Office of the Comptroller of the Currency (OCC) on methods for best achieving the FIRREA goals.[6] Section 367(4)(B) of the Dodd-Frank Act also amended FIRREA section 308 to require each agency to submit an annual report to Congress describing actions it has taken to preserve and encourage MDIs.[7]

In 2013, the NCUA Board proposed Interpretive Ruling and Policy Statement (IRPS) 13–1 to establish a Minority Depository Institution Preservation Program (MDI Program) to encourage the preservation of MDIs and the establishment of new ones.[8] In 2015, the NCUA Board approved final IRPS 13–1, establishing the NCUA's MDI Program.[9]

The NCUA Board subsequently restructured the agency in 2018. Among other changes, the restructuring created the Office of Credit Union Resources and Expansion (CURE). CURE assumed administration of the NCUA's MDI Program from the agency's Office of Minority and Women Inclusion.

II. Summary of Proposed Changes to IRPS 13–1 and Request for Comments

The NCUA is proposing to amend IRPS 13–1 to reflect changes to the agency's structure and current administration of the MDI Program by CURE and improve the MDI Program, including: recognizing the transfer of the MDI program administration to CURE, incorporating recent program initiatives, simplifying ''community it services, as designated in its charter'' to refer to an MDI's field of membership, referencing guidance the NCUA provides examination staff who continue to play a significant role in supporting and guiding MDIs under their supervision, explaining how the NCUA will review an MDI's designation status during routine evaluations, and adding new subsections on engagement, technical assistance, MDI examinations, Community Development Revolving Loan Fund grants and loans, training and education, and MDI preservation.

The Board invites comments on all aspects of the proposed amendments to the IRPS. Additionally, the agency welcomes comments on any other aspects of the IRPS and what additional information the agency could provide to help MDIs and how best to deliver the information.

Authority: 12 U.S.C. 1463 note; Sec. 308, Pub. L. 101–73, 103 Stat. 353; as amended by Sec. 367(4), Pub. L. 111–203, 124 Stat. 1556.

III. Interpretive Ruling and Policy Statement 13–1, Minority Depository Institution Preservation Program, as Amended

The text of IRPS 13–1, with proposed amendments, follows:

a. Goals and Objectives of the MDI Preservation Program

Minority Depository Institutions (MDIs) play an important and unique role in promoting the economic viability of minority and underserved communities. The NCUA employs proactive steps and outreach efforts to preserve MDIs and foster their success. The NCUA's MDI Preservation Program (MDI Program) is designed to comply with section 308 of FIRREA, which requires the NCUA to report on the actions it has taken in furtherance of the following goals:[10]

- Preserve the present number of MDIs;
- Preserve the minority character of MDIs involved in mergers and acquisitions;
- Provide technical assistance to prevent insolvency of MDIs that are not now insolvent;
- Promote and encourage the creation of new MDIs; and
- Provide training, technical assistance, and educational programs for MDIs.

b. Description of the MDI Program

The NCUA's MDI Program consists of proactive steps and outreach efforts to promote and preserve MDIs in the credit union system. The NCUA's Office of Credit Union Resources and Expansion (CURE) administers the agency's MDI Program and will meet periodically with State regulators, other Federal regulators, and other stakeholders to discuss outreach efforts, share ideas, and identify areas to work together to assist MDIs.

The NCUA offers MDI-designated credit unions a variety of initiatives to assist in preserving the economic viability of their institutions. The initiatives include technical assistance, educational opportunities, and funding. Examples of such initiatives include the following:

- Consulting and support program;
- Training; and
- Grants and loans through the NCUA's Community Development Revolving Loan Fund (CDRLF), subject to eligibility.[11]

Examples of broad-based and individualized technical assistance include the following:

- Providing guidance in resolving examination concerns;
- Helping MDIs locate new sponsors, mentors, or merger partners;
- Assisting with field of membership expansions;
- Supporting management in setting up new programs and services;
- Attempting to preserve the minority character of failing institutions during the resolution process; and
- Aiding groups that are interested in chartering a new MDI.

[2] *Id.* Title III, sec. 308, 103 Stat. 353, *codified at* 12 U.S.C. 1463 note, ''Preserving Minority Ownership of Minority Financial Institutions.''

[3] *Id.* sec. (a). The Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System also initiated minority depository institution programs to comply with the spirit of FIRREA sec. 308, even though neither was originally required to do so. OTS became part of the Office of the Comptroller of the Currency on July 21, 2011.

[4] *Id.* sec. (b).

[5] Public Law 111–203, 124 Stat. 1376 (July 21, 2010); 12 U.S.C. 5301 *et seq.*

[6] 12 U.S.C. 1463 note sec. (a).

[7] *Id.* sec. (c).

[8] 78 FR 46374 (July 31, 2013).

[9] 80 FR 36356 (June 24, 2015).

[10] Public Law 101–73, title III, sec. 308, 103 Stat. 353 (1989), as amended by Public Law 111–203, title III, sec. 367(4), 124 Stat. 1556 (2010), *codified at* 12 U.S.C. 1463 note.

[11] Prior to 2023, under the annual appropriations statutes, grants and loans from the CDRLF were historically only available to low-income designated credit unions, some of which are also MDIs. However, not all MDIs have a low-income designation.

Engagement With MDIs

The NCUA's MDI Program will provide continual engagement with MDIs through interaction with headquarters and field staff. This interaction includes sharing information and expertise on supervisory topics, using various venues to engage in an open dialogue between NCUA, MDIs, and related organizations, seeking feedback on the NCUA's efforts under the MDI program, and providing a variety of training opportunities hosted or sponsored by the NCUA. The NCUA's outreach also includes seeking out, working with, and supporting groups interested in applying for a new Federal or State charter with an MDI designation, and aiding existing credit unions interested in receiving the MDI designation.

Technical Assistance

The NCUA will provide technical assistance to an MDI designated credit union upon request. The agency contacts each MDI at least annually to ask if it would like to receive technical assistance. Also, an MDI can contact its assigned field office, supervisory examiner, or district examiner to request technical assistance.

Technical assistance is not an examination or supervisory activity and will be provided separate from examinations and supervision contacts. Technical assistance includes but is not limited to assistance in understanding applicable laws and regulations, agency processes, reporting requirements, supervisory guidance, accounting standards, supervisory findings and conclusions (only after the conclusion of the applicable examination or supervision contact), applications or requests for agency approval or action (such as field of membership, bidding on a failing institution, regulatory waivers, etc.), and assistance in receiving an MDI designation. In providing technical assistance, agency staff will not perform tasks expected of an institution's management or employees. And while they may help the institution understand how to apply for something or submit a bid, agency staff will not assist or guide the institution in developing the substance of such application or bid.

Examinations of MDIs

MDI-designated credit unions have a unique role in promoting the economic viability of minority and underserved communities, at times necessitating distinct approaches to taking and managing the related financial and operational risks. The NCUA expects examiners to recognize the distinctive characteristics and differences in core objectives of each financial institution and consider these when evaluating the institution's financial and operational condition and related management practices. Examiners are able to evaluate an MDI using peer metrics such as through the Financial Performance Report.

The NCUA provides examiners guidance to educate them about the unique challenges faced by MDIs and the support and services the NCUA offers to assist MDIs to address such challenges. The guidance acknowledges, at times, some MDIs may need more or different support from the NCUA than other credit unions. The guidance also lists specific types of technical assistance an MDI may request of the NCUA. It also advises that MDIs often have unique memberships and provide financial services to consumers and businesses in communities that might not otherwise have access to another federally insured financial institution. Therefore, the policies, processes, risks, and practices of MDIs may vary and comparison to other credit unions based solely on similar size may have limited value. Instead, examiners are instructed to assess each MDI based on its unique strategy and membership.

CDRLF Grants and Loans

The CDRLF provides loans and grants to low-income designated credit unions to expand outreach to underserved populations, improve digital services and cybersecurity, to provide staff training, and to support capacity-building programs for example. In 2023, MDIs without the low-income designation became eligible for CDRLF grants and loans.[12]

Training and Education

The NCUA offers training to credit unions through various formats such as webinars, online courses, videos, and in-person events. Through the Learning Management System, the agency offers training and educational resources to credit union board members, management, employees, and volunteers online and at no charge. Examples of the content provided include guidance on credit union operations, compliance, community partnerships, and strategic planning.[13]

[12] Refer to the Grants and Loans section of the NCUA website for eligibility requirements in future periods.

[13] These training opportunities are accessible to all credit unions through the Learning section the NCUA's website.

Preservation of MDIs

With regard to a potentially failing MDI or the need for an assisted merger of an MDI, as with any insured credit union, the NCUA Board will consider providing Section 208 assistance to reduce the risk or avert a threatened loss to the National Credit Union Share Insurance Fund (NCUSIF), facilitate a merger or consolidation, or to prevent the closing of a credit union that the Board determines is in danger of closing.[14] Requirements concerning field of membership apply to most mergers. In addition, the NCUA must consider resolution costs and safety and soundness implications for all mergers.

The NCUA will attempt to preserve the minority character of failing MDIs during the resolution process. In the event of the potential failure of an MDI, the agency will contact MDIs in the NCUA's merger registry that qualify to bid on a particular failing institution. Agency staff will solicit interest in bidding on the failing MDI and offer technical assistance to any MDI desiring to bid. The NCUA will also provide MDIs interested in submitting a bid with an additional two weeks to submit a bid whenever possible. Except in the cases of conservatorships, liquidations, or assisted mergers, the MDI's board of directors is generally the decision maker on a merger partner provided the selection is consistent with regulatory and safety and soundness standards. For conservatorships, liquidations, or assisted mergers, in the selection process, the NCUA will consider all the requirements applicable to a merger or purchase and assumption, including FIRREA's general preference guidelines.[15]

c. MDI Designation Eligibility

The agency adopted the definition of an MDI in FIRREA section 308 that applies to a mutual institution.[16] Accordingly, a credit union is eligible to receive the MDI designation if it meets all the following criteria:

- A majority of its current members are from any of the eligible minority groups;
- A majority of the members of its board of directors are from any of the eligible minority groups; and

[14] 12 U.S.C. 1788(a)(1)–(2).

[15] Generally, the NCUA is involved in the selection process when the transaction will cause a loss to the Share Insurance Fund or when the failing credit union is in conservatorship and the NCUA Board is the conservator. For additional information on the NCUA's selection process, see Letter to Credit Unions 10–CU–11, *Information on NCUA's Merger and Purchase & Assumption Process.*

[16] 12 U.S.C. 1463 note sec. (b)(1)(C).

• A majority of the community it services, as designated in its field of membership, are from any of the eligible minority groups.

For minority representation to be a ''majority,'' it must be greater than 50 percent.

The NCUA relies on the FIRREA section 308 ''minority'' definition to identify an eligible minority as any Black American, Asian American, Hispanic American, or Native American.[17] For the purpose of this IRPS, Asian American includes anyone who is Native Hawaiian or Other Pacific Islander, and Native American includes anyone who is American Indian or Alaska Native. Also, for the purpose of minority representation under the MDI definition, an individual who falls into more than one of the minority categories will be considered as a single, eligible minority.

A credit union that meets the eligibility requirements can self-certify as an MDI by following agency guidelines as specified on the NCUA's website. The instructions to the NCUA's *Credit Union Profile* form, which credit unions use to self-certify as an MDI, contain detailed directions on how to make the designation.[18] An MDI may participate in the NCUA's MDI Program subject to the eligibility requirements of any specific initiative. An eligible credit union's decision to designate as an MDI or to participate in the MDI Program is voluntary.

A credit union defined as a ''small credit union'' by the NCUA under the Regulatory Flexibility Act (RFA) may self-certify greater than 50 percent representation among its current members, and within the community it services (potential members), based solely on knowledge of those members. Under the RFA, the NCUA currently defines a small credit union as a credit union with total assets of less than $100 million.[19]

A credit union not defined as a small credit union by the NCUA may rely on one of the following methods, as applicable, to determine the minority composition of its current membership exclusively and of the community it services. The credit union must maintain documentation supporting its MDI self-designation.

1. The credit union may ascertain the minority representation using demographic data from the U.S. Census Bureau website, based on the area(s) where the current or potential membership resides, such as a township, borough, city, county, or Metropolitan Statistical Area. If the U.S. Census data—for example, census tracts, zip codes, townships, boroughs, cities, or counties—shows the area's population comprises mostly eligible minorities, the credit union may assume that its current membership and the community it services each have the same minority composition as the Census data indicates.

2. The credit union may use Home Mortgage Disclosure Act (HMDA) data to calculate the reported number of minority mortgage applicants divided by the total number of mortgage applicants within the credit union's membership. If the share of minority representation among applicants is greater than 50 percent, the credit union may assume its current membership has the same minority composition as the HMDA data indicates. If a credit union grants a majority of its mortgage loans to minorities, it is likely the majority of the community the credit union services (its potential members) will consist of minorities.[20]

3. The credit union may elect to collect data from members who voluntarily choose to participate in such collection about their racial identity and use the data to determine minority representation among the credit union's membership. The credit union should consider using an unbiased third party to conduct such a collection. For example, data can be collected through a survey of members, assessing the services they desire, or by mailed electoral ballots for official positions. Once collected, it is essential to maintain the confidentiality of the data; it should not be retained in the members' files or with any personal identifiers, such as, names, accounts, or Social Security numbers. If a majority of its current members are minorities, it is likely the majority of the community the credit union services (its potential members) will consist of minorities.

4. The credit union may use any other reasonable form of data, such as membership address list analyses or an employer's demographic analysis of employees.

An MDI credit union must assess whether it continues to meet the required definition of an MDI whenever there is a significant change in its board of directors, or it changes its field of membership, and update its designation, if necessary, in the NCUA *Credit Union Profile.* In accordance with the regular examination process, the NCUA will review whether a credit union has updated its analysis and made any corresponding changes to its self-certification in the *Credit Union Profile.* Credit unions can expect to have the *Credit Union Profile* reviewed during routine evaluations. An MDI may elect to withdraw its designation by not completing the relevant questions in the *Profile.*

d. Monitoring and Reporting on MDIs

The NCUA will monitor MDIs and report to Congress annually on the number and overall financial condition of MDIs, along with actions taken by the agency to preserve and strengthen them and to encourage the chartering of new ones.[21] The report summarizes the NCUA's efforts to obtain feedback from MDIs on the effectiveness of the agency's MDI support and preservation activities. The NCUA also maintains a list of MDIs on its website.

IV. Regulatory Procedures

Regulatory Flexibility Act

The RFA generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include credit unions with assets less than $100 million) [22] and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

The Board fully considered the potential economic impact of the proposed changes during the development of the revised IRPS. As noted in the preamble, the revised IRPS would clarify the NCUA's current policy on MDI preservation and provide additional services to MDIs. The proposed rule would not impose any new significant burden on credit unions designated as MDIs and may provide some additional resources. The resources gained, however, are unlikely to result in a significant economic impact for affected credit unions. Small credit unions are also not obligated to participate in the MDI program. Accordingly, the NCUA certifies that it would not have a significant economic impact on a substantial number of small federally insured credit unions.

[17] *Id.*

[18] NCUA Form 4501A, *https://ncua.gov/files/publications/regulations/credit-union-profile-form-instructions-4501A-sept-2022.pdf.*

[19] 80 FR 57512 (Sept. 24, 2015).

[20] HMDA data can be obtained from the Federal Financial Institutions Examination Council website.

[21] 12 U.S.C. 1463 note sec. (c).

[22] See 80 FR 57512 (Sept. 24, 2015).

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new information collection or amends existing information collection requirements.[23] For purposes of the PRA, an information collection requirement may take the form of a reporting, recordkeeping, or a third-party disclosure requirement. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The current information collection requirements for the MDI policy are approved under OMB control number 3133–0195, Minority Depository Institution Preservation Program.

The amendments in this proposed revision to IRPS 13–1 do not alter the information collection described under OMB control number 3133–0195, and the NCUA does not anticipate an increase in the burden based on the proposed revisions. There are no additional information collections resulting from these proposed changes.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order to adhere to fundamental federalism principles. This revised IRPS will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Although State-chartered credit unions are eligible to obtain the MDI designation and receive assistance based on it, the NCUA does not believe this affects State governments generally or State credit union regulators in particular. The NCUA will continue to work cooperatively with State credit union regulators to examine federally insured, State-chartered credit unions and does not expect the proposed IRPS to alter these relationships or allocation of responsibilities. The decision about whether to certify as an MDI or seek MDI program benefits will be an individual business decision for each credit union's board. The NCUA has determined that this revised IRPS does not constitute a policy that has federalism implications for purposes of the executive order.

Assessment of Federal Regulations and Policies on Families

The NCUA has determined that these proposed revisions to IRPS 13–1 will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[24] The proposed revisions to IRPS 13–1 may increase the ability of MDIs to provide financial services to families. However, the Board does not have a means to quantify how this might affect family well-being as described in factors included in the legislation, which include the effects of the action on the stability and safety of the family; parental authority and rights in the education, supervision, and nurture of their children; the ability of families to support their functions or substitute governmental activity for these functions; and on increases or decreases to disposable income.

By the National Credit Union Administration Board on June 22, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2023–13848 Filed 6–28–23; 8:45 am]

BILLING CODE 7535–01–P

[23] 44 U.S.C. 3507(d); 5 CFR part 1320.

[24] Public Law 105–277, 112 Stat. 2681 (1998).

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–0320; NRC–2023–0042]

TMI–2 Solutions; Three Mile Island Nuclear Station, Unit No. 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC, or Commission) is issuing an exemption in response to a September 29, 2022, request from TMI–2 Solutions, LLC (TMI–2 Solutions, or Licensee) for an exemption from NRC regulations. The action exempts TMI–2 Solutions from the requirements to maintain a radiation monitoring system in each area where licensed special nuclear material is handled, used, or stored that would energize clearly audible alarm signals if accidental criticality occurred during decommissioning. In evaluating the exemption request, the NRC staff determined that the Licensee's proposed decommissioning activities do not present any credible criticality hazards.

DATES: The exemption was issued on and was effective on May 2, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0042 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–2023–0042. 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, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Amy M. Snyder, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6822, email: *Amy.Snyder@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

TMI–2 Solutions is the holder of Possession Only License (POL) No. DPR–73 for Three Mile Island Nuclear Station, Unit No. 2 (TMI–2). The POL provides, among other things, that the facility is subject to all rules, regulations, and orders of the NRC now or hereafter in effect. TMI–2 is located in Dauphin County, Pennsylvania.

The NRC previously granted TMI–2 an exemption from the criticality accident monitoring requirements of section 70.24 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Criticality accident requirements,'' for Special Nuclear Material (SNM) storage, on June 15, 1992 (ADAMS Accession No. ML20210D729). In its exemption request (ADAMS Accession No. ML22276A024), the Licensee noted that the June 15, 1992, exemption stated:

''. . . it is appropriate to request an exemption from 10 CFR 70.24 if an evaluation determines that a potential for criticality does not exist, as for example where the quantities or form of special nuclear material make criticality practically impossible or where geometric spacing is used to preclude criticality.''

The NRC granted the 1992 exemption based on the lack of a credible criticality hazard related to the storage of fissionable material at the facility (ADAMS Package Accession No. ML20210D728). That exemption, however, only covered the initial cleanup of TMI–2 fuel debris. Consequently, as TMI–2 Solutions progresses to radiological decommissioning of TMI–2, including activities beyond the initial cleanup of TMI–2 fuel debris, the 1992 exemption will no longer apply. Therefore, TMI–2 Solutions requested this exemption from 10 CFR 70.24, which will extend until license termination.

II. Request/Action

Section 70.24 requires, in relevant part, that each licensee authorized to possess special nuclear material in a quantity exceeding 700 grams of contained uranium-235, 520 grams of uranium-233, 450 grams of plutonium, 1,500 grams of contained uranium-235 if no uranium enriched to more than 4 percent by weight of uranium-235 is present, or 450 grams of any combination thereof, shall maintain a monitoring system in each area in which such licensed special nuclear material is handled, used, or stored. The monitoring system must use gamma- or neutron-sensitive radiation detectors which will energize clearly audible alarm signals if accidental criticality occurs.

In its exemption application, TMI–2 Solutions states that criticality is not credible at TMI–2, and therefore it considers an exemption to 10 CFR 70.24 for a criticality monitoring system to be appropriate for decommissioning. The licensee states that TMI2–RA–COR–2022–0008, ''Supplemental Information to License Amendment Request—Three Mile Island, Unit 2, Decommissioning Technical Specifications,'' demonstrates that the spent fuel mass limit (SFML) associated with remaining fuel bearing material at TMI–2 is 1361 kilograms (kg) of uranium oxide (UO_2). The licensee notes that this SFML is 24 percent higher than the previous estimate on record for remaining fuel bearing material at TMI–2, which the NRC staff found to analytically preclude a credible criticality accident at TMI–2 (ADAMS Accession No. ML23094A269). The updated SFML result represents a more accurate and updated calculation from the 1990 SFML calculation. The Licensee arrived at this updated calculation by taking credit for impurities and actual enrichment based on the results of physical samples taken during the defueling effort.

III. Discussion

Pursuant to 10 CFR 70.17(a), ''Specific exemptions,'' the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 70 when the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the interest of the public.

The NRC staff has reviewed the exemption request and finds that granting the proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, the Commission's regulations, or other laws. As explained as follows, the proposed exemption will not endanger life or property, or the common defense and security, and is otherwise in the public interest. Therefore, the exemption is authorized by law.

The exemption presents no undue risk to the public health and safety and therefore will not endanger life or property. Based on the NRC staff's evaluation, the NRC staff determined that the Licensee's proposed decommissioning activities do not present any credible criticality hazards. Because there are no credible criticality hazards related to the Licensee's proposed decommissioning activities and because all activities will be conducted such that subcriticality is assured under normal and all credible abnormal conditions, the NRC staff concludes that the Licensee's program will provide reasonable assurance of adequate protection of the health and safety of workers and the public.

The exemption is consistent with the Common Defense and Security because the NRC staff determined there would be no impact to the physical protection plan, emergency preparedness, environmental monitoring, effluent monitoring, or material control and accountability programs at TMI–2. Further, as described in the NRC staff's safety evaluation, the NRC staff conducted independent evaluations and concluded that criticality is not credible; therefore, an exemption from criticality monitoring requirements is warranted. The NRC staff agrees with the licensee's conclusion in its application that the requested exemption to the requirements of 10 CFR 70.24 does not involve information or activities that could potentially impact the common defense and security. The Licensee demonstrated that there is no credible criticality hazard, and the existing administrative restrictions described in the TMI–2 Fuel Bearing Material Program prevent proliferation and limit aggregation. The elimination of the criticality monitoring requirements does not involve information or activities that could potentially impact the common defense and security of the United States.

Further, while administrative controls for geometric spacing are not necessary because there is not enough UO_2 to assemble an optimal critical configuration, TMI–2 Solutions will be implementing local administrative controls as part of its Fuel Bearing Material Management Program for the purpose of defense in depth. These administrative controls will apply to the activities which will handle the highest quantities of fuel bearing material (*e.g.,* segmenting the reactor vessel internals which represent 925 kg UO_2 or 68 percent of the SFML). These defense in depth controls will include control on the physical location of segmentation equipment and limiting the number of waste receptacles (*i.e.,* physical manifestations of controls on geometric spacing).

Finally, the NRC staff concludes that the exemption is in the public interest. As stated previously, the Licensee demonstrated that criticality is not credible during site decommissioning activities under credible normal and credible abnormal conditions. Therefore, conducting criticality monitoring at TMI–2 would expend NRC staff inspection and other NRC staff regulatory resources that could be used for other activities at the facility. Additionally, the Licensee states that, if the exemption request were denied, its personnel would experience a slight increase in occupational dose during the maintenance of criticality monitors, which would not be consistent with as low as reasonably achievable principles. The NRC staff agrees.

IV. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR 70.17(a), the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the interest of the public. Therefore, the Commission hereby grants TMI–2 Solutions an exemption from 10 CFR 70.24 during decommissioning.

Dated: June 26, 2023.

For the Nuclear Regulatory Commission.

Jane E. Marshall,

Director, Division of Decommissioning, Uranium Recovery and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–13882 Filed 6–28–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–174 and CP2023–178; MC2023–175 and CP2023–179; MC2023–176 and CP2023–180]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* July 5, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–174 and CP2023–178; *Filing Title:* USPS Request to Add Priority Mail, First-Class Package Service & Parcel Select Contract 30 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 23, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* July 5, 2023.

2. *Docket No(s).:* MC2023–175 and CP2023–179; *Filing Title:* USPS Request to Add First-Class Package Service & Parcel Select Contract 3 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 23, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* July 5, 2023.

3. *Docket No(s).:* MC2023–176 and CP2023–180; *Filing Title:* USPS Request to Add First-Class Package Service & Parcel Select Contract 4 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 23, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* July 5, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–13835 Filed 6–28–23; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Request for Information; National Strategy for a Sustainable Ocean Economy

AGENCY: Office of Science and Technology Policy (OSTP).

ACTION: Notice of request for information (RFI).

SUMMARY: The Office of Science and Technology Policy (OSTP) and the Council on Environmental Quality (CEQ), on behalf of the interagency Ocean Policy Committee (OPC), request input from all interested parties to inform the development of a National Strategy for a Sustainable Ocean Economy (National Strategy). The National Strategy will describe the vision, goals, and high-level actions for a robust, equitable, secure, sustainable ocean economy enabled by healthy, resilient ocean ecosystems. It will build on current Federal, Tribal, Territorial, State, and regional sustainable ocean management practices and identify needs and opportunities to enhance these efforts with new and emerging science, technology, knowledge, and policy. Through this request for information (RFI), the Ocean Policy Committee seeks public input on what the goals and outcomes of the National Strategy should be, and how the Federal Government can best advance sustainable management of ocean, coastal, and Great Lakes resources and ecosystems of the United States.

DATES: Responses are due by 11:59 p.m. Eastern Time on August 28, 2023. Submissions received after the deadline may not be taken into consideration.

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**. OSTP will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that OSTP 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 how to use *Regulations.gov,* including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''FAQ'' (*https://www.regulations.gov/faq*).

Privacy Note: OSTP's policy is to make all comments received from members of the public 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. OSTP requests that no proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI.

Instructions: Response to this RFI is voluntary. Each individual or organization is requested to submit only one response. Commenters can respond to one or many questions. Submissions are suggested to not exceed the equivalent of five (5) pages in 12 point or larger font. Submissions should clearly indicate which questions are being addressed. Responses should include the name of the person(s) or organization(s) filing the response. Responses containing references, studies, research, and other empirical data that are not widely published should include copies of or electronic links to the referenced materials. Responses containing profanity, vulgarity, threats, or other inappropriate language or content will not be considered.

Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response. A response to this RFI will not be viewed as a binding commitment to develop or pursue the project or ideas discussed.

FOR FURTHER INFORMATION CONTACT: Deerin Babb-Brott, OSTP Asst. Director for Ocean Policy, (202) 456–3267.

SUPPLEMENTARY INFORMATION:

Background: The Nation's ocean, coasts, and Great Lakes support strong local economies and provide good-paying jobs, healthy food, carbon storage, energy, recreation, culture and heritage, transportation, trade, mobility for our armed forces, natural protection from storm surge and floods, and numerous other benefits. But many of these benefits are not inexhaustible, and the ocean is vulnerable to the impacts of human activity. The myriad impacts of climate change, habitat and biodiversity loss, and ocean pollution, for example, continue to degrade the health, productivity, and resilience of ocean ecosystems and make clear the integral connection between a healthy ocean, coasts, and Great Lakes and the health, prosperity, security, and well-being of all Americans.

To address these continuing challenges, the Administration is committed to advancing the science, knowledge, tools, and activities that support sustainable policies, management, and practices as solutions. Because the challenges are numerous and their scale is great—for example, the country's ocean, coastal, and Great Lakes areas cover as much area as the terrestrial United States—solving them will require a whole-of-country effort, with critical roles for Tribal Nations, local, State, and Territorial governments, the private sector, academia, non-governmental organizations, a wide range of stakeholders, and the public. Actions to address these challenges are being developed and implemented across the country—at all scales, by governments, organizations, businesses, academia, and people of all kinds who are developing new science and tools, recognizing the critical importance of Indigenous Knowledge, building new technologies, and employing policies, management, and practices that prioritize sustainable outcomes and reflect the resilience, interconnectedness, value, and productivity of natural systems. Ocean policies, management, and practices focused on achieving healthy communities, ecosystems, and economies are needed to provide abundant co-benefits, including good-paying jobs, thriving communities, and healthy ocean ecosystems that support future discovery and innovation. These solutions can also provide an opportunity to advance more equitable access to the benefits provided by the ocean to people, and to create and sustain a diverse workforce.

To engage the Nation in developing a vision, goals, and high-level actions for sustainable management of the ocean, coasts, and Great Lakes, the Ocean Policy Committee, a Congressionally mandated, Cabinet-level interagency committee charged with coordinating Federal ocean policy (*https://www.noaa.gov/interagency-ocean-policy*), will develop a National Strategy for a Sustainable Ocean Economy (National Strategy) in consultation with federally recognized Tribes and input from governments, civil society, the private sector, and the public. The National Strategy will: (1) describe a vision and goals for sustainable management of the U.S. ocean, coasts, and Great Lakes; (2) characterize and assess needs and opportunities to achieve the vision and goals; (3) identify existing and new high-level actions by Federal, Tribal, State, Territorial, regional, and local governments that can advance sustainable management; and (4) describe how those actions will be implemented to engage and build on the work of and partnerships with civil society, the private sector, and the public.

Examples of subject matter that may be addressed by the National Strategy include, but are not necessarily limited to: ocean food and human health; ocean energy and resources; ocean-based tourism; ocean transportation; new ocean industries; climate change; marine and coastal ecosystems; ocean pollution; equity and environmental justice; ocean literacy and skills; economic valuation of coastal and ocean natural capital; ocean science and technology; ocean finance; Indigenous Knowledge, ancestral and historical areas of importance, and national security.

At the Federal level, the National Strategy will take into account current actions related to the sustainability of the nation's ocean, coasts, and Great Lakes, including, but not necessarily limited to: the Ocean Climate Action Plan (*https://www.whitehouse.gov/wp-content/uploads/2023/03/Ocean-Climate-Action-Plan_Final.pdf*), the National Nature Assessment (*https://www.globalchange.gov/nna*), and the National Strategy to Develop Statistics for Environmental-Economic Decisions (*https://www.whitehouse.gov/ostp/news-updates/2023/01/19/fact-sheet-biden-harris-administration-releases-national-strategy-to-put-nature-on-the-nations-balance-sheet/*).The Ocean Policy Committee is coordinating the development of the National Strategy in conjunction with the United States'

participation in the ''High Level Panel for a Sustainable Ocean Economy'' (Ocean Panel; *https://oceanpanel.org/*), committing with 16 other nations to develop sustainable ocean plans for their marine areas under national jurisdiction. This initiative aims to advance the prosperity, health, and security of participating nations through the sustainable management of their marine areas, and to provide a range of examples that can be considered as potential models by other nations. The U.S. National Strategy will serve as a sustainable ocean plan for the purposes of the Ocean Panel initiative.

Questions To Inform Development of the Strategy

Respondents may provide information for one or as many topics below as they choose. Submissions should clearly indicate which questions are being addressed. An interagency work group under the Ocean Policy Committee and co-led by the Department of the Interior and the Department of the Navy, in partnership with the CEQ and OSTP, and other Federal agencies and entities, will develop the National Strategy with input from, Tribal Nations, local, State, and Territorial governments, the private sector, academia, non-governmental organizations, a wide range of stakeholders, and the public. The workgroup is seeking input from the public on high-level goals and how to achieve them in the following areas:

- *Sustainable Ocean Economy.* What should the national vision and high-level goals be for a sustainable ocean economy? Are there successful regional or local efforts that could be applied nation-wide? What elements or activities do you consider critical to a sustainable ocean economy? Are there other topics beyond those listed above (*e.g.,* ocean food; ocean energy and resources; ocean-based tourism; ocean transportation; new ocean industries; climate change; marine and coastal ecosystems; ocean pollution; equity and environmental justice; ocean literacy and skills; economic valuation of the ocean's natural capital; ocean science, technology; ocean finance; Indigenous Knowledge and ancestral and historical areas of importance; and national security) that should be addressed?
- *Ocean, Coasts, and Great Lakes Priorities.* What are your priorities for sustainable management of the ocean, coasts, and Great Lakes at a local, state, Tribal, territorial, regional, and/or national scale? What key challenges do you face in achieving them? Are your priorities for ocean, coastal, and Great Lakes management reflected in existing workplans, strategy documents, or other materials? What practices/tactics are you employing or would you need to employ to meet those priorities?
- *An Informed and Responsive National Strategy.* Are there gaps in our knowledge of the ocean, coasts, and Great Lakes that need to be addressed to support sustainable ocean management? Are there opportunities to improve how we manage the use of marine ecosystems to maximize their benefits while minimizing human impacts on them? For example, and as relevant only to the U.S. Exclusive Economic Zone, how can the United States advance its commitment to a precautionary approach to seabed mining and other emerging ocean industries? What co-management and co-stewardship practices are needed to meet ocean, coasts, and Great Lakes sustainability?
- *Additional Considerations.* Is there anything else you would like to be considered in the development of the National Strategy?

Please note that this RFI is designed to complement existing Federal activities in this space. Previous relevant comments submitted to the RFIs for the Ocean Climate Action Plan (*https://www.federalregister.gov/documents/2022/10/04/2022-21480/ocean-climate-action-plan*) and the National Nature Assessment (*https://www.federalregister.gov/documents/2022/10/31/2022-23593/framing-the-national-nature-assessment*) will also be considered to inform the development of the National Strategy.

Dated: June 26, 2023.

Stacy Murphy,

Deputy Chief Operations Officer/Security Officer.

[FR Doc. 2023–13839 Filed 6–28–23; 8:45 am]

BILLING CODE 3270–F1–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–323, OMB Control No. 3235–0362]

Proposed Collection; Comment Request; Extension: Form 5—Annual Statement of Beneficial Ownership

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 (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Under Section 16(a) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*) every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which registered pursuant to Section 12 of the Exchange Act, or who is a director or an officer of the issuer of such security (collectively ''reporting persons''), must file statements setting forth their security holdings in the issuer with the Commission. Form 5 (17 CFR 249.105) is an annual statement of beneficial ownership of securities. The information disclosure provided on Form 5 is mandatory. All information is provided to the public for review. We estimate that approximately 5,939 reporting persons file Form 5 annually and we estimate that it takes approximately one hour to prepare the form for a total of 5,939 annual burden hours.

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by July 31, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: June 23, 2023.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13787 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97789; File No. SR–ICEEU–2023–016]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments FTSE 100 Index Contracts and SARON Futures Contracts

June 22, 2023.

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 June 9, 2023, ICE Clear Europe Limited filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been prepared by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') proposes to amend certain clearing transaction fees for FTSE 100 index contracts and SARON futures contracts (the ''Contracts'').[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe 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

(a) Purpose

ICE Clear Europe is proposing to increase certain clearing fees for specified ICE Futures Europe (''IFEU'') contracts, specifically the ICE Futures Europe FTSE 100 Futures and Options Contracts, FTSE 100 Dividend Index Futures Contracts (collectively the ''Equity Index Contracts'') and Three-Month SARON® Index Futures Contracts (the ''SARON Futures.'') The proposed fee changes are set forth in the following tables:

	Existing clearing fee (£/contract)	Proposed new clearing fee (£/contract)
CONTRACT—FTSE 100 Futures and Options Contract		
Outrights/Basis	0.24	0.27
Block	0.29	0.33
Block with Delayed Publication	0.33	0.35
Cash Settlement fee (Futures)	0.35	0.40
Exercise/Assignment fee (Options)	0.35	0.40
Block fee cap (Options)	2,080	2,350
Block fee cap with Delayed Publication (Options)	2,800	3,100
Exercise/Assignment fee cap (Options)	2,400	2,700
FTSE 100 Trade at Index Close Published	0.28	0.31
FTSE 100 Trade at Index Close Delayed Published	0.35	0.38
CONTRACT—FTSE 100 Dividend Index Futures Contract		
Outrights/Basis	0.24	0.27
Block	0.29	0.33
Block with Delayed Publication	0.33	0.35
Cash Settlement fee	0.35	0.40
CONTRACT—SARON Index Futures		
Outrights/Basis	0.40	0.48
Block	0.40	0.48
Block with Delayed Publication	0.56	0.68
Cash Settlement fee	0.50	0.60

The proposed fee changes are intended to become operative on July 1, 2023, subject to regulatory approval.

The proposed increases in clearing fees for the Equity Index Contracts are intended to provide additional revenue to support the ongoing investments by ICE Clear Europe in developing clearing for derivative products on FTSE indexes, including the Equity Index Contracts. The amendments are also intended to bring fees into line with the fees of similar equity index contracts traded on other European exchanges, which have increased in 2023.

The proposed increases in fees for SARON Futures are intended to provide additional revenue to support ongoing clearing of the SARON Futures, including to support marketing and business development efforts relating to Swiss franc denominated interest rate derivatives in light of the continued evolution of European markets as a result of ongoing regulatory changes under EU law and other factors.

[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).

[5] Capitalized terms used but not defined herein have the meanings specified in the IFEU Equity Index Contracts and SARON Futures or, if not defined therein, the ICE Clear Europe Clearing Rules.

The amendments to the fees for both Equity Index Contracts and SARON Futures will also generally provide additional revenue to support Clearing House investments that enhance the services provided to market participants, including through new clearing technology to augment the existing clearing platform, reduce systems risk, and add additional regulatory reporting related to MIFID and other regulations. Fee increases also reflect the current inflationary macroeconomic environment.

(b) Statutory Basis

ICE Clear Europe believes that the proposed fee amendments for the Equity Index Contracts and SARON Futures are consistent with the requirements of Section 17A of the Act[6] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(D) of the Act[7] requires that ''[t]he rules of the clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants.'' ICE Clear Europe believes that its clearing fees, as proposed to be amended, would be reasonable and appropriate for the Contracts. ICE Clear Europe's fees are imposed at the product level on a per transaction basis (as are the applicable exchange fees), and would be generally applicable to market participants trading in the contracts. ICE Clear Europe has determined that the increased clearing fees are appropriate to support continued investments in clearing operations. Specifically, the increased fees for the Equity Index Contracts would support ongoing development of clearing of derivatives on FTSE indices, and will be consistent with fees for other contract for similar equity index futures contracts traded on other exchanges. The increased fees for the SARON Futures would facilitate ongoing market and business development with respect to that contract. ICE Clear Europe has further determined that the increased fees would be commensurate with the size and nature of the contracts and would provide an appropriate balance between the costs of clearing for market participants and the expenses incurred by ICE Clear Europe in offering clearing of the relevant contracts, taking into account the investments ICE Clear Europe has made and will continue to make in clearing such products. As such, in ICE Clear Europe's view, the amendments are consistent with the equitable allocation of reasonable dues, fees, and other charges among its Clearing Members and other market participants, within the meaning of Section 17A(b)(3)(D) of the Act.[8]

The proposed amendments are also consistent with the requirements of Section 17A(b)(3)(F) of the Act[9] which requires, among other things, that the ''rules of a clearing agency [. . .] are not designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency.'' As noted above, the proposed fee changes for the Contracts would apply on a per transaction basis and would apply to Clearing Members and market participants generally. As a result, the amendments would not result in any unfair discrimination among Clearing Members in their use of the Clearing House, within the meaning of Section 17A(b)(3)(F) of the Act.[10]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. Although ICE is increasing certain clearing fees, as set forth herein, it believes such changes are appropriate to reflect the costs and expenses incurred by the Clearing House and to support continued investment in its operations and infrastructure to support clearing activities for these and other contracts. Further, as discussed above, because fees are imposed on a per transaction basis at the product level, the revised fees would be applied equally to all Clearing Members and other market participants who transact in the Contracts. ICE does not believe that the amendments would adversely affect the ability of such Clearing Members or other market participants generally to access clearing services for the Contracts. Further, since the revised fees will apply to market participants generally, ICE believes that the amendments would not otherwise affect competition among Clearing Members, adversely affect the market for clearing services or limit market participants' choices for obtaining clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendment have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any written comments received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission and Advance Notice and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and paragraph (f) of Rule 19b–4[12] 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 (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–ICEEU–2023–016 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–ICEEU–2023–016. 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

[6] 15 U.S.C. 78q–1.
[7] 15 U.S.C. 78q–1(b)(3)(D).
[8] 15 U.S.C. 78q–1(b)(3)(D).
[9] 15 U.S.C. 78q–1(b)(3)(F).
[10] 15 U.S.C. 78q–1(b)(3)(F).
[11] 15 U.S.C. 78s(b)(3)(A).
[12] 17 CFR 240.19b–4(f).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation*.

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–ICEEU–2023–016 and should be submitted on or before July 20, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13791 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–598, OMB Control No. 3235–0655]

Proposed Collection; Comment Request; Extension: Regulation 14N and Schedule 14N

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 (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Schedule 14N (17 CFR 240.14n–101) requires the filing of certain information with the Commission by shareholders who submit a nominee or nominees for director pursuant to applicable state law, or a company's governing documents. Schedule 14N provides notice to the company of the shareholder's or shareholder group's intent to have the company include the shareholder's or shareholder group's nominee or nominees for director in the company's proxy materials. This information is intended to assist shareholders in making an informed voting decision with regards to any nominee or nominees put forth by a nominating shareholder or group, by allowing shareholders to gauge the nominating shareholder's interest in the company, longevity of ownership, and intent with regard to continued ownership in the company. We estimate that Schedule 14N takes approximately 40 hours per response and will be filed by approximately 10 issuers annually. In addition, we estimate that 75% of the 40 hours per response (30 hours per response) is prepared by the issuer for an annual reporting burden of 300 hours (30 hours per response × 10 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by July 31, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: June 23, 2023.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13785 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–112, OMB Control No. 3235–0101]

Proposed Collection; Comment Request; Extension: Form 144—Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933

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 (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collections of information discussed below.

Form 144 (17 CFR 239.144) is used to report the sale of securities during any three-month period that exceeds 5,000 shares or other units and has an aggregate sales price that does not exceed $50,000. Under Sections 2(a)(11), 4(a)(1), 4(a)(2), 4(a)(4) and 19(a) of the Securities Act of 1933 (15 U.S.C. 77b(a)(11), 77d(a)(1), 77d(a)(2), 77d(a)(4) and 77s(a)) and Rule 144 (17 CFR 230.144) there under, the Commission is authorized to solicit the information required to be supplied by Form 144. The objectives of the rule could not be met, if the information collection was not required. The information collected must be filed with the Commission and is publicly available. Form 144 takes approximately one burden hour per response and is filed by 33,725 respondents for a total of 33,725 total burden hours.

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by July 31, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John

[13] 17 CFR 200.30–3(a)(12).

Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: June 23, 2023.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13788 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97788; File No. SR–Phlx–2023–26]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx Options 7 Regarding PXL Order Pricing

June 22, 2023.

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 June 13, 2023, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Pricing Schedule at Options 7: Section 1, General Provisions; Section 3, Rebates and Fees for Adding and Removing Liquidity in SPY; and Section 6, Other Transaction Fees.[3]

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On June 2, 2023, the Exchange withdrew SR–Phlx–2023–20 and replaced it with SR–Phlx–2023–24. On June 5, 2023, the Exchange withdrew SR–Phlx–2023–24 and replaced it with SR–Phlx–2023–25. On June 13, 2023, the Exchange withdrew SR–Phlx–2023–25 and replaced it with the instant filing.

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 Phlx's Pricing Schedule at Options 7: Section 1, General Provisions; Section 3, Rebates and Fees for Adding and Removing Liquidity in SPY; and Section 6, Other Transaction Fees. Specifically, Phlx proposes to: (1) introduce new references in Options 7, Section 1; and (2) amend its Price Improvement XL (''PIXL'')[4] pricing for both options overlying SPY and other options to provide more detail regarding the pricing of unrelated market or marketable interest and make other amendments to utilize the proposed references. Each change is described below.

Options 7, Section 1

The Exchange proposes to amend Options 7, Section 1(c) to introduce four new references: ''Initiating Order'', ''PIXL Auction Order'', ''PIXL Order'', and ''PIXL Response.''

The Exchange proposes to provide that the term ''Initiating Order'' is one-side of a PIXL Auction Order that represents principal or other interest which is paired with a PIXL Order.

The Exchange proposes to provide that a ''PIXL Auction Order'' is a two-sided, paired order, comprised of a PIXL Order and an Initiating Order.

[4] A member may electronically submit for execution an order it represents as agent on behalf of a Public Customer, broker-dealer, or any other entity (''PIXL Order'') against principal interest or against any other order it represents as agent (an ''Initiating Order'') provided it submits the PIXL Order for electronic execution into the PIXL Auction pursuant to Options 3, Section 13.

The Exchange proposes to provide that a ''PIXL Order'' is one-side of a PIXL Auction Order that represents an agency order on behalf a Public Customer, broker-dealer or other entity which is paired with an Initiating Order.

Finally, the Exchange proposes to provide that a ''PIXL Response'' is interest that executed against the PIXL Order pursuant to Options 3, Section 13.

The Exchange believes that these references will bring more transparency to Phlx's PIXL pricing.[5]

Options 7, Section 3

The Exchange proposes to amend PIXL pricing for options overlying SPY in Options 7, Section 3, Part C. The Exchange proposes to replace the current text below with a proposed table. The current text of Options 7, Section 3, related to PIXL Executions in SPY, provides,

- *Initiating Order:* $0.05 per contract. Members or member organizations that qualify for Options 7, Section 2, Customer Rebate Tiers 2 through 6 or qualify for the Monthly Firm Fee Cap are eligible for a rebate of $0.12 per contract for all SPY Complex PIXL Orders greater than 499 contracts when contra to an Initiating Order, provided the member or member organization executes an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month.
- When the PIXL Order is contra to the Initiating Order, a Customer PIXL Order will be assessed $0.00 per contract and all other Non-Customer market participants will be assessed a $0.38 per contract fee when contra to an Initiating Order.
- When the PIXL Order is contra to other than the Initiating Order, the PIXL Order will be assessed $0.00 per contract, unless the PIXL Order is a Customer, in which case the Customer will receive a rebate of $0.40 per contract.
- All other Non-Customer contra parties to the PIXL Order that are not the Initiating Order will be assessed a Fee for Removing Liquidity of $0.50 per contract or will receive the Rebate for Adding Liquidity. When the PIXL Order is contra to a Lead Market Maker or Market Maker quote, which was established at the initiation of a PIXL auction, the Customer PIXL Order will not be eligible for a rebate.

In lieu of the current rule text, the Exchange proposes the below table.

[5] The Exchange also proposes a technical amendment in Options 7, Section 1(c) to add a period to the end of the reference to ''floor transaction.''

Type of market participant	PIXL Order executes against Initiating Order [1]		PIXL Order executes against a PIXL Response or unrelated market or marketable interest			
	Initiating Order fee	PIXL Order fee	PIXL Order rebate	PIXL Order fee	PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction fee	Unrelated market or marketable interest received *prior* to a PIXL Auction fee
Customer	$0.05	$0.00	[2] $0.40	N/A	$0.00	Options 7, Section 3, Part A Rebate for Adding Liquidity/Options 7, Section 3, Part B Fee for Adding Liquidity.
Non-Customer	0.05	0.38	N/A	$0.00	0.50	Options 7, Section 3 Part A Rebate for Adding Liquidity/Options 7, Section 3 Part B Fee for Adding Liquidity.

The current rule text in the first bullet states that the Initiating Order is $0.05 per contract. This fee currently applies to Customers [6] and Non-Customers [7] and is reflected in the proposed table in a manner consistent with the current rule text. The remainder of the sentence was relocated to footnote 1. The Exchange proposes to amend the original rule text by breaking the current sentence into two sentences and restating the rebate that will be paid by the Exchange for SPY Complex Orders in a succinct manner. This non-substantive amendment to new footnote 1 would provide,

A rebate of $0.12 will be paid to members or member organizations that qualify for Options 7, Section 2, Customer Rebate Tiers 2 through 6 or qualify for the Monthly Firm Fee Cap. The rebate will be paid on all SPY Complex PIXL Orders greater than 499 contracts when contra to an Initiating Order, provided the member or member organization executes an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month.

The current rule text in the second bullet applies to the scenario where the PIXL Order is contra to the Initiating Order. In this case, the Customer PIXL Order is assessed $0.00 per contract and Non-Customer PIXL Orders are assessed a $0.38 per contract fee. The proposed table reflects these current PIXL Order fees and does not substantively amend the rule text in this second bullet.

The current rule text in the third bullet applies to the scenario when the PIXL Order is contra to a PIXL Response or unrelated market or marketable interest. In this case, the PIXL Order is $0.00 for Non-Customers and the Customer receives a rebate of $0.40 per contract. The proposed table reflects these current PIXL Order fees and does not substantively amend the rule text in this third bullet.

Finally, the current rule text in the fourth bullet provides that Non-Customer PIXL Responses or unrelated market or marketable interest that trades with a PIXL Order are assessed a Fee for Removing Liquidity of $0.50 per contract. The Exchange notes that this fee is currently appliable to unrelated market or marketable interest that was received *during* the PIXL Auction. This fee is reflected in the proposed table but is not referred to as a Fee to Remove Liquidity, rather simply as a fee. The rule text states that Non-Customers could also receive a Rebate for Adding Liquidity, but such a rebate is not possible in this scenario as the PIXL Responses and unrelated market or marketable interest would be removing liquidity in this scenario. Because the Rebate for Adding Liquidity is not possible in this scenario, it is being removed. The last sentence of the final bullet is reflected in footnote 2 to the table and the language has been amended to replace the words ''contra to'' with ''executed against.'' Also, the word ''unrelated'' was added before Lead Market Maker or Market Maker quote because that interest would have been placed on the order book. The Exchange amended the language to clearly state ''which was received prior to the PIXL Auction'' instead of ''established at the initiation of a PIXL auction.'' [8] The Exchange believes the proposed rule text adds clarity to understand the particular scenario.

The current rule text does not make clear the fee that a Customer PIXL Response or unrelated market or marketable interest, received *during* a PIXL Auction, would be assessed when that response or interest executes against a PIXL Order. Today, the Customer PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction is not assessed a fee in this scenario. The Exchange proposes to memorialize the $0.00 per contract rate in this proposed table at this time to add transparency to the SPY PIXL pricing. This fee is not changing, rather it is being memorialized in the proposed table.

The Exchange notes that unrelated market or marketable interest received in SPY *during* a PIXL Auction is noted in the current rule text, other than the Customer PIXL Response or unrelated market or marketable interest described above. Today, unrelated market or marketable interest in SPY received *prior* to the PIXL Auction is subject to the simple order book pricing within Options 7, Section 3, Part A and the complex order book pricing within Options 7, Section 3, Part B. At this time, the Exchange proposes to memorialize this pricing in the proposed table. The Exchange applies the order book pricing within Options 7, Section 3, Parts A and B to interest received *prior to* the PIXL Auction, which is considered unrelated market or marketable interest for purposes of the PIXL Auction, because at the time the interest was submitted to the order book, the Phlx members and member organizations would have known [9] that

[6] The term ''Customer'' applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (''OCC'') which is not for the account of a broker or dealer or for the account of a ''Professional'' (as that term is defined in Options 1, Section 1(b)(45)). *See* Options 7, Section 1(c).

[7] The term ''Non-Customer'' applies to transactions for the accounts of Lead Market Makers, Market Makers, Firms, Professionals, Broker-Dealers and JBOs. *See* Options 7, Section 1(c).

[8] *See* Securities Exchange Act Release No. 80064 (February 24, 2017), 82 FR 11666 (February 24, 2017) (SR–Phlx–2017–15).

[9] Phlx members and member organizations become aware of ongoing PIXL Auctions when Phlx disseminates a PIXL Auction Notification or ''PAN.'' When the Exchange receives a PIXL Order for Auction processing, a PAN detailing the side and size and option series of the PIXL Order is sent

there was no ongoing PIXL Auction and would not expect to be subject to the PIXL pricing. Rather, these market participants would be subject to SPY order book pricing similar to all other orders entered into Phlx's order book. In contrast, the Exchange applies the SPY PIXL pricing within Options 7, Section 3 to the unrelated market or marketable interest that interest arrived *during* a PIXL Auction because Phlx seeks to incentivize members and member organizations to submit PIXL Auction Orders to receive a guaranteed execution and potential price improvement. Phlx members and member organizations submitting interest to the order book during a PIXL Auction are aware that they may be allocated in the PIXL Auction. The Exchange assesses the SPY PIXL pricing within Options 7, Section 3 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement. The pricing for unrelated market or marketable interest received *during* a PIXL Auction is not changing, this is the pricing being assessed today by Phlx.

Options 7, Section 6

The Exchange proposes to amend Options 7, Section 6.A, PIXL Pricing. The Exchange proposes to create paragraphs in lieu of the single block text within Options 7, Section 6.A which describes the Initiating Order, and demarcate each paragraph with a symbol. The Exchange is not otherwise amending that paragraph.

Next, the Exchange proposes to amend the rule text under the heading, ''PIXL Order Executions in Options 7, Section 4, Multiply Listed Options (including ETFs, ETNs and indexes which are Multiply Listed):'' The Exchange is amending the current rule text in the second bullet which currently states,

When a PIXL Order is contra to a PIXL Auction Responder, a Customer PIXL Order will be assessed $0.00 per contract, other Non-Customer PIXL Orders will be assessed $0.30 per contract in Penny Symbols or $0.38 per contract in Non-Penny Symbols. A Responder that is a Lead Market Maker or a Market Maker will be assessed $0.25 per contract in Penny Symbols or $0.40 per contract in Non-Penny Symbols. Other Non-Customer Responders will be assessed $0.48 per contract in Penny Symbols or $0.70 per contract in Non-Penny Symbols when contra to a PIXL Order. A Responder that is a Customer will be assessed $0.00 per contract in Penny Symbols and Non-Penny Symbols.

The Exchange proposes to create two separate bullets in lieu of this one bullet. The first bullet would provide,

When a PIXL Order executes against a PIXL Response or unrelated market or marketable interest received during a PIXL Auction, a Customer PIXL Order will be assessed $0.00 per contract, and other Non-Customer PIXL Orders will be assessed $0.30 per contract in Penny Symbols or $0.38 per contract in Non-Penny Symbols.

In amending this sentence, the Exchange proposes to replace the words ''is contra to'' with ''executes against.'' Also, the Exchange proposes to replace the words ''Auction Responder'' with ''PIXL Response or unrelated market or marketable interest received during a PIXL Auction.'' Finally, the Exchange is adding an ''and'' in the sentence to make the sentence clear. These non-substantive changes utilize the references proposed within Options 7, Section 1. As amended, the second bullet would provide,

A PIXL Response or unrelated market or marketable interest received during a PIXL Auction from a Lead Market Maker or a Market Maker will be assessed $0.25 per contract in Penny Symbols or $0.40 per contract in Non-Penny Symbols. Other Non-Customer PIXL Responses and unrelated market or marketable interest received during a PIXL Auction will be assessed $0.48 per contract in Penny Symbols or $0.70 per contract in Non-Penny Symbols when contra to a PIXL Order. A PIXL Response or unrelated market or marketable interest received during a PIXL Auction from a Customer will be assessed $0.00 per contract in Penny Symbols and Non-Penny Symbols.

Similar to the first bullet, the Exchange proposes to replace ''Responder'' with ''PIXL Response or unrelated market or marketable interest received during a PIXL Auction.'' [10] These non-substantive changes utilize the references proposed within Options 7, Section 1.

The Exchange is also amending the current rule text in the third bullet which currently states,

When a PIXL Order is contra to a resting order or quote a Customer PIXL Order will be assessed $0.00 per contract, other Non-Customer will be assessed $0.30 per contract and the resting order or quote will be assessed the appropriate Options Transaction Charge in Options 7, Section 4.

The Exchange proposes to create two separate bullets in lieu of this one bullet. The first bullet would provide,

When a PIXL Order is a Customer order and executes against unrelated market or marketable interest received prior to a PIXL Auction, the Customer order will be assessed $0.00 per contract. Unrelated market or marketable interest received prior to a PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4.

In amending this sentence, the Exchange proposes to replace the words ''is contra to a resting order or quote'' with ''executes against unrelated market or marketable interest received prior to a PIXL Auction'' and ''PIXL Order'' with ''Customer PIXL Order.'' Any order resting on the order book would have been received prior to the PIXL Auction. The Exchange also proposes to add a new sentence that states, ''Unrelated market or marketable interest received prior to a PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4.'' Today, the rule text does not describe the manner in which the Exchange prices unrelated market or marketable interest received prior to the commencement of a PIXL Auction. This new sentence memorializes the current pricing that Phlx members and member organizations are assessed for such interest, which is order book pricing. As amended, the second bullet would provide,

Non-Customer PIXL Orders will be assessed $0.30 per contract when trading with an unrelated market or marketable interest received prior to the PIXL Auction and the unrelated market or marketable interest received prior to the PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4.

The Exchange is adding the words ''PIXL Order'' after Non-Customer since it started a new sentence to retain the original reference to a PIXL Order at the beginning of the current sentence.[11] To add more context to this scenario, the Exchange is also noting that ''when trading with an unrelated market or marketable interest received prior to the PIXL Auction'' to make clear the type of interest trading with the Non-Customer PIXL Order. The Exchange is also replacing the phrase ''resting order or quote'' with ''unrelated market or marketable interest received prior to the PIXL Auction.'' These non-substantive amendments utilize the references within Options 7, Section 1. Also, of note, any order resting on the order

over the Exchange's TOPO data feed pursuant to Options 3, Section 23(a)(1) and Specialized Quote Feed pursuant to Options 3, Section (a)(i)(B). *See* Phlx Options 3, Section 13(b)(1)(C).

[10] The Exchange proposes other technical amendments for readability of the sentence.

[11] The Exchange is also making other technical changes to start a new paragraph, removing '', other.''

book would have been received prior to the PIXL Auction.

As noted herein, the Exchange applies the order book pricing within Options 7, Section 4 to interest received *prior to* the PIXL Auction, which is considered unrelated market or marketable interest for purposes of the PIXL Auction, because at the time the interest was submitted to the order book, the Phlx members and member organizations would have known that there was no ongoing PIXL Auction and would not expect to be subject to the PIXL pricing. In contrast, the Exchange applies PIXL pricing within Options 7, Section 6 to the unrelated market or marketable interest when interest arrived *during* a PIXL Auction because Phlx seeks to incentivize members and member organizations to submit PIXL Auction Orders to receive a guaranteed execution, and potential price improvement. Phlx members and member organizations submitting interest to the order book during a PIXL Auction are aware that they may be allocated in the PIXL Auction. These market participants would be subject to order book pricing similar to all other orders entered into Phlx's order book. The Exchange assesses the PIXL pricing in Options 7, Section 6 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement.

The Exchange's pricing models for the order book and PIXL Auction each seek to attract liquidity to Phlx and reward members and member organizations differently for the order flow. To this end, the Exchange's pricing considers the manner in which orders interact with the PIXL Auction based on the timing of when the order entered the order book. The Exchange's pricing is consistent with its current practice of assigning the applicable pricing for auctions versus order book pricing depending on how and when the order was submitted to the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[13] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission* [14] (''NetCoalition''), the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [15]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

Options 7, Section 1

The Exchange's proposal to amend Options 7, Section 1(c) to introduce four new references: ''Initiating Order'', ''PIXL Auction Order'', ''PIXL Order'', and ''PIXL Response'' is reasonable, equitable and not unfairly discriminatory because these references will bring more transparency to Phlx's PIXL pricing and also apply in the same manner to all PIXL transactions executed on the Exchange.

Options 7, Section 3

The Exchange's proposal to amend PIXL pricing for options overlying SPY in Options 7, Section 3, Part C by replacing the current text below with a proposed table is reasonable, equitable and not unfairly discriminatory because the proposed table reflects the current pricing offered today on Phlx and adds transparency to that pricing. The proposed table does not amend the current rule text except to add the Customer PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction, which is currently not described in the rule text, and to specify the pricing for unrelated market or marketable interest received *during* a PIXL Auction.

Assessing a SPY Customer PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction is reasonable because the Exchange currently does not assess a Customer a PIXL Order fee when the PIXL Order trades against a PIXL Response or unrelated market or marketable interest. The Exchange believes that not assessing a fee will attract more SPY Customer liquidity to Phlx's PIXL Auction. The proposed SPY Customer PIXL Response and unrelated market or marketable interest of $0.00 per contract reflects the current rate assessed today to these participants.

Assessing a SPY Customer PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction is equitable and not unfairly discriminatory because Customer orders bring valuable liquidity to the market, which liquidity benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Lead Market Makers and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Assessing unrelated market or marketable interest in SPY received *prior* to a PIXL Auction the simple order book pricing within Options 7, Section 3, Part A and the complex order book pricing within Options 7, Section 3, Part B is reasonable because at the time the interest was submitted to the order book, the Phlx members and member organizations would have known that there was no ongoing PIXL Auction and would not expect to be subject to the PIXL pricing. In contrast, applying SPY PIXL pricing within Options 7, Section

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[15] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

3 to the unrelated market or marketable interest that interest arrived *during* a PIXL Auction is reasonable because Phlx seeks to incentivize members and member organizations to submit PIXL Auction Orders to receive a guaranteed execution and potential price improvement. Phlx members and member organizations submitting interest to the order book during a PIXL Auction are aware that they may be allocated in the PIXL Auction. The Exchange's pricing models for the order book and PIXL Auction each seek to attract liquidity to Phlx and reward members and member organizations differently for the order flow. To this end, the Exchange's pricing considers the manner in which orders interact with the PIXL Auction based on the timing of when the order entered the order book. The Exchange's pricing is consistent with its current practice of assigning the applicable pricing for auctions versus order book pricing depending on how and when the order was submitted to the Exchange.

Assessing unrelated market or marketable interest in SPY received *prior* to a PIXL Auction the simple order book pricing within Options 7, Section 3, Part A and the complex order book pricing within Options 7, Section 3, Part B is equitable and not unfairly discriminatory because all Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction will be uniformly assessed the applicable order book pricing for adding liquidity. The Exchange's proposal would treat Phlx members and member organizations who submitted unrelated market or marketable interest in SPY which rested on the order book *prior* to the commencement of a PIXL Auction in the same manner as other Phlx members and member organizations who posted liquidity on the order book as they would both be considered makers of liquidity. Conversely, the Exchange assesses the SPY PIXL pricing within Options 7, Section 3 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement.

The Exchange's proposal to amend the rule text in the last sentence of the final bullet that is being relocated to footnote 2 to state ''which was received prior to the PIXL Auction'' instead of ''established at the initiation of a PIXL auction'' is reasonable, equitable and not unfairly discriminatory because the proposed new language continues to reflect the intent of the original language.[16] The amended rule text makes clear that the Lead Market Maker or Market Maker quote that is being referenced would have been resting on the order book prior to the PIXL Order. Today, the rebate is paid to the PIXL Order where the Lead Market Maker or Market Maker executes against the PIXL Order portion of the paired order as a response. The Exchange would apply new footnote 2 uniformly to Customer PIXL Orders.

Options 7, Section 6

The Exchange's proposal to amend Options 7, Section 6.A, PIXL Pricing to make technical non-substantive rule changes and replace certain text with the proposed references within Options 7, Section 1 is reasonable, equitable and not unfairly discriminatory as it will clarify and harmonize the current rule text by utilizing specified terms.

The Exchange's proposal to add a new sentence that states, ''Unrelated market or marketable interest received prior to a PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4,'' is reasonable because the proposed rule text will describe the manner in which the Exchange prices unrelated market or marketable interest received prior to the commencement of a PIXL Auction. This new sentence memorializes the current pricing that Phlx members and member organizations are assessed for such interest, which is order book pricing. The Exchange applies the order book pricing within Options 7, Section 4 to interest received *prior to* the PIXL Auction, which is considered unrelated market or marketable interest for purposes of the PIXL Auction, because at the time the interest was submitted to the order book, the Phlx members and member organizations would have known that there was no ongoing PIXL Auction and would not expect to be subject to the PIXL pricing. In contrast, the Exchange applies PIXL pricing within Options 7, Section 6 to the unrelated market or marketable interest when interest arrived *during* a PIXL Auction because Phlx seeks to incentivize Participants to submit PIXL Auction Orders to receive a guaranteed execution and potential price improvement. Phlx members and member organizations submitting interest to the order book during a PIXL Auction are aware that they may be allocated in the PIXL Auction. Additionally, the Exchange's pricing models for the order book and PIXL Auction each seek to attract liquidity to Phlx and reward members and member organizations differently for the order flow. To this end, the Exchange's pricing considers the manner in which orders interact with the PIXL Auction based on the timing of when the order entered the order book. The Exchange's pricing is consistent with its current practice of assigning the applicable pricing for auctions versus order book pricing depending on how and when the order was submitted to the Exchange.

The Exchange's proposal to add a new sentence that states, ''Unrelated market or marketable interest received prior to a PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4,'' is equitable and not unfairly discriminatory because all Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction will be uniformly assessed the applicable order book pricing for adding liquidity. The Exchange's proposal would treat Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction in the same manner as other Phlx members and member organizations who posted liquidity on the order book as they would both be considered makers of liquidity. Conversely, the Exchange assesses the SPY PIXL pricing within Options 7, Section 3 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement.

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 not necessary or appropriate in furtherance of the purposes of the Act.

[16] *See* Securities Exchange Act Release No. 80064 (February 24, 2017), 82 FR 11666 (February 24, 2017) (SR–Phlx–2017–15).

Intermarket Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice to initiate a price improvement auction. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intramarket Competition

The Exchange's proposal to amend Options 7, Section 1(c) to introduce four new references: ''Initiating Order'', ''PIXL Auction Order'', ''PIXL Order'', and ''PIXL Response'' does not impose an undue burden on competition because these references will apply in the same manner to all PIXL transactions executed on the Exchange.

Assessing a Customer PIXL Response or unrelated market or marketable interest received *during* a PIXL Auction does not impose an undue burden on competition because Customer orders bring valuable liquidity to the market, which liquidity benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Lead Market Makers and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Assessing unrelated market or marketable interest within Options 7, Section 3, related to SPY, that was received *prior* to a PIXL Auction the simple order book pricing within Options 7, Section 3, Part A and the complex order book pricing within Options 7, Section 3, Part B does not impose an undue burden on competition because all Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction will be uniformly assessed the applicable order book pricing for adding liquidity. The Exchange's proposal would treat Phlx members and member organizations who submitted unrelated market or marketable interest in SPY which rested on the order book *prior* to the commencement of a PIXL Auction in the same manner as other Phlx members and member organizations who posted liquidity on the order book as they would both be considered makers of liquidity. Conversely, the Exchange assesses the SPY PIXL pricing within Options 7, Section 3 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement. The Exchange would apply new footnote 2 uniformly to Customer PIXL Orders.

The Exchange's proposal to add a new sentence that states, ''Unrelated market or marketable interest received prior to a PIXL Auction will be assessed the appropriate Options Transaction Charge in Options 7, Section 4,'' does not impose an undue burden on competition because all Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction will be uniformly assessed the applicable order book pricing for adding liquidity. The Exchange's proposal would treat Phlx members and member organizations who submitted unrelated market or marketable interest which rested on the order book *prior* to the commencement of a PIXL Auction in the same manner as other Phlx members and member organizations who posted liquidity on the order book as they would both be considered makers of liquidity. Conversely, the Exchange assesses the SPY PIXL pricing within Options 7, Section 3 in the same manner that responders to the PIXL Auction are assessed fees for their PAN responses. The unrelated market or marketable interest that received an allocation within the PIXL Auction would be uniformly subject to the same fees as those Phlx members and member organizations who submitted PAN responses and were allocated, thereby receiving a guaranteed execution and potential price improvement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[17]

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–Phlx–2023–26 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–Phlx–2023–26. 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

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

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–Phlx–2023–26 and should be submitted on or before July 20, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13790 Filed 6–28–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–456, OMB Control No. 3235–0515]

Proposed Collection; Comment Request; Extension: Schedule TO

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 (''Commission'') has submitted to the Office of Management and Budget the request for extension of the previously approved collection of information discussed below.

Schedule TO (17 CFR 240.14d–100) must be filed by a reporting company that makes a tender offer for its own securities. Also, persons other than the reporting company making a tender offer for equity securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l) (which offer, if consummated, would cause that person to own over 5% of that class of the securities) must file Schedule TO. The purpose of Schedule TO is to improve communications between public companies and investors before companies file registration statements involving tender offer statements. Schedule TO takes approximately 44.752 hours per response and is filed by approximately 1,378 issuers annually. We estimate that 50% of the 44.752 hours per response (22.376 hours) is prepared by the issuer for an annual reporting burden of 30,834 hours (22.376 hours per response × 1,378 responses). An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by July 31, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: June 23, 2023.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13784 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97794; File No. SR–BOX–2023–17]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 7660 (Communications and Equipment)

June 23, 2023.

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 June 12, 2023, BOX Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7660 (Communications and Equipment). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *https://rules.boxexchange.com/rulefilings.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 purpose of the proposed rule change is to amend Rule 7660 to modernize and clarify the scope of the recordkeeping obligations for Floor Participants[3] relating to communication devices. Specifically, the Exchange is proposing to amend Rule 7660 to: (1) codify that the registration requirement is only applicable to any communication device to be used for business purposes; and (2) explicitly provide that Floor Participants must maintain records of the use of any communication devices on the Trading Floor.[4]

Rule 7660, which applies to the use of electronic communication devices on the Trading Floor, was adopted in 2017

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Floor Participant'' means Floor Brokers as defined in Rule 7540 and Floor Market Makers as defined in Rule 8510(b). *See* BOX Rule 100(a)(26).

[4] The term ''Trading Floor'' or ''Options Floor'' means the physical trading floor of the Exchange located in Chicago. The Trading Floor shall consist of one ''Crowd Area'' or ''Pit'' where all option classes will be located. The Crowd Area or Pit shall be marked with specific visible boundaries on the Trading Floor, as determined by the Exchange. A Floor Broker must open outcry an order in the Crowd Area. *See* BOX Rule 100(a)(68).

with the establishment of the BOX Trading Floor. The Exchange is now proposing to update and modernize Rule 7660(k).

Currently Rule 7660(f) provides that Floor Participants must register, prior to use, any new communication device to be used on the Trading Floor. Each device registered with the Exchange must be registered by category of user. If there is a change in the category of any user, the device must be re-registered with the Exchange. At the time of registration, Floor Participant representatives must sign a statement that they are aware of and understand the rules and procedures governing the use of communication devices on the Options Floor. The Exchange is proposing to update Rule 7660(f) to codify that the registration requirement is only applicable to communication devices to be used for business purposes. Specifically, the Exchange is proposing to amend Rule 7660(f) to state: ''Floor Participants must register, prior to use, any new communication device to be used for business purposes on the Trading Floor. Each device registered with the Exchange must be registered by category of user. If there is a change in the category of any user, the device must be re-registered with the Exchange. At the time of registration, Floor Participant representatives must sign a statement that they are aware of and understand the rules and procedures governing the use of communication devices on the Options Floor.''

The proposed updates to Rule 7660(f) are intended to codify an existing requirement that Floor Participants must register, prior to use, any new communication device to be used for business purposes on the Trading Floor. The Exchange is proposing this additional language to clarify that the registration requirement is only applicable to communication devices to be used for business purposes. This requirement is already reflected on the BOX Communication Device Registration Form and the Exchange is not proposing to change the existing practice. The Exchange is looking to codify this existing requirement into the Rulebook to provide additional clarity to Floor Participants. The Exchange believes that this proposed change will help provide greater clarity to the existing practices on the Trading Floor and may reduce the potential for confusion regarding the requirements relating to communication devices on the Trading Floor.

The Exchange notes that proposed Rule 7660(f) is similar in relevant part to an existing rule governing recordkeeping on the trading floor at another exchange.[5]

Currently, Rule 7660(k) provides that Floor Participants must maintain their cellular or cordless telephone records, including logs of calls placed, for a period of not less than three years, the first two in an easily accessible place. The Exchange reserves the right to inspect and/or examine such telephone records. The Exchange is proposing to modernize Rule 7660(k) to make it clear that the recordkeeping obligations are applicable to any registered communication devices and not limited to telephone records. Specifically, the Exchange is proposing to update Rule 7660(k) to state: ''Floor Participants must maintain records of the use of telephones and all other registered communication devices, including, but not limited to, logs of calls, emails, and chats, for a period of not less than three years, the first two in an easily accessible place. The Exchange reserves the right to inspect and/or examine such records.''

The proposed updates to Rule 7660(k) are intended to modernize and clarify that the recordkeeping obligations are applicable to all registered communication devices and that records of Floor Participant's use of any communication devices, including, but not limited to, emails and chats, are also required to be maintained. The Exchange believes that this proposed change will help with the Exchange's surveillance function. Additionally, the Exchange has notified all Participants that their record keeping obligations apply to all communication devices and extend to chats and emails by Regulatory Notice.[6]

The Exchange notes that proposed Rule 7660(k) is similar in relevant part to an existing rule governing recordkeeping on the trading floor at another exchange [7] and to an existing Exchange recordkeeping rule.[8]

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[9] in general, and Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest.

The Exchange believes that the rule change will promote just and equitable principles of trade by making the rules clearer and easier to use. The Exchange is proposing to update Rule 7660(f) to codify the requirement that Floor Participants must register, prior to use, any new communication device to be used for business purposes on the Trading Floor. The Exchange is proposing this additional language to clarify that the registration requirement is only applicable to communication devices to be used for business purposes. As noted above, the proposed amendment to 7660(f) is an effort to codify an existing Exchange practice that is detailed in the BOX Communication Device Policy and is similar in relevant part to a provision governing the registration of devices in the communications and equipment rules at another exchange.[11] The Exchange believes that this proposed update to codify the requirement to register all communication devices that to be used for a business purpose on the Trading Floor will help provide greater

[5] *See* Cboe Exchange, Inc. (''Cboe'') Rule 5.81(a). The registration requirements relating to communication devices and equipment on the trading floor at Cboe explicitly provides that prior to use, all communication devices for business purposes must be registered with the exchange. Proposed Rule 7660(f) states: Floor Participants must register, prior to use, any new communication device to be used for business purposes on the Trading Floor. Each device registered with the Exchange must be registered by category of user. If there is a change in the category of any user, the device must be re-registered with the Exchange. At the time of registration, Floor Participant representatives must sign a statement that they are aware of and understand the rules and procedures governing the use of communication devices on the Options Floor. Cboe Rule 5.81(a) states: (a) Subject to the requirements of this Rule, Trading Permit Holders may use any communication device (*e.g.,* any hardware or software related to a phone, system, or other device, including an instant messaging system, email system, or similar device) on the trading floor and in any trading crowd of the Exchange. Prior to using a communications device for business purposes on the trading floor of the Exchange, Trading Permit Holders must register the communications device by identifying (in a form and manner prescribed by the Exchange) the hardware (*i.e.,* headset, cellular telephone, tablet, or other similar hardware).

[6] *See* Exchange Notice 2023–11. Available at: *https://boxexchange.com/assets/Communications-and-Equipment-Notice_2.28.2023.pdf.*

[7] *See* Cboe Rule 5.81(g). The recordkeeping obligations relating to communication devices and equipment on the trading floor at Cboe explicitly covers all communication devices and includes emails and chats as well. Proposed Rule 7660(k) states: Floor Participants must maintain records of the use of telephones and all other registered communication devices, including, but not limited to, logs of calls, emails, and chats, for a period of not less than three years, the first two in an easily accessible place. The Exchange reserves the right to inspect and/or examine such records. Cboe Rule 5.81(g) states: Trading Permit Holders must maintain records of the use of communication devices, including, but not limited to, (1) logs of calls placed, (2) emails, and (3) chats, for a period of not less than three years, the first two years in an easily accessible place. The Exchange reserves the right to inspect such records pursuant to Rule 13.2.

[8] *See* BOX Rule 7670(a)(1)(G).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See supra* note 5.

clarity into existing practices on the Trading Floor and may reduce the potential for confusion regarding the requirements relating to communication devices on the Trading Floor. As such, the Exchange believes that the proposed changes to codify this existing registration requirement in Rule 7660(f) is in the public interest, and therefore, consistent with the Act.

The Exchange is also proposing to modernize Rule 7660(k) to amend the records retention requirement for telephone records to explicitly provide that, the recordkeeping obligations are applicable to all registered communication devices and that records of Floor Participant's use of any communication devices, including, but not limited to, emails and chats are also required to be maintained for a period of not less than three years, the first two in an easily accessible place. As noted above, these proposed amendments are similar in relevant part to a provision governing recordkeeping in the communications and equipment rules at another exchange [12] and to an existing Exchange recordkeeping rule.[13] The Exchange believes that this modernization and clarification of the scope of the recordkeeping requirements under Rule 7660(k), will help with the Exchange's surveillance function and make the Rule clearer for Participants. As such, the Exchange believes that the proposed changes to modernize and clarify Rule 7660(k) is in the public interest, and therefore, consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange believes that the proposed change will not impose a burden on intermarket or intramarket competition, as the proposed change applies equally to all market participants. While the Exchange does not believe that the proposed non-controversial change is a burden on competition, or is competitive in nature, the Exchange believes that proposed updates to codify an existing practice and provide for clearer, modernized recordkeeping obligations will benefit market participants. The Exchange also notes that the proposed updates to 7660(f) are similar in relevant part to an existing provision governing communication device registration in the communications and equipment rules at another options exchange [14] and that the proposed updates to 7660(k) are similar in relevant part to an existing provision governing recordkeeping in the communications and equipment rules at another options exchange [15] and to an existing Exchange recordkeeping rule.[16] As such, the Exchange does not believe that the proposed rule change will impose any 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

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [17] and Rule 19b–4(f)(6) thereunder.[18] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [19] and Rule 19b–4(f)(6)(iii) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6) [21] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[22] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. As discussed above, the Exchange states that this proposed update to 7660(f) to codify the existing requirement to register all communication devices to be used for a business purpose on the Trading Floor will help provide greater clarity into existing practices on the Trading Floor and may reduce the potential for confusion regarding the requirements relating to communication devices on the Trading Floor. The Exchange believes that the waiver of the operative delay will protect investors by allowing the Exchange to quickly codify existing practices and to modernize and clarify the scope of the recordkeeping requirements under Rule 7660(k). The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to immediately codify an existing practice within Rule 7660(f) and amend Rule 7660(k) to modernize the requirements applicable to communication devices. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[23]

At any time within 60 days of the filing of this proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [24] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–BOX–2023–17 on the subject line.

[12] *See supra* note 7.

[13] *See supra* note 8.

[14] *See supra* note 5.

[15] *See supra* note 7.

[16] *See supra* note 8.

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78s(b)(2)(B).

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–BOX–2023–17. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–BOX–2023–17 and should be submitted on or before July 20, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13795 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97792; File No. SR–ICC–2023–008]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC Clearing Participant Default Management Procedures

June 26, 2023.

I. Introduction

On May 2, 2023, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the ICC Clearing Participant Default Management Procedures. The proposed rule change was published for comment in the **Federal Register** on May 12, 2023.[3] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

ICC is registered with the Commission as a clearing agency for the purpose of clearing CDS contracts. ICC clears CDS contracts for its members, which it refers to as Clearing Participants.[4] Clearing CDS contracts for Clearing Participants presents certain risks to ICC, such as the risk that a Clearing Participant may default on payments or other obligations it owes to ICC. Accordingly, ICC has developed a comprehensive set of tools to manage and mitigate such risks. These tools include, among other things, collecting margin from Clearing Participants, maintaining a Guaranty Fund, and establishing procedures to manage a Clearing Participant's default.

The proposed rule change relates to the third set of risk management tools—procedures that explain what happens when a Clearing Participant is in default and how ICC responds to the default, which ICC refers to as its Clearing Participant Default Management Procedures (the ''Procedures''). The proposed rule change would amend the Procedures.

The proposed rule change would add Section 4.6 to the Procedures, which would explain how ICC tests both its Recovery Plan and its Wind-Down Plan (together the ''Plans''). ICC would test the Plans at least once every twelve months, and the purpose of these annual tests would be to demonstrate that ICC is ready to execute the Plans when needed. ICC would need to execute the plans, for example, in the following circumstances: (i) to address uncovered credit losses, liquidity shortfalls and general business risk, operational risk, or any other risk that threatens ICC's viability as a going concern and (ii) to wind-down ICC in an orderly manner.

Section 4.6 would detail (i) the ICC personnel responsible for planning and conducting the tests and (ii) the overall scope of the tests. With respect to responsible personnel, the ICC Risk Oversight Officer (''ROO'') would have overall responsibility for planning and coordinating the execution of each test. In doing so, the ROO would work with other members of the Close-Out Team [5] to determine the scope of the test. The proposed scope and format of the test would be presented to the ICC Board of Managers for review prior to execution of the test. After Board review, the Close-Out Team would then be responsible for executing the tests, capturing the results of the tests, and providing the results to the ROO.

Once provided with the results, the ROO would collate the information, summarize any lessons learned, and identify possible revisions that should be made to the Plans. The ROO would then develop a presentation to summarize the tests. The Close-Out Team, ICC Risk Committee, and Board would review this presentation. Going forward, the ROO would maintain a list of work items for the future development and/or enhancement of the business processes and capabilities necessary to execute the Plans.

With respect to the overall scope of each test, this would include choosing the recovery and wind-down scenarios and the recovery tools to test. In choosing the scenarios and tools, ICC would give consideration to scenarios, business processes, and tools which have not been recently tested. In addition, ICC would consider the applicability of new Rules, procedures, or newly implemented ICC capabilities

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC Clearing Participant Default Management Procedures; Exchange Act Release No. 97455 (May 8, 2023), 88 FR 30812 (May 12, 2023) (File No. SR–ICC–2023–008) (''Notice'').

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in the ICC Clearing Participant Default Management Procedures or the ICC Clearing Rules.

[5] The ICC Close-Out Team is comprised of ICC management, the ROO, and the most senior member of the ICC Treasury Department.

(such as new cleared contracts). Finally, Section 4.6 would specify that ICC would always include in the test all three wind-down options set forth in the Wind-Down Plan.

Section 4.6 would also state that ICC could conduct some of the testing as part of its annual default management tests. Specifically, Section 4.6 would explain that ICC may test those parts of the Plans that address a Clearing Participant's default, such as business processes and tools, as part of its annual default management tests. With respect to the business processes and tools to address losses not related to a Clearing Participant's default, however, Section 4.6 would clarify that ICC will test those in a separate table-top exercise. ICC will test those parts of the Plans that relate to non-default losses apart from its annual default management tests.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[6] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[7] and Rules 17Ad–22(e)(2)(i), (e)(2)(v), and (e)(3)(ii)[8] thereunder.

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICE Clear Credit be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.[9] Based on its review of the record, and for the reasons discussed below, the Commission believes the proposed changes to the Procedures are consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions.

As discussed above, the proposed rule change would modify the Procedures to require that ICC conduct annual testing of the Plans. Section 4.6 also would detail (i) the ICC personnel responsible for planning and conducting the tests and (ii) the overall scope of the tests. The Commission believes that requiring annual testing and establishing relevant responsibilities for conducting the tests would each help to ensure that ICC tests the Plans at least once every twelve months. The Commission further believes that the proposed scope for the tests would help to ensure that the tests identify any possible issues with, or improvements to, the Plans. Thus, the Commission believes that the proposed rule change would help to ensure that ICC maintains and enforces an effective Recovery Plan and an effective Wind-Down Plan.

The Commission believes that ICC's Recovery Plan is designed to help ICC promote the prompt and accurate clearance and settlement of securities transactions, by providing a roadmap for actions it may employ to monitor and manage its risks, and, as needed, to stabilize its financial condition in the event those risks materialize. The Commission similarly believes ICC's Wind-Down Plan is designed to help ICC to promote the prompt and accurate clearance and settlement of securities transactions by providing a roadmap to wind-down as needed. The Commission believes the actions set forth in the Plans would help to ensure the availability of ICC's services to the marketplace in the event of a recovery or wind-down, while reducing disruption to the operations of Clearing Participants and financial markets.[10] The Commission thus believes both Plans would help ICC to avoid disruption to its operations, and therefore promote ICC's ability to promptly and accurately clear and settle transactions.

Because the proposed rule change would help ICC to maintain, enforce, and improve the Plans, and because the Commission believes the Plans would promote the prompt and accurate clearance and settlement of securities transactions, the Commission therefore believes the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[11]

B. Consistency With Rules 17Ad–22(e)(2)(i) and (v)

Rules 17Ad–22(e)(2)(i) and (v) require ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility.[12] The Commission believes the governance arrangements for testing the Plans, as discussed above, would be clear and transparent and would specify clear and direct lines of responsibility. For example, the ROO would, among other things, have overall responsibility for planning and coordinating the execution of each test; work with other members of the Close-Out Team to determine the scope of each the test; and collate and summarize the results of each test. The Close-Out Team would be responsible for executing the tests, capturing the results of the tests, and providing the results to the ROO. The Board would review the scope and format prior to the execution of each test as well as the results of each test. The Commission believes overall these arrangements would be clear and transparent and specify clear and direct responsibilities for the ROO, Close-Out Team, and Board, consistent with Rules 17Ad–22(e)(2)(i) and (v).[13]

C. Consistency With Rule 17Ad–22(e)(3)(ii)

Rule 17Ad–22(e)(3)(ii) requires ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICC, which includes plans for the recovery and orderly wind-down of ICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[14] As discussed above, the Commission believes the proposed rule change would help ICC to maintain, enforce, and improve the Plans. The Commission further believes that the Plans generally would provide for the recovery and orderly wind-down of ICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[15] The Commission therefore believes that the proposed rule change, in helping to maintain, enforce, and improve the

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 240.17Ad–22(e)(2)(i), (e)(2)(v), and (e)(3)(ii).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] For a further discussion of the Plans, *see* Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan, Exchange Act Release No. 91806 (May 10, 2021), 86 FR 26561 (May 14, 2021) (SR–ICC–2021–005).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(2)(i), (v).

[13] 17 CFR 240.17Ad–22(e)(2)(i), (v).

[14] 17 CFR 240.17Ad–22(e)(3)(ii).

[15] For a further discussion of the Plans, *see* Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan, Exchange Act Release No. 91806 (May 10, 2021), 86 FR 26561 (May 14, 2021) (SR–ICC–2021–005).

Plans, would be consistent with Rule 17Ad–22(e)(3)(ii).[16]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act, and Rules 17Ad–22(e)(2)(i), (e)(2)(v), and (e)(3)(ii) thereunder.[17]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[18] that the proposed rule change (SR–ICC–2023–008), be, and hereby is, approved.[19]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 2023–13864 Filed 6–28–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: 30-day notice.

SUMMARY: The Small Business Administration (SBA) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act and OMB procedures, SBA is publishing this notice to allow all interested member of the public an additional 30 days to provide comments on the proposed collection of information.

DATES: Submit comments on or before July 31, 2023.

ADDRESSES: Written comments and recommendations for this information collection request should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Small Business Administration''; ''Currently Under Review,'' then select the ''Only Show ICR for Public Comment'' checkbox. This information collection can be identified by title and/or OMB Control Number.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the information collection and supporting documents from the Agency Clearance Office at *Curtis.Rich@sba.gov;* (202) 205–7030, or from *www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: To obtain the information needed to carry out its oversight responsibilities under the Small Business Investment Act, the Small Business Administration (SBA) requires Small Business Investment Companies (SBICs) to submit financial statements and supplementary information on SBA Form 468. SBA uses this information to monitor SBIC financial condition and regulatory compliance, for credit analysis when considering SBIC leverage applications, and to evaluate financial risk and economic impact for individual SBICs and the program as a whole.

Solicitation of Public Comments

Comments may be submitted on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

OMB Control Number: 3245–0063.

Title: SBIC Financial Reports.

Description of Respondents: Small Business Investment Companies.

SBA Form Number: 468 (Short Form, Long Form, Reinvest or Reporting Appendix).

Estimated Number of Respondents: 309.

Estimated Annual Responses: 1,047.

Estimated Annual Hour Burden: 26,973.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–13826 Filed 6–28–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: 30-Day notice.

SUMMARY: The Small Business Administration (SBA) is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act and OMB procedures, SBA is publishing this notice to allow all interested member of the public an additional 30 days to provide comments on the proposed collection of information.

DATES: Submit comments on or before July 31, 2023.

ADDRESSES: Written comments and recommendations for this information collection request should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Small Business Administration''; ''Currently Under Review,'' then select the ''Only Show ICR for Public Comment'' checkbox. This information collection can be identified by title and/or OMB Control Number.

FOR FURTHER INFORMATION CONTACT: You may obtain a copy of the information collection and supporting documents from the Agency Clearance Office at *Curtis.Rich@sba.gov;* (202) 205–7030, or from *www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: To obtain the information needed to carry out its program evaluation and oversight responsibilities. SBA requires small business investment companies (SBICs) to provide information on SBA Form 1031 each time financing is extended to a small business concern. SBA uses this information to evaluate how SBICs fill market financing gaps and contribute to economic growth, and to monitor the regulatory compliance of individual SBICs.

Solicitation of Public Comments

Comments may be submitted on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

OMB Control Number: 3245–0078.

Title: Portfolio Financial Reports.

Description of Respondents: Small Business Investment Companies.

SBA Form Number: 1031.

Estimated Number of Respondents: 309.

Estimated Annual Responses: 2,755.

[16] 17 CFR 240.17Ad–22(e)(3)(ii).

[17] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(2)(i), (e)(2)(v), and (e)(3)(ii).

[18] 15 U.S.C. 78s(b)(2).

[19] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

Estimated Annual Hour Burden: 2,755.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–13828 Filed 6–28–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12111]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Eternal Medium: Seeing the World in Stone'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition ''Eternal Medium: Seeing the World in Stone'' at the Los Angeles County Museum of Art, Los Angeles, California, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–13881 Filed 6–28–23; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 12107]

60-Day Notice of Proposed Information Collection: Affidavit of Relationship for Minors Who Are Nationals of El Salvador, Guatemala, or Honduras

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to August 28, 2023.

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

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2023–0020'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: LeCR@state.gov.* You must include 60-Day Submission Comment on ''information collection title'' in the subject line of your message.
- *Regular Mail:* Send written comments to Cassie Le, PRM/A, 2025 E St. NW, Washington, DC 20006.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Affidavit of Relationship for Minors who are Nationals of El Salvador, Guatemala, or Honduras.
- *OMB Control Number:* 1405–0217.
- *Type of Request:* Notice of request for public comment.
- *Originating Office:* PRM/A.
- *Form Number:* DS–7699.
- *Respondents:* Those seeking qualified family members to access the U.S. Refugee Admissions Program.
- *Estimated Number of Respondents:* 3,000.
- *Estimated Number of Responses:* 3,000.
- *Average Time per Response:* One hour.
- *Total Estimated Burden Time:* 3,000 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

To obtain biographical information about children overseas who intend to seek access to the USRAP, as well as other eligible family members or caregivers, for verification by the U.S. government. This form also assists DHS's U.S. Citizenship and Immigration Services to verify parent-child relationships during refugee case adjudication. This form is necessary for implementation of this program.

Methodology

Working with a State Department contracted Resettlement Agencies (RA), qualifying individuals in the United States must complete the AOR and submit supporting documentation to: (a) establish that they meet the requirements for being a qualifying individual who currently falls into one of the aforementioned categories; (b) provide a list of qualifying family members who may seek access to refugee resettlement in the United States. Once completed, the form is sent by the RA to the Refugee Processing Center (RPC) for case creation and processing. The information is used by the RPC for case management; by USCIS to determine that the qualifying individual falls into one of the aforementioned categories; and by the Resettlement Support Center (RSC) for case prescreening and further processing after DHS interview. The International Organization for Migration (IOM) administers the RSC in Latin America under a Memorandum of Understanding with the Department to

conduct case prescreening and assist in the processing of refugee applicants.

Sarah R. Cross,

Deputy Assistant Secretary, Bureau of Population, Refugees and Migration, Department of State.

[FR Doc. 2023–13834 Filed 6–28–23; 8:45 am]

BILLING CODE 4710–33–P

DEPARTMENT OF STATE

[Public Notice: 12116]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Picasso: A Cubist Commission in Brooklyn'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Picasso: A Cubist Commission in Brooklyn'' at The Metropolitan Museum of Art, New York, New York, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–13797 Filed 6–28–23; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 748]

Indexing the Annual Operating Revenues of Railroads

The Surface Transportation Board (the Board) is publishing the annual inflation-adjusted index and deflator factors for 2022. The deflator factors are used by the railroads to adjust their gross annual operating revenues for classification purposes. This indexing methodology ensures that railroads are classified based on real business expansion and not on the effects of inflation. Classification is important because it determines the extent to which individual railroads must comply with the Board's reporting requirements.

The Board's deflator factors are based on the annual average Railroad Freight Price Index developed by the Bureau of Labor Statistics. The Board's deflator factor is used to deflate revenues for comparison with established revenue thresholds.

RAILROAD REVENUE THRESHOLDS [1]

Year	Factor	Class I	Class II
2018	0.5103	489,935,956	39,194,876
2019 [2]	0.4952	504,803,294	40,384,263
2020 [3]	1.0000	900,000,000	40,400,000
2021	0.9535	943,898,958	42,370,575
2022	0.8721	1,032,002,719	46,325,455

[1] In *Montana Rail Link, Inc., & Wisconsin Central Ltd., Joint Petition for Rulemaking with Respect to 49 CFR part 1201,* 8 I.C.C.2d 625 (1992), the Board's predecessor, the Interstate Commerce Commission, raised the revenue classification level for Class I railroads from $50 million (1978 dollars) to $250 million (1991 dollars), effective for the reporting year beginning January 1, 1992. The Class II threshold was also raised from $10 million (1978 dollars) to $20 million (1991 dollars). In *Montana Rail Link, Inc.—Petition for Rulemaking—Classification of Carriers,* EP 763 (STB served Apr. 5, 2021), the revenue classification level for Class I railroads was raised from $250 million (1991 dollars) to $900 million (2019 dollars), and the Class II threshold was converted and rounded from $20 million (1991 dollars) to $40.4 million (2019 dollars), effective for the reporting year beginning January 1, 2020.

[2] The 2019 values reflect those in *Indexing the Annual Operating Revenues of Railroads,* EP 748 (STB served June 10, 2020).

[3] The 2020 and subsequent values are based on the thresholds established in Docket No. EP 763, and the deflator factor is referenced to the new base year of 2019. As the Railroad Freight Price Index remained the same from 2019 to 2020, the annual deflator factor for 2020 was 1.0000.

DATES: The inflation-adjusted indexes and deflator factors are effective January 1, 2022.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez at (202) 245–0333. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

Board decisions and notices are available at *www.stb.gov.*

Decided: June 23, 2023.

By the Board, William Brennan, Ph.D., Chief Economist & Director, Office of Economics.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2023–13852 Filed 6–28–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the OCC, the Board, and the FDIC (the agencies) 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 Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has approved the agencies' publication for public comment of a proposal to extend for three years, without revision, the Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101), which is currently an approved collection of information for each agency. At the end of the comment period for this notice, the FFIEC and the agencies will review any comments received. As required by the PRA, the agencies will then publish a second **Federal Register** notice for a 30-day comment period and submit the final FFIEC 101 to OMB for review and approval.

DATES: Comments must be submitted on or before August 28, 2023.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the OMB control number(s), will be shared among the agencies.

OCC: 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: 1557–0239, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''1557–0239'' 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.

Viewing Comments Electronically: Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' drop down menu and select ''Information Collection Review.'' 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 ''1557–0239'' or ''Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101).'' 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.

Board: You may submit comments, which should refer to ''FFIEC 101,'' by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at: *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include ''FFIEC 101'' in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

FDIC: You may submit comments, which should refer to ''FFIEC 101,'' by any of the following methods:

- *Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.* Follow the instructions for submitting comments on the FDIC's website.
- *Email: comments@FDIC.gov.* Include ''FFIEC 101'' in the subject line of the message.
- *Mail:* Manuel E. Cabeza, Counsel, Attn: Comments, Room MB–3007, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications/,* including any personal information provided. Paper copies of public comments may be requested from the FDIC Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

Additionally, commenters may send a copy of their comments to the OMB desk officers for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503; by fax to (202) 395–6974; or by email to *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about the information collections discussed in this notice, please contact any of the agency staff whose names appear below. In addition, copies of the FFIEC 101 reporting forms and instructions can be obtained at the FFIEC's website (*https://www.ffiec.gov/ffiec_report_forms.htm*).

OCC: Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649–5490, or for persons who are hearing impaired, TTY, (202) 649–5597. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Board: Nuha Elmaghrabi, Federal Reserve Board Clearance Officer, (202) 452–3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

Telecommunications Device for the Deaf (TDD) users may call (202) 263–4869.

FDIC: Manuel E. Cabeza, Counsel, (202) 898–3767, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Report Title: Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework.

Form Number: FFIEC 101.

Frequency of Response: Quarterly.

Affected Public: Business or other for-profit.

OCC:

OMB Control No.: 1557–0239.

Estimated Number of Respondents: 10 national banks and Federal savings associations.

Estimated Time per Response: 674 burden hours per quarter to file for banks and Federal savings associations.

Estimated Total Annual Burden: 26,960 burden hours to file.

Board:

OMB Control No.: 7100–0319.

Estimated Number of Respondents: 4 State member banks; 5 bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only; 9 other bank holding companies and savings and loan holding companies; and 6 intermediate holding companies.

Estimated Time per Response: 674 burden hours per quarter to file for State member banks; 3 burden hours per quarter to file for bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only; 677 burden hours per quarter to file for other bank holding companies and savings and loan holding companies; and 3 burden hours per quarter to file for intermediate holding companies.

Estimated Total Annual Burden: 10,784 burden hours for State member banks to file; 60 burden hours for bank holding companies and savings and loan holding companies that complete Supplementary Leverage Ratio (SLR) Tables 1 and 2 only to file; 24,372 burden hours for other bank holding companies and savings and loan holding companies to file; and 72 burden hours for intermediate holding companies to file.

FDIC:

OMB Control No.: 3064–0159.

Estimated Number of Respondents: 1 insured State nonmember bank and State savings association.

Estimated Time per Response: 674 burden hours per quarter to file.

Estimated Total Annual Burden: 2,696 burden hours to file.

General Description of Report

Each advanced approaches institution [1] is required to report quarterly regulatory capital data on the FFIEC 101. Each top-tier advanced approaches institution and Category III institution [2] is required to report supplementary leverage ratio information on the FFIEC 101. The FFIEC 101 information collections are mandatory for advanced approaches and top-tier Category III banking organizations under the following authorities: 12 U.S.C. 161 (national banks), 12 U.S.C. 324 (State member banks), 12 U.S.C. 1844(c) (bank holding companies), 12 U.S.C. 1467a(b) (savings and loan holding companies), 12 U.S.C. 1817 (insured State nonmember commercial and savings banks), 12 U.S.C. 1464 (Federal and State savings associations), and 12 U.S.C. 1844(c), 3106, and 3108 (intermediate holding companies). Certain data items in this information collection are given confidential treatment under 5 U.S.C. 552(b)(4) and (8).

The agencies use data reported in the FFIEC 101 to assess and monitor the levels and components of each reporting entity's applicable capital requirements and the adequacy of the entity's capital under the Advanced Capital Adequacy Framework [3] and the supplementary leverage ratio,[4] as applicable; to evaluate the impact of the Advanced Capital Adequacy Framework and the supplementary leverage ratio, as applicable, on individual reporting entities and on an industry-wide basis and its competitive implications; and to supplement on-site examination processes. The reporting schedules also assist advanced approaches institutions and top-tier Category III banking organizations in understanding expectations relating to the system development necessary for implementation and validation of the capital rule and the supplementary leverage ratio, as applicable. Submitted data that are released publicly will also provide other interested parties with additional information about advanced approaches institutions' and top-tier Category III institutions' regulatory capital.

Request for Comment

The agencies invite comment on the following related topics to these collections of information:

(a) Whether the information collections are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections, including the validity of the methodology and assumption used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Comments submitted in response to this joint notice will be shared among the agencies. All comments will become a matter of public record.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on June 20, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–13861 Filed 6–28–23; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

[1] 12 CFR 3.100(b) (OCC); 12 CFR 217.100(b) (Board); 12 CFR 324.100(b) (FDIC).

[2] 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC).

[3] 12 CFR part 3, subpart E (OCC); 12 CFR part 217, subpart E (Board); 12 CFR part 324, subpart E (FDIC).

[4] 12 CFR 3.10(c) (OCC); 12 CFR 217.10(c) (Board); 12 CFR 324.10(c) (FDIC).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property

subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On June 23, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. POPOV, Yegor Sergeyevich (Cyrillic: ПОПОВ, Егор Сергеевич) (a.k.a. POPOV, Egor Sergeevich; a.k.a. POPOV, Igor; a.k.a. "KONTORA, Egor"; a.k.a. "ZHUKOV, Egor"), Moscow, Russia; DOB 25 Jan 1992; POB Volgograd, Russia; nationality Russia; citizen Russia; Gender Male; National ID No. 1811675248 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(vii) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

2. SUKHODOLOV, Aleksei Borisovich (Cyrillic: СУХОДОЛОВ, Алексей Борисович) (a.k.a. SUKHODOLOV, Alexey Borisovich), Moscow, Russia; DOB 19 Apr 1974; POB Voronezh, Russia; nationality Russia; citizen Russia; Gender Male; Passport 100137518 (Russia) (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

Dated: June 23, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–13820 Filed 6–28–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee: Change

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting: Change.

SUMMARY: In the **Federal Register** notice that was originally published on June 5, 2023, the day for this meeting changed from Monday, June 26, 2023, to Monday, July 17, 2023 at 3:00 p.m. Eastern Time. All other meeting details remain unchanged. This meeting will be held via teleconference.

DATES: The meeting will be held Monday, July 17, 2023.

FOR FURTHER INFORMATION CONTACT: Rosalind Matherne at 1–888–912–1227 or 202–317–4115.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Monday, July 17, 2023, at 3:00 p.m. Eastern Time via teleconference. This meeting was previously announced in the **Federal Register** June 5, 2023 at 88 FR 37141. The public is invited to make oral comments or submit written statements for consideration. For more information, please contact Rosalind Matherne at 1–888–912–1227 or 202–317–4115, or write TAP Office, 1111 Constitution Ave. NW, Room 1503, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.*

The agenda will include Tax Forms and Publications committee referral #52664 to be discussed. Public input is welcomed.

Dated: June 23, 2023.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2023–13800 Filed 6–28–23; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 88 Thursday,
No. 124 June 29, 2023

Part II

Department of the Interior

Bureau of Ocean Energy Management

30 CFR Parts 550, 556, and 590
Risk Management and Financial Assurance for OCS Lease and Grant Obligations; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Parts 550, 556, and 590

[Docket ID: BOEM–2023–0027]

RIN 1010–AE14

Risk Management and Financial Assurance for OCS Lease and Grant Obligations

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The Department of the Interior (the Department or DOI), acting through BOEM, proposes to modify its criteria for determining whether oil, gas, and sulfur lessees, right-of-use and easement (RUE) grant holders, and pipeline right-of-way (ROW) grant holders may be required to provide bonds or other financial assurance above the current regulatorily prescribed base bonds to ensure compliance with their Outer Continental Shelf Lands Act (OCSLA) obligations. This proposed rule would also remove existing restrictive provisions for third-party guarantees and decommissioning accounts and would add new criteria under which a bond or third-party guarantee that was provided as supplemental financial assurance may be canceled. Additionally, this proposed rule would clarify bonding requirements for RUEs serving Federal leases. Based on the proposed framework, BOEM estimates that the aggregate amount of supplemental financial assurance required of lessees and grant holders under this proposed rulemaking available to the U.S. government for decommissioning activities would increase by an estimated $9.2 billion over current levels. This value represents less than one-quarter of all offshore decommissioning liabilities, which is currently estimated at $42.8 billion. This proposed rulemaking would not apply to renewable energy activities.

DATES: BOEM must receive your comments on or before August 28, 2023. BOEM has the discretion not to consider comments received after this date. The Office of Management and Budget (OMB) and BOEM must receive your comments on the information collection (IC) burden in this rulemaking on or before July 31, 2023. The IC burden comment opportunity does not affect the deadline for the public to comment to BOEM on the proposed regulations.

ADDRESSES: You may submit comments on the rulemaking by any of the following methods. In your comments, please reference ''Risk Management and Financial Assurance for OCS Lease and Grant Obligations, RIN 1010–AE14.'' Please include your name, and phone number or email address, so we can contact you if we have questions regarding your submission.

- *Federal rulemaking portal: https://www.regulations.gov.* In the entry titled, ''Enter Keyword or ID,'' enter BOEM–2023–0027 then click search. Follow the instructions to submit public comments and view supporting and related materials available for this rulemaking.
- *Mail or delivery service:* Send comments on the BOEM proposed rule to the Department of the Interior, Bureau of Ocean Energy Management, Office of Regulations, Attention: Kelley Spence, 45600 Woodland Road, Mailstop VAM–BOEM DIR, Sterling, VA 20166.

Submit comments on the IC in this proposed rule to *www.reginfo.gov/public/do/PRAMain.* From this main web page, you can find and submit comments on this particular information collection by proceeding to the boldface heading ''Currently under Review,'' selecting ''Department of the Interior'' in the ''Select Agency'' pull down menu, clicking ''Submit,'' then, checking the box ''Only Show ICR for Public Comment'' on the next web page, scrolling to this proposed rule, and clicking the ''Comment'' button at the right margin. Or, you may use the search function to locate the IC request related to the proposed rule on the main web page. Please provide a copy of your comments to the Information Collection Clearance Officer, Office of Regulations, Bureau of Ocean Energy Management, Attention: Anna Atkinson, 45600 Woodland Road, Sterling, Virginia 20166; or by email to *anna.atkinson@boem.gov.* Please reference OMB Control Number 1010–0006 in the subject line of your comments.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking (1010–AE14). All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Availability of Comments:'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

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

FOR FURTHER INFORMATION CONTACT: Kelley Spence, Office of Regulations, BOEM, at *kelley.spence@boem.gov* or at (984) 298–7345; or Karen Thundiyil, Chief, Office of Regulations, BOEM, at *Karen.Thundiyil@boem.gov* or at (202) 742–0970.

To obtain a copy of the information collection supporting statement, contact: Information Collection Clearance Officer, Office of Regulations, Bureau of Ocean Energy Management, Attention: Anna Atkinson, at *anna.atkinson@boem.gov* or at (703) 787–1025.

SUPPLEMENTARY INFORMATION:

Public Availability of Comments: BOEM may post all submitted comments to *regulations.gov.* Before including your name, return address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available. In order for BOEM to withhold from disclosure your personally identifiable information, you must identify, in a cover letter, any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe in such cover letter any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so. Even if BOEM withholds your information in the context of this rulemaking, your submission is subject to the Freedom of Information Act (FOIA) and any relevant court orders, and if your submission is requested under the FOIA or such court order, your information will only be withheld if a determination is made that one of the FOIA's exemptions to disclosure applies or if such court order is challenged. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

Organization of this document. The information in this preamble is organized as follows:

I. Table of Acronyms and Terms

Several acronyms and terms are included in this preamble. To ease the reading of this preamble and for reference purposes, we list the following acronyms and their meanings here.

ANCSA Alaska Native Claims Settlement Act
ANPRM Advance Notice of Proposed Rulemaking
BOEM Bureau of Ocean Energy Management
BSEE Bureau of Safety and Environmental Enforcement
DOI Department of the Interior
E.O. Executive Order
FASB Financial Accounting Standards Board
FDIC Federal Deposit Insurance Corporation
FR Federal Register
GAAP Generally Accepted Accounting Principles
GAO Government Accountability Office
IC Information Collection
INC Incidents of Non-Compliance
IRFA Initial Regulatory Flexibility Analysis
IRIA Initial Regulatory Impact Assessment
MMS Minerals Management Service
NAICS North American Industry Classification System
NEPA National Environmental Policy Act
NRSRO Nationally Recognized Statistical Rating Organization
NTL Notice to Lessees
OIRA Office of Information and Regulatory Affairs (a component of OMB)
OMB Office of Management and Budget
OCS Outer Continental Shelf
OCSLA Outer Continental Shelf Lands Act
PRA Paperwork Reduction Act
RIA Regulatory Impact Analysis
RUE Right-of-Use and Easement
ROW Right-of-Way
SBA Small Business Administration
SEC Securities and Exchange Commission
S&P Standard and Poor's
U.S.C. United States Code

II. Executive Summary

This proposed rule would require that the holders of interests in Outer Continental Shelf (OCS) leases and grants provide financial assurance for their own contractual and regulatory obligations, including decommissioning obligations, to prevent the Federal Government from incurring costs to perform those obligations and to avoid the environmental or safety hazards associated with delayed compliance. This approach adheres to the general principle that the private parties enjoying the benefit of producing the mineral resources of the OCS should not shift the cost of satisfying their contractual and environmental obligations to the public. Based on the proposed framework, BOEM estimates that the aggregate amount of supplemental financial assurance required of lessees and grant holders under this proposed rulemaking available to the U.S. government for decommissioning activities would increase by an estimated $9.2 billion over current levels. This value represents less than one-quarter of all decommissioning liabilities, which is currently estimated at $42.8 billion.

This proposed rule is intended to update BOEM's criteria for determining whether oil, gas, and sulfur lessees, RUE grant holders, and ROW grant holders may be required to provide surety bonds or other financial assurance above the prescribed base financial assurance to ensure compliance with OCSLA. Provisions of this proposed rulemaking would change the existing criteria used to determine whether supplemental financial assurance should be required of OCS oil and gas lessees and grantees. Under the existing regulations, BOEM considers five criteria in making this determination for lessees: financial capacity; projected financial strength; business stability; record of compliance with existing rules and regulations; and reliability. This rulemaking proposes to eliminate those five criteria and replace them with two new criteria: credit rating and the ratio of the value of proved oil and gas reserves on the lease to the lease decommissioning liability associated with those reserves.

Using the credit rating of the lessee (to determine its financial strength) and the value of proved oil and gas reserves available to meet future financial obligations, BOEM would not require supplemental financial assurance in three cases. First, under this proposed rule, a lessee with an investment grade credit rating would not be required to post supplemental financial assurance beyond a base bond to cover its lease and regulatory obligations. These base bonds can range from $50,000 for a lease-specific bond with no approved operational activity to $3 million for an area-wide bond that includes a development production plan. Second, where there are multiple co-lessees on a lease, if any one co-lessee meets the credit rating threshold, none of the other co-lessees would be required to post supplemental financial assurance. Finally, for any lease on which all lessees are rated below investment grade, BOEM would next look to the value of the lease's proved oil and gas reserves relative to lease decommissioning obligations associated with the production of those reserves. For any such lease, if a lease has proved reserves with a value of at least three times that of the estimated decommissioning cost, no supplemental financial assurance would be required. In any case other than the three mentioned here, supplemental financial assurance would be mandatory.

Overall, this proposed rule would impose greater supplemental financial assurance requirements on lessees than the amounts currently required. This proposed rule also contains a provision that would allow phased-in compliance over a period of three years, which could ease burdens on individual lessees and operators in the short term.

This proposed rule would also make other less significant changes. This proposed rule would provide more specific bonding requirements for Federal RUEs and would remove restrictive provisions for third-party guarantees and decommissioning

accounts. Finally, it would add new criteria under which supplemental bonds and third-party guarantees may be cancelled.

On October 16, 2020, BOEM proposed a joint rulemaking with the Bureau of Safety and Environmental Enforcement (BSEE) to update BOEM's financial assurance criteria and other BSEE-administered regulations. On January 20, 2021, President Biden signed Executive Order (E.O.) 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' This Executive order, among other things, instructs agencies to review actions taken between January 20, 2017, and January 20, 2021, and consider publishing a notice of proposed rulemaking suspending, revising, or rescinding that action. Upon conducting such a review of the 2020 proposal and the record postdating the review, BOEM has decided, as an exercise of its judgment and expertise, not to move forward with the BOEM-administered portions of that 2020 proposed rulemaking. BOEM has instead decided to issue this new notice of proposed rulemaking to address its financial assurance policy concerns. BOEM is no longer considering any BOEM-related topics or proposals from that 2020 proposed joint rulemaking that are not discussed in this current proposed rule. BSEE finalized the BSEE-related provisions of the 2020 joint proposed rule on April 18, 2023 (88 FR 23569). This proposed rulemaking takes a new approach to update the financial assurance criteria to ensure that current lessees have sufficient resources to meet their lease and regulatory obligations, therefore providing more protection to the taxpayer. BSEE is expected to continue to exercise its regulatory authority to issue decommissioning orders to predecessor lessees, seek an appropriation, or intervene as necessary to address an environmental or safety risk, regardless of the outcome of this proposed rule. However, without this proposed rule (*i.e.,* without the financial assurance fully in place), it could take longer to arrange for decommissioning, which could result in additional environmental damage or increased obstacles to navigation. A reduction in decommissioning activity lead-time could reduce environmental damage, but BOEM cannot quantify this benefit in this rulemaking.

This proposed rulemaking would not apply to renewable energy activities.

III. Background of BOEM Regulations

A. BOEM Statutory and Regulatory Authority and Responsibilities

BOEM's authority to promulgate this rulemaking is granted by section 5 of OCSLA, 43 U.S.C. 1334. That section authorizes the Secretary of the Interior (Secretary) to issue regulations to administer OCS leasing for mineral development. Section 5(a) of OCSLA (43 U.S.C. 1334(a)) authorizes the Secretary to ''prescribe such rules and regulations as may be necessary to carry out'' the ''provisions of [OCSLA] relating to the leasing of the'' OCS. Section 5(b) of OCSLA (43 U.S.C. 1334(b)) provides that ''compliance with regulations issued under'' OCSLA must be a condition of ''[t]he issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of'' OCSLA.

43 U.S.C. 1338a reflects Congress' intent to authorize BOEM to collect financial assurance by specifically addressing the forfeiture of bonds and financial assurances by an OCS permittee, lessee, or right-of-way holder that does not fulfill the requirements of its permit, lease, or right-of-way or does not comply with the regulations of the Secretary, which includes defaulting on decommissioning activities.

The Secretary, in Secretary's Order 3299, as amended, delegated the authority to BOEM to carry out offshore conventional energy-related (*e.g.,* oil and gas) and renewable energy-related functions including, but not limited to, activities involving resource evaluation, planning, and leasing. Thus, BOEM is responsible for managing development of the Nation's offshore energy and mineral resources in an environmentally and economically responsible way. Secretary's Order 3299 also assigned authority to BSEE, including, but not limited to, enforcement of a lessee's obligation to perform decommissioning. BSEE provides estimates of decommissioning costs to BOEM so that the financial assurance required by BOEM will be sufficient to cover the estimated cost to perform decommissioning, thereby protecting the Federal Government from incurring financial loss. While BOEM also has program oversight for the financial assurance requirements set forth in 30 CFR parts 551, 581, 582, and 585, this proposed rule pertains only to the financial assurance requirements for oil and gas or sulfur leases under 30 CFR part 556, associated RUE grants and ROW grants under 30 CFR part 550, and appeals of supplemental financial assurance demands under 30 CFR part 590.

B. History of Bonding Regulations and Guidance

BOEM's existing financial assurance requirements for oil and gas leases (30 CFR 556.900 through 556.907) and pipeline ROW grants (30 CFR 550.1011), published by BOEM's predecessor, the Minerals Management Service (MMS), on May 22, 1997 (62 FR 27948),[1] authorize the Regional Director to require bonding for oil and gas leases and pipeline ROW grants. Sections 556.900(a) and 556.901(a) and (b) require lease-specific or area-wide base bonds in prescribed amounts, depending on the level of activity on a lease or leases. Section 556.901(d) authorizes the Regional Director to require supplemental financial assurance for leases above the amounts for lease and area-wide base bonds prescribed in the regulations. Similarly, § 550.1011 authorizes the Regional Director to require an area-wide base surety bond in a prescribed amount and, when determined necessary, supplemental financial assurance above the prescribed amount, for ROW grants.

BOEM's existing bonding regulations for RUE grants (§§ 550.160 and 550.166), published by MMS on December 28, 1999 (64 FR 72756),[2] empower the Regional Director to require surety bonds or other financial assurance for RUE grants. Section 550.160(c) states that an applicant for a RUE serving an OCS lease ''must meet bonding requirements.'' *See* 30 CFR 550.160(c). While no regulation prescribes a particular bond amount for a RUE that applies to an OCS lease, § 550.160 authorizes the Regional Director to require financial assurance if, and in the amount, the Regional Director determines necessary.

Section 550.166(a) requires an applicant for a RUE that serves a State lease to provide a base surety bond of $500,000. Section 550.166(b) provides that the Regional Director may require supplemental financial assurance above the prescribed $500,000 base surety bond from the holder of a such a RUE. MMS and now BOEM have employed the criteria used for determining whether supplemental financial assurance is required for leases to such

[1] The 1997 rule amended 30 CFR parts 250 and 256; 30 CFR parts 550 and 556 did not exist at that time. BOEM published the current regulations in 30 CFR parts 550 and 556 on October 18, 2011, 76 FR 64432. However, the 2011 rule did not make any substantive changes to the bonding and financial assurance requirements that were adopted in 1997; thus, the 1997 rule represents the last substantive update to the regulatory provisions for lessees.

[2] The financial assurance regulations for RUE and ROW grants, then at §§ 250.160 and 250.166, were substantively modified in 1999. These provisions were renumbered in October 2011.

determinations for RUE and ROW grants because specific criteria for grants do not exist in the current regulations.

BOEM regulations at §§ 556.604(d) and 556.605(e) and BSEE regulations at § 250.1701 hold predecessors and current co-lessees responsible for decommissioning when a current lessee is unable to perform. The existing lease bonding regulations under § 556.901(d) provide five criteria [3] that the Regional Director uses to determine whether a lessee's potential inability to carry out present and future financial obligations warrants a demand for supplemental financial assurance. However, the existing regulations do not specifically describe how the agency weighs those criteria. To provide guidance, MMS issued Notice to Lessees (NTL) No. 98–18N, effective December 28, 1998, which provided details on how it would apply the five criteria. This NTL was superseded by NTL No. 2003–N06, effective June 17, 2003, and that NTL was later superseded by NTL No. 2008–N07, which was effective August 28, 2008, but which was superseded on September 12, 2016. The September 12, 2016, NTL was subsequently rescinded.

Pursuant to BOEM's practice under NTL No. 2008–N07, a lessee or grant holder that did not pass established financial thresholds [4] was required to provide supplemental financial assurance to cover its decommissioning liabilities. However, a lessee or grant holder that did pass such thresholds—including an analysis whether its cumulative potential decommissioning liability was less than or equal to 50 percent of its net worth [5]—did not have to provide supplemental financial assurance and was considered ''waived.'' Additionally, if one lessee on a lease was waived, no other co-lessee (regardless of its own financial strength) would be required to provide supplemental financial assurance to cover the decommissioning liability for the lease. In a situation involving multiple lessees and two or more co-lessees that qualified for a waiver, none of the co-lessees was required to provide financial assurance, and the decommissioning liability on the lease was not attributable to any lessee. Because companies in this situation would not have the decommissioning liability associated with their lease(s) attributed to them (*i.e.,* the decommissioning liability would not be attributed to any company), that liability would not have been considered in determining whether that company met the net worth requirements to obtain a waiver.

For a company in this situation, the financial capacity of the lessee would have appeared better than it actually was, because its total decommissioning liability appeared artificially low; the lessee could potentially qualify for a waiver to which it might not otherwise be entitled. Undergirding this rationale was an assumption that the chances of two waived lessees becoming financially distressed was unlikely. This proposed rule addresses that potential risk by allowing BOEM to obtain additional data to take contingent liabilities into consideration.

Since 2009, more than 30 corporate bankruptcies have occurred involving offshore oil and gas lessees with unbonded decommissioning liabilities. The fact that bankruptcies and reorganizations have involved unbonded decommissioning liabilities demonstrates that the waiver criteria in NTL No. 2008–N07 were inadequate to protect the public from potential responsibility for OCS decommissioning liabilities, especially during periods of low oil and gas prices. For example, ATP Oil & Gas was a mid-sized company with a supplemental financial assurance waiver when it filed for bankruptcy in 2012. Similarly, Bennu Oil & Gas, LLC, had a waiver at the time of its bankruptcy filing, and Energy XXI, Ltd., and Stone Energy Corporation obtained waivers within a year of filing for bankruptcy. While most OCS leases affected by the bankruptcies were ultimately sold or retained by the companies reorganized under chapter 11 of the U.S. Bankruptcy Code, these bankruptcies highlighted the weaknesses in BOEM's supplemental financial assurance program, including the waiver criteria in NTL No. 2008–N07, and BOEM's inability to forecast financial distress of these waived operators with sufficient time to require and receive financial assurance.

These bankruptcies involved a total offshore decommissioning liability of approximately $7.5 billion. This figure includes properties with co-lessees and predecessor lessees and properties held by companies that successfully emerged from a chapter 11 reorganization. However, the actual financial risk to the United States is significantly less than the total offshore decommissioning liability associated with offshore corporate bankruptcies. This is in part because other private parties may be responsible for decommissioning costs. Co-lessees and predecessors retain pre-existing obligations to fund or perform decommissioning. Also, a bankrupt company's assets were often sold to financially stronger buyers who assumed those liabilities.

Additionally, if BOEM has insufficient supplemental financial assurance at the time of an operator's bankruptcy, BOEM may pursue legal avenues for obtaining performance or funds in bankruptcy proceedings, such as provisions for decommissioning in the terms of the reorganization, the sale of the leases to financially responsible buyers, or limitations on debtor attempts to abandon environmental problems. However, in pursuing legal avenues, favorable outcomes are not assured, and additional funds may not be obtained to cover decommissioning obligations. It is possible that when there are multiple co-lessees on a lease, only one of them meets the credit rating threshold. It is also possible that co-lessees are not required to provide additional financial assurance and predecessors lack sufficient capital to fulfill unexpected decommissioning obligations. In these scenarios, bankrupt assets may prove less valuable than anticipated and fail to generate new buyers at auction. Components and wells for which the bankrupt party is the only liable party on the lease may further complicate decommissioning efforts. These challenges create a risk of unplugged wells and orphaned infrastructure. The American taxpayer may pay the cost of plugging those wells and reclaiming that abandoned infrastructure. BSEE has identified orphaned infrastructure without a predecessor and no financial assurance to cover the cost of decommissioning. BSEE's fiscal year 2023 budget request included $30 million in order to address this uncovered infrastructure.

On May 27, 2009, MMS issued a proposed rule, ''Leasing of Sulphur or Oil and Gas and Bonding Requirements in the Outer Continental Shelf'' (74 FR 25177), to rewrite the majority of 30 CFR part 256 (now redesignated as 30 CFR part 556).[6] However, BOEM (post MMS restructuring) deferred revision of the bonding regulations to a separate rulemaking. The separate rulemaking

[3] The following are the five criteria: (i) Financial capacity substantially in excess of existing and anticipated lease and other obligations; (ii) Projected financial strength significantly in excess of existing and future lease obligations; (iii) Business stability based on five years of continuous operation and production of oil and gas or sulfur in the OCS or in the onshore oil and gas industry; (iv) Reliability in meeting obligations based on: (A) Credit rating; or (B) Trade references; and (v) Record of compliance with laws, regulations, and lease terms.

[4] The 2008 NTL mandated a minimum net worth of $65 million and imposed a cap on the amount of waived liability at 50% of net worth. Liability covered by two qualified companies was not counted against the 50% cap.

[5] This is not a separate criterion but simply an elaboration of criterion one.

[6] 76 FR 64432, Oct. 18. 2011.

commenced August 19, 2014, with an advance notice of proposed rulemaking (ANPRM), ''Risk Management, Financial Assurance and Loss Prevention'' (79 FR 49027), to solicit ideas for improving the bonding regulations.

In December 2015, the Government Accountability Office (GAO) reviewed BOEM's supplemental financial assurance procedures and issued a report titled ''Offshore Oil and Gas Resources: Actions Needed to Better Protect Against Billions of Dollars in Federal Exposure to Decommissioning Liabilities.'' (GAO Report). While acknowledging BOEM's ongoing efforts to update its policies, the GAO Report recommended, inter alia, that ''BOEM complete its plan to revise its supplemental financial assurance procedures, including the use of alternative measures of financial strength.'' [7]

Following further analysis and a series of stakeholder meetings in 2015 and 2016 to solicit industry input, BOEM attempted to remedy the weaknesses in its supplemental financial assurance program with new NTL No. 2016–N01, ''Requiring Additional Security,'' which became effective September 12, 2016. NTL No. 2016–N01 sought to clarify the procedures and explain how BOEM would use the regulatory criteria to determine if and when supplemental financial assurance would be required for OCS leases and RUE and ROW grants. The NTL used net worth of a lessee as a measure of financial strength, detailed several changes in policy, and refined the criteria used to determine a lessee's or grant holder's financial ability to carry out its obligations. On August 29, 2016, BOEM requested GAO to close the above-stated recommendation in the GAO Report, stating that BOEM had implemented the recommendation by issuance of the NTL. The GAO found that the recommendation had been implemented and closed the audit recommendation later in Fiscal Year 2016.

In December 2016, BOEM began implementing the NTL and issued numerous orders to lessees and grant holders to provide supplemental financial assurance for ''sole liability properties,'' *i.e.,* leases and RUE and ROW grants for which the lessee or grant holder was the only party liable for meeting the lease or grant obligations.

On January 6, 2017, BOEM issued a note to stakeholders extending the implementation timeline for NTL No. 2016–N01 for six months. The extension applied to leases and RUE and ROW grants for which there were co-lessees, predecessors in interest, or both, except where BOEM determined there was a substantial risk of nonperformance of the interest holder's decommissioning obligations. The extension of the implementation timeline allowed BOEM to evaluate which leases and grants would be considered sole liability properties.

BOEM issued a second note to stakeholders on February 17, 2017, further extending the implementation timeline. BOEM also announced in the February note that it would withdraw the December 2016 orders issued on sole liability properties to allow time for the then new administration to review BOEM's supplemental financial assurance program.

In 2017, BOEM began to review its supplemental financial assurance program and NTL No. 2016–N01 to determine whether modifications were necessary and, if so, to what extent. BOEM's objective was ensuring operator compliance with lease terms while minimizing unnecessary burden on industry. As a result of this review, BOEM recognized the need to further develop a comprehensive program to assist in identifying, prioritizing, and managing the risks associated with industry activities on the OCS. This included options for revising or rescinding NTL No. 2016–N01 and revising the financial assurance program through rulemaking.

C. 2020 Joint Notice of Proposed Rulemaking

On October 16, 2020, BOEM and BSEE issued a joint notice of proposed rulemaking to revise certain BSEE policies concerning decommissioning orders and BOEM's financial assurance regulations. (See ''Risk Management, Financial Assurance and Loss Prevention,'' 85 FR 65904). As stated above, under existing regulations, BOEM requires lessees to provide a base bond as financial assurance to ensure that the cost of meeting OCS obligations is not passed to the taxpayer. The Regional Director may also order supplemental financial assurance if necessary to ensure performance of offshore decommissioning obligations.

In the joint proposed rule, BOEM proposed to adjust its supplemental financial assurance criteria to reflect the risk mitigation already provided by the joint and several liability of financially stable co-lessees and predecessor lessees. BSEE and BOEM regulations hold predecessors and current co-lessees responsible for decommissioning when a current lessee is unable to perform.[8] In the joint proposed rule, BOEM would have taken into account the financial stability of predecessor lessees by waiving supplemental financial assurance requirements for a current lessee when there was a financially strong predecessor lessee.

In the joint proposed rule, BOEM also sought to change its methodology for measuring financial strength to focus on a lessee's or its predecessor's credit rating and the value of proved oil and gas reserves. These proposed criteria would have relied on a company's nationally recognized statistical rating organization (NRSRO) credit rating or an equivalent BOEM proxy credit rating determined by evaluating a company's submitted audited financial statements through S&P Global's Credit Analytics credit model or a similar, widely accepted credit rating model. Under the joint proposed rule, a credit rating less than or equal to either BB − from S&P Global's Credit Analytics ratings (S&P), Ba3 from Moody's Investor Service (Moody's) or a proxy credit rating less than or equal to either BB − or Ba3, as determined by the Regional Director, could have constituted grounds for the Regional Director to require a lessee to provide supplemental financial assurance. If a company did not meet the minimum credit rating or proxy credit rating level, BOEM would have inquired into the credit or proxy credit ratings of co-lessees and predecessor lessees, which could be held liable under joint and several liability. If one of these co-lessees or predecessors met the credit rating criteria, BOEM could decide not to require supplemental financial assurance from the lessee. If there were no co-lessee or predecessor lessee that met the credit rating criteria, BOEM would then look to the value of the proved oil and gas reserves on the lease. If the value of those proved reserves was equal to or greater than three times the estimated cost of the decommissioning associated with the production of the reserves on any given lease, supplemental financial assurance would not have been required.

BOEM further proposed to use the same credit rating criteria to determine the financial assurance requirements for RUE grants described in § 550.160 and ROW grants in a revised § 550.1011. This would have included consideration of the credit and proxy credit ratings of co- and predecessor grant holders but would not have considered proved oil and gas reserves, given that neither RUE nor ROW grants entitle the holder to any interest in oil and gas reserves.

[7] *https://www.gao.gov/products/gao-16-40.*

[8] See, for example, 30 CFR 556.604(d), 556.605(e), and 250.1701.

The joint proposed rule would have also applied the same credit rating criteria to its evaluation of potential guarantors. The joint proposed rule also would have removed the requirement for a third-party guarantee to ensure full compliance with the obligations of all lessees, operating rights owners, and operators on the lease and would have allowed a third-party guarantee to be used as supplemental financial assurance for a RUE or ROW grant. The former change would have allowed a guarantor to limit its guarantee to a subset of lease or grant obligations. Additional proposed changes would have applied to third-party guarantees the same terms and conditions that apply to cancellation of supplemental financial assurance surety bonds and return of pledged financial assurance, as well as a clarification to reiterate that ''guarantee'' and ''indemnity agreement'' both refer to the same guarantee agreement.

On January 20, 2021, President Biden signed Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' This Executive order, among other things, instructs agencies to review actions taken between January 20, 2017, and January 20, 2021, and consider publishing a notice of proposed rulemaking suspending, revising, or rescinding that action. Upon conducting such a review of the 2020 proposal and the record postdating the review, BOEM has decided, as an exercise of its judgement and expertise, not to move forward with the joint proposed rule and acknowledges that NTL No. 2016–N01 was never fully implemented and has since been rescinded. This NPRM parallels the approach in BOEM's portion of the 2020 proposal but, to increase protection of the taxpayer, it would require a higher threshold credit rating and would not allow a current lessee to avoid posting additional assurance based on a predecessor lessee's strength.

D. Purpose of BOEM's Proposed Rulemaking

This proposed rule is intended to update BOEM's criteria for determining whether oil, gas, and sulfur lessees, RUE grant holders, and ROW grant holders may be required to provide supplemental financial assurance to ensure compliance with their OCS obligations. In its continued efforts to address concerns with the financial assurance program, BOEM has opted to issue this new notice of proposed rulemaking to better protect the taxpayer from bearing the cost of facility decommissioning and other financial risks associated with OCS development, such as oil spill cleanup or other environmental remediation. Although the cases where taxpayers have actually paid costs for decommissioning are rare, some BOEM lessees have entered bankruptcy without the resources to cover decommissioning. In these cases, BOEM is required to negotiate with predecessors, co-lessees, and bankruptcy courts to obtain the funds needed for decommissioning. As mentioned earlier, this process is not always sufficient, as reflected in BSEE's request for additional appropriations to cover decommissioning of facilities for which there is no remaining liable party. BOEM has decided not to set a lower supplemental financial assurance requirement for lessees with financially strong predecessor lessees. Instead, BOEM proposes to require supplemental financial assurance for all leases owned by lessees that do not meet the proposed financial strength threshold or have sufficiently valuable proved oil and gas reserves on their leases that may attract a buyer if the current lessees are in financial distress. The omission of predecessor lessees from this calculus addresses several financial assurance issues. It ensures the current lessees have the financial capability to fulfill its decommissioning obligations, and discourages lessees from ignoring end-of-life decommissioning costs. It also simplifies potential administrative demands, since it obviates the need for parties to distinguish between wells with predecessor lessees and more recent sole-liability wells, side-track wells, and other sole-liability components. This proposed rule would retain the authority to pursue predecessor lessees for the performance of decommissioning; however, this proposed rule would not allow BOEM to rely upon the financial strength of predecessor lessees when determining whether, or how much, supplemental financial assurance should be provided by current OCS leaseholders.

Under this proposed rule, instead of relying primarily on net worth to determine whether a lessee must provide supplemental financial assurance, BOEM's primary consideration would be a lessee's credit rating. Credit rating agencies account for many factors when evaluating a company, including cash flow, debt-to-earnings ratios, debt-to-funds-from-operations ratios, and other financial factors. A credit rating considers the past performance of a company, including, but not limited to, the income statement and cash flow statement, which provide a broad picture of how well a company may be able to meet its liabilities. The rating also considers forward-looking factors, such as the anticipated loss of assets and the anticipated highs and lows of the company's business cycle. Credit ratings provide a measure of the probability of a default on an obligation; studies have shown a very close correlation between the rating level and the probability of default.[9]

On the other hand, a net worth analysis (typically total assets minus total liabilities) uses figures that reflect the last day of the fiscal period. This ''snapshot'' is not adequate to predict a lessee's future financial position because a lessee's financial deterioration can occur quickly due to volatility in oil and gas prices, improper hedging of risks, and other business and economic reasons. Net worth is one financial data point that may not accurately reflect the overall financial risk posed by the company, as compared to the more comprehensive financial review undertaken by the rating agencies. A singular financial ratio analysis may unintentionally penalize some corporate structures where that particular ratio is not as important or relevant to that business, for example midstream master limited partnerships, which the tax code requires to distribute 90% of net income to partners. Relying on the more comprehensive and forward-looking credit rating analysis—both to determine whether supplemental financial assurance may be necessary and to determine whether a company can be a guarantor of the financial obligations of other companies operating on the OCS—would better allow BOEM to demand security before a company becomes financially distressed. For more discussion on credit ratings, see section VI.A (BOEM Evaluation Methodology—Credit Ratings) of this preamble.

After accruing an obligation to decommission certain infrastructure (*e.g.,* well, platform, pipeline), the predecessor lessee remains jointly and severally liable for decommissioning that infrastructure, even in cases where a predecessor lessee has divested its full interest in a lease by assignment to another company. This rulemaking would retain BOEM's existing right to pursue predecessor lessees for the performance of decommissioning; however, this rulemaking would not allow BOEM to rely upon the financial

[9] See for example, ''Ratings vs Default Rates'', Moody's Annual Default Study—February 8, 2022, Douglas J. Lucas, ''Default Correlation and Credit Analysis'', The Journal of Fixed Income Mar 1995, 4 (4) 76–87; DOI: 10.3905/jfi.1995.408124.

strength of predecessor lessees when determining whether, or how much, supplemental financial assurance should be provided by current OCS leaseholders. This change strengthens the financial assurance program by ensuring current lessees have the financial strength or supplemental financial assurance in order to fulfill all their obligations.

In summary, BOEM is proposing this rulemaking to clarify and simplify its financial assurance requirements and to provide greater protection to taxpayers. These proposed regulatory changes provide additional clarity that current grant holders, lessees, and, when appropriate, operating rights holders (sublessees) bear the cost of ensuring compliance with lease obligations, rather than relying on prior owners.

IV. Proposed Revisions to BOEM Supplemental Financial Assurance Requirements

BOEM's existing financial assurance regulatory framework has two main components: (1) Base bonds, generally required in amounts prescribed by regulation, and (2) Supplemental financial assurance, above the prescribed base bond amounts, that may be required upon the Regional Director's determination that an increased amount is necessary to ensure compliance with OCS obligations. BOEM's objective is to ensure that taxpayers do not bear the cost of meeting the obligations of lessees and grant holders on the OCS, particularly the costs of decommissioning that must be met after the cash flow from production ceases. At the same time, BOEM also recognizes the costs and disincentives to additional exploration, development, and production that are imposed on lessees and grant holders by increasing the required amounts of bonds and/or other financial assurance. After taking these considerations into account, BOEM is proposing to: (1) Modify the evaluation process for requiring supplemental financial assurance by clarifying and streamlining the evaluation criteria; and, (2) Remove restrictive provisions for third-party guarantees and decommissioning accounts. This proposed rule would allow the Regional Director to require supplemental financial assurance when a lessee or grant holder poses a substantial risk of becoming financially unable to carry out its obligations under its lease or grant, or when the property may not have sufficient value to be sold to another company that could assume those obligations. In the former case, the risk that the taxpayer might have to take on the financial obligations of a lessee or grant holder is mitigated when there is a co-lessee or co-grant holder that has sufficient financial capacity to carry out the obligations.

A. Leases

Lessees are jointly and severally liable for the lease decommissioning obligations that accrue during their ownership, as well as those that accrued prior to their ownership, which means that each current co-lessee is liable for the full obligation and BSEE may pursue performance from any individual current lessee. *See, e.g.,* 30 CFR 556.604(d). In addition, a lessee that transfers its interest to another party continues to be liable for any unperformed decommissioning obligations that accrued prior to, or during, the time that lessee owned an interest in the lease. *See, e.g.,* 30 CFR 556.710. This transferor liability applies, however, only to those obligations existing at the time of transfer; new facilities, or additions to existing facilities, that were not in existence at the time of any lease transfer are not obligations of a predecessor company and are considered obligations of the party that built such new facilities and its co- and successor lessees.

BOEM's existing supplemental financial assurance evaluation process, contained in § 556.901(d), is based only on the current lessee's ability to carry out present and future obligations. BOEM proposes to codify that this evaluation process includes an evaluation of the ability of a co-lessee to carry out present and future obligations. This codification recognizes that all of the current owners are benefiting from ongoing operations and are jointly and severally liable for compliance with DOI requirements. A current co-lessee is equally liable for present obligations and future obligations that exist while it is a co-lessee, including nonmonetary obligations.

Under BOEM's existing regulations, the Regional Director's evaluation of the need for supplemental financial assurance is based on the following five criteria: financial capacity; projected financial strength; business stability; reliability in meeting obligations based upon credit rating or trade references; and record of compliance with laws, regulations, and lease terms. BOEM is proposing to streamline its evaluation process by using only two criteria to determine whether supplemental financial assurance on a lease may be required: (1) A credit rating, either from an NRSRO, as identified by the United States Securities and Exchange Commission (SEC) pursuant to its grant of authority under the Credit Rating Agency Reform Act of 2006 and its implementing regulations at 17 CFR parts 240 and 249, or a proxy credit rating determined by BOEM based on a company's audited financial statements; [10] or (2) The 3-to-1 ratio of the value of proved oil and gas reserves on a lease to the decommissioning liability associated with these reserves. These criteria better align BOEM's evaluation process with accepted financial risk evaluation methods used by the banking and finance industry. Corporate credit ratings are intended to evaluate the potential for a company to default on its financial obligations and are designed so that the higher the credit rating, the lower the risk of default. Credit ratings and proved oil reserves are good indicators of the likelihood that a company will be able to meet its financial obligations. Eliminating subjective or less precise criteria—such as the length of time in operation to determine business stability, or trade references to determine reliability in meeting obligations—will simplify the process and remove criteria that may not accurately or consistently predict financial distress. For more discussion on credit ratings, see section VI.A (BOEM Evaluation Methodology—Credit Ratings) of this preamble.

BOEM proposes to eliminate the ''business stability'' criterion found in the current version of § 556.901(d)(1)(iii). The existing regulation bases business stability on 5 years of continuous operation and production of oil and gas, but BOEM has determined that there is little correlation between such history and a company's ability to carry out its present and future obligations. BOEM conducted an analysis of offshore bankruptcies, including an assessment of the number of years incorporated prior to bankruptcy, and determined that whether a company was in business for 5 or more years had no relationship to the likelihood of bankruptcy.

BOEM also proposes to eliminate the existing ''record of compliance'' criterion found in the current version of § 556.901(d)(1)(v). BOEM has determined that the number of INCs a company receives correlates with the

[10] In order for BOEM to establish a proxy credit rating, which can be used for the purpose of waiving any supplemental financial assurance requirements that would otherwise be required, BOEM is requiring that any company seeking a proxy credit rating provide audited financial statements. If such statements are not provided, BOEM will require supplemental financial assurance because it will have insufficient basis for concluding that the owners have sufficient capacity to reliably and timely meet their lease obligations.

number of OCS properties it owns, not its financial stability, and therefore, BOEM has concluded that it is not an accurate predictor of its financial health. BOEM reviewed BSEE's Incidents of Non-Compliance (INCs) records and its Increased Oversight List, which represent BSEE's cumulative records of violations of performance standards on the part of OCS operators and lessees and determined that the number of incidents of non-compliance typically increases with the size and complexity of the operator's or lessee's operations, including the ratio of incidents to number of components. Because larger companies (regardless of credit score) tend to have more properties and components and therefore more INCs, BOEM determined that record of compliance criterion does not accurately predict financial default. BOEM's review of this information confirmed the feedback BOEM received in response to the 2016 NTL, namely that companies with a large number of properties and facilities tended to receive a large number of INCs and had more individual properties on the Increased Oversight List.[11] BOEM specifically requests comments regarding the use of fines and violations as a criterion in the determination of a company's ability to fulfill decommissioning obligations, and any data or analysis addressing any correlation between the number of violations and the risk of financial default. BOEM also requests comments on whether the elimination of the INC's criteria would create a disincentive to comply with regulations. BOEM also requests comment on whether or not the cost of decommissioning is likely to increase based on the type, quantity, and magnitude of previous violations.

BOEM proposes to replace the existing ''financial capacity'' and ''reliability'' criteria in existing § 556.901(d)(1) with issuer credit rating or proxy credit rating. BOEM has found credit ratings, which are part of the existing ''reliability'' criterion, to be a more reliable indicator of financial ability to meet obligations than previous financial criteria issued by BOEM via NTLs (ex. NTL 2008–N07, NTL 2016–N01). Issuer credit ratings provided by a NRSRO incorporate a broad range of qualitative and quantitative factors, and a business entity's credit rating most accurately represents its overall ability to meet its financial commitments. An issuer credit rating is a forward-looking opinion about an obligor's overall creditworthiness. This opinion focuses on the obligor's capacity and willingness to meet its financial commitments as they come due.

Under the proposal, if a lessee does not have a credit rating from a NRSRO, the lessee may instead submit audited financial statements, and BOEM will determine a proxy credit rating using a commercially available credit model determined by BOEM to fulfill its financial risk analysis requirements, such as the S&P Global's Credit Analytics credit model. Such audited financial information is currently the basis of one of the five criteria in BOEM's regulations, namely the ''financial capacity'' criterion. Under the proposed rule, this information will be the primary consideration used to evaluate lessees that do not have a NRSRO credit rating. BOEM has concluded that audited financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP) and accompanied by an auditor's certificate, provide an accurate representation of the company's economic position and operational performance. Using this audited financial information to generate a proxy credit rating would allow BOEM to accurately determine if supplemental financial assurance is needed when a NRSRO rating is not available.

This proposed rule would provide the Regional Director with the authority to require a lessee to provide supplemental financial assurance if the lessee or its co-lessee does not have an investment grade credit rating, *i.e.,* a credit rating from a NRSRO that is greater than or equal to either BBB- from S&P or Baa3 from Moody's, or its equivalent, or a proxy credit rating greater than or equal to either BBB- or Baa3, as determined by the Regional Director, based on audited financial information with an accompanying auditor's certificate. BOEM has determined that having an investment grade credit rating is important to reliably ensure that a company not pose a substantial risk of default.

Under existing BOEM and BSEE regulations that would not change in this proposed rule, co-lessees are jointly and severally liable for accrued decommissioning obligations, and the risk that the government will be responsible for the decommissioning cost is therefore lower when co-lessees are financially viable. Hence, BOEM will not require supplemental financial assurance for properties where at least one co-lessee has an investment grade credit rating.

If BOEM determines that supplemental financial assurance is required, BOEM bases the amount of supplemental financial assurance required on the BSEE decommissioning cost estimate. Previously, BSEE provided a single algorithm-based deterministic estimate for OCS facilities. In 2020, BSEE updated certain decommissioning costs in the Technical Information Management System (*data.boem.gov*).[12] The new estimates were based on industry-reported decommissioning costs pursuant to NTL 2016–N03—Reporting Requirements for Decommissioning Expenditures on the OCS, later superseded by NTL 2017–N02. Based on the reported data, BSEE has developed three probabilistic estimates of decommissioning costs for each OCS facility on any given lease. The lowest cost estimate would have a fifty percent likelihood of covering the full cost of decommissioning a facility and is thus referred to as ''P50.'' The second lowest cost estimate, P70, would have a seventy percent likelihood of covering the full cost of decommissioning a facility. The third and highest cost estimate, P90, would have a ninety percent likelihood of covering the full decommissioning cost of a facility. These BSEE-generated estimates are based on actual decommissioning expenditures reported by offshore companies.

BOEM proposes to use the P70 value to set the amount of any required supplemental financial assurance. In determining to use the P70 value, BOEM considered using either the P50, P70, or P90 decommissioning liability levels, which respectively represent an approximately 11 percent ($3.5 billion), 30 percent ($9.6 billion), and 55 percent ($17.9 billion) increase in total estimated financial assurances available to address offshore decommissioning liability relative to the previous algorithm-based estimate, based on an analysis of industry-reported decommissioning costs. BOEM weighed the risk of being underfunded (greatest at the P50 level) against the financial impact of requiring more financial assurance (greatest at the P90 level). As an example, a supplemental financial assurance set based on the P70 value means that, based on the uncertainty and risk applied by BSEE to its model, there is a 70% probability of covering the decommissioning cost of the facility (and therefore a 30% probability of exceeding it). The P70 value is not to be confused with the figure representing 70% of the cost of decommissioning a particular facility. Because it is a

[11] The most recent data are available at *https://www.data.bsee.gov/Company/INCs/Default.aspx.*

[12] BSEE decommissioning cost estimates are available at the following URL: *https://www.data.bsee.gov/Leasing/DecomCostEst/Default.aspx.*

statistical concept, it relies on the quality and size of the sample, as well as the uncertainty (variance) existing in these costs. There is also a real possibility that the P70 figure exceeds the actual decommissioning value of many facilities, in which case excess would cover some portion of insufficient assurance in those cases where the assurance is designed to address that entity's full range of liabilities.

BOEM's goal for its financial assurance program continues to be the protection of the American taxpayers from exposure to financial loss associated with OCS development, while ensuring that the financial assurance program does not detrimentally affect offshore investment or position American offshore exploration and production companies at a competitive disadvantage. BOEM's proposal to use P70 would reduce offshore decommissioning risk to taxpayers relative both to previous BSEE decommissioning estimates and to a methodology based on P50, while reducing burden on available capital for offshore investment, including both conventional and renewable energy activities, imposed by the use of P90. BOEM requests comments on potential unknown risks associated with the use of P70. BOEM has examined the impact that the different P values would have on the amount of financial assurance required but lacks the data to estimate the impact that selecting a P90 value might have on offshore capital expenses and investments, and therefore has selected P70 in this proposal. We are also specifically seeking information and data related to these impacts from commenters.

For comparison, at BSEE's P90 levels, the total decommissioning liability is approximately $51.2 billion, compared with $42.8 billion at P70; of that total, the liability estimate associated with lessees who have sub-investment grade credit ratings is approximately $24.7 billion at the P90 level and $20.2 billion at the P70 level. The total liability estimates for properties expected to meet the three times reserves threshold is approximately $9.0 billion at the P90 level and $7.8 billion at P70 level. The difference between the full Tier 2 estimate and that of Tier 2 properties meeting the three times the reserves threshold provides BOEM's total expected bond portfolio value if the rule were to be finalized. For P90 this would be $15.7 billion, reflecting an increase of $3.2 billion in bond demands (increased from $12.5 billion at P70). The annual premium estimate for the forecasted Tier 2 bond portfolio would increase from $380 million to $494 million, an increase of approximately $114 million to bond lessees at the P90 level. This additional burden would be realized by the same population of lessees as at the P70 level but would provide additional certainty of sufficient bonding for that population in the event the facility owners (1) defaulted on their obligations and (2) no viable predecessor is available to fulfill their obligations.

BOEM requests comments and additional data on the costs and benefits of setting the supplemental financial assurance requirements based on each of the P50, P70, and P90 decommissioning liability levels. In particular, BOEM would like information on impacts to offshore capital expenses and investments of each liability level, as well as impacts to potential taxpayer liability. BOEM also solicits comment on whether setting assurance requirements based on different liability levels might be appropriate for different circumstances. BOEM also requests comments on costs and benefits of otherwise considering predecessor lessees or grantees in determining the level of required supplemental financial assurance.

Additionally, BOEM requests comments on the possibility of using a higher BSEE decommissioning estimate (*i.e.,* P90), including on how a P90 estimate would affect small entities.

An offshore oil and gas lease that has a significant reserve-to-liability value that is, a property that can generate a cash flow significantly in excess of the costs associated with the decommissioning of its assets—is likely to be purchased by another company in the event of a default by the current lessee. The acquiring company would then become liable for existing decommissioning obligations, but due to the value of existing reserves, it would acquire sufficient positive cash flow to reduce the risk that the costs associated with the decommissioning of the assets would be borne by the government. BOEM has determined that an adequate threshold for the ratio of reserve value to the level of decommissioning liability should be three to one. This threshold is discussed further in Section VI.B of this preamble. Therefore, supplemental financial assurance will not be required for properties with a value of proved oil and gas reserves (using SEC methodology of reported value in the notes to the publicly traded companies' Form 10–Ks) exceeding three times the decommissioning costs (using the BSEE P70 estimated value) associated with the production of those reserves, as these properties pose minimal risk that the government will be required to bear the cost of decommissioning.

BOEM is proposing to use and is requesting comments on this test as the criterion to replace the existing generalized ''projected financial strength'' criterion found currently at § 556.901(d)(1)(ii), which considers whether the estimated value of a lessee's existing lease production and proved reserves is significantly in excess of the lessee's existing and future lease obligations.

B. Right-of-Use and Easement Grants

BOEM's regulations concerning RUE grants serving a Federal OCS lease or a State lease are found in §§ 550.160 through 550.166. Section 550.160 provides that an applicant for a RUE that serves an OCS lease ''must meet bonding requirements,'' but the regulation does not prescribe a base surety bond amount. The proposed rule would replace this requirement with a cross-reference to the specific criteria governing supplemental financial assurance demands in proposed § 550.166.

BOEM is proposing to revise the bonding regulations to clarify that any RUE grant holder must provide base financial assurance in a specific amount, regardless of whether the RUE serves a State lease or a Federal OCS lease. BOEM is proposing to establish a Federal RUE base financial assurance requirement that matches the existing $500,000 base financial assurance requirement for State RUEs. BOEM is also proposing to establish a requirement for $500,000 area-wide RUE financial assurance, which would satisfy the base financial assurance requirement for any RUE holder that owns one or more RUEs within the same OCS area, regardless of whether the RUE serves a State or Federal lease. BOEM is also proposing to allow any lessee that has posted area-wide lease financial assurance, pursuant to § 556.900(a)(1), 556.901(a)(2), or 556.901(b)(2) for the areas specified in § 556.900(a)(2), to modify that lease surety bond to also cover any RUE(s) in the area owned by the same lessee. The ability to use area-wide lease financial assurance to cover the RUE base financial assurance obligation would be subject to the requirement that the area-wide lease financial assurance would be in an amount equal to or greater than the RUE base financial assurance requirement (*i.e.,* equal to or greater than $500,000). For example, under the proposed regulations a lessee with a $3 million area-wide lease surety bond could establish or acquire any number of Federal or State RUEs in the area

without having to post any additional financial assurance, provided the lessee agrees to modify the terms of its area-wide lease surety bond to also cover any State or Federal RUEs that it owns or acquires. If the existing area-wide bond is not modified, the lessee may satisfy the requirement by providing new financial assurance to cover its RUE(s).

The rule proposes to consider the credit rating or proxy credit rating of a RUE co-grant holder, mirroring the proposed methodology used to determine if a lessee must provide supplemental financial assurance. These credit rating standards provide the most effective and proven method to evaluate a company's financial wherewithal and are widely accepted as a significant demarcation of credit risk between investment and non-investment grade rated companies. BOEM proposes to include consideration of the credit rating or proxy credit rating of co-owners of RUE grants because, like co-lessees, they are jointly and severally liable for accrued decommissioning obligations for facilities and pipelines on their RUE.

These changes to the RUE financial assurance requirements are intended to: (1) Clarify the bonding requirement for Federal RUEs, which is not explicitly defined in the existing regulations; (2) Align the RUE bonding requirements for RUEs serving State and Federal leases; and (3) Ensure that all RUEs are duly covered and that the risk of a RUE holder defaulting on its decommissioning obligations is not transferred to the American taxpayer.

BOEM is also proposing a new regulation to establish the conditions under which the assignment of RUE interests may be disapproved. BOEM may disapprove the assignment of a RUE when the assignee has not satisfied all obligations under the regulations or under any BOEM or BSEE order. BOEM may disapprove the assignment when the assignee has not satisfied the financial assurance requirements.

BOEM is also proposing to revise the financial assurance regulations to clarify that any RUE grant holder, whether the RUE serves a State or Federal lease, may be required to provide supplemental financial assurance for the RUE—above the $500,000 RUE base financial assurance discussed above—if the grant holder does not meet the credit rating or proxy credit rating criteria proposed to be used for lessees. This change aligns the supplemental financial assurance criteria for RUEs with those used in making the same determination for leases. The value of proved oil and gas reserves will not be considered because a RUE grant does not entitle the holder to any interest in oil and gas reserves.

C. Pipeline Right-of-Way Grants

BOEM's bonding requirements for pipeline ROW grants, contained in § 550.1011, prescribe a $300,000 area-wide base surety bond that guarantees compliance with all the terms and conditions of the pipeline ROW grants held by a company in an OCS area. BOEM may require a pipeline ROW grant holder to provide supplemental financial assurance if the Regional Director determines that financial assurance in excess of $300,000 is needed, but, unlike with leases, the regulation provides no factors for the Regional Director's consideration when making this determination. Therefore, BOEM is proposing to revise the financial assurance regulations to provide that the Regional Director will demand that a pipeline ROW grant holder provide supplemental financial assurance when the grant holder does not meet the same credit rating or proxy credit rating criteria proposed to be used for lessees. The value of proved oil and gas reserves will not be considered because a ROW grant does not entitle the holder to any interest in oil and gas reserves.

The rule also proposes to consider the credit rating or proxy credit rating of a co-grant holder. This change would better align BOEM's evaluation process with accepted financial risk evaluation methods used by the banking and finance industry and with the process used to determine if a lessee must provide supplemental financial assurance. BOEM proposes to include consideration of the credit rating or proxy credit rating of co-owners of ROW grants because, like co-lessees, they are jointly and severally liable for accrued decommissioning obligations for facilities and pipelines on their ROW (§ 250.1701(b)).

V. Proposed Revisions to Other Types of Supplemental Financial Assurance

A. Third-Party Guarantees

BOEM is proposing to evaluate a potential guarantor using the same credit rating or proxy credit rating criteria proposed for lessees. The value of proved oil and gas reserves of an associated lease would not be considered because that value is a characteristic of the lease belonging to the guaranteed lessee and not an asset belonging to the guarantor.

The criteria to evaluate a guarantor provided in the existing regulations have proved difficult to apply. For example, § 556.905(a)(3) provides that the guarantor's total outstanding and proposed guarantees may not exceed 25 percent of its unencumbered net worth in the United States. Determining a company's total outstanding and proposed guarantees depends on accurate information provided by the guarantor, and BOEM has no way to confirm whether the 25 percent threshold has been exceeded at the time the guarantee is proffered or afterward. The same provision requires BOEM to consider the unencumbered net worth of the company in the United States, while another provision, § 556.905(c)(2)(iv), requires BOEM to consider the guarantor's unencumbered fixed assets in the United States. Both of these criteria are difficult to apply when the company under evaluation has domestic and international assets that must be separated. Using the same financial evaluation criterion, *i.e.,* issuer credit rating or proxy credit rating, to assess both guarantors and lessees as the most relevant measure of future capacity would provide consistency in evaluations and avoid overreliance on net worth.

To allow more flexibility in the use of third-party guarantees, the proposed rule would allow a third-party guarantee to be used as supplemental financial assurance for a RUE or ROW grant, as well as a lease. Most significantly, in proposed § 556.902(a)(3), this proposed rule would remove the requirement for a third-party guarantee to ensure compliance with the obligations of all lessees, operating rights owners, and operators on the lease, and would allow a guarantee limited to a specific amount, as agreed to by BOEM, or limited to the liabilities of specific parties. Potential guarantors are reluctant to provide a guarantee if they cannot limit the amount of their guarantee or choose the entity for which they are guaranteeing compliance. This change would allow a guarantor to limit its guarantee to a specific amount of the total financial assurance requirement. The remaining amount of required financial assurance must be covered by additional security from the guaranteed lessee/grant holder or its co-lessees or co-grant holders, so the amount of the requirement is fully satisfied. BOEM is proposing this change because the existing regulations do not clearly limit the liability of a guarantor to a fixed monetary amount stated in the guarantee. Therefore, few parties were willing to use third-party guarantees in the past.

By allowing a third-party guarantor to guarantee only the obligations it wishes to cover, BOEM would provide industry with the flexibility to use the guarantee to satisfy supplemental financial

assurance requirements without forcing the guarantor to cover the risks associated with all parties on the lease or grant or operations in which the party they wish to guarantee has no interest and over which the guarantor may have no control. Moreover, the proposal to allow BOEM to accept a third-party guarantee that is limited to specific obligations does not reduce BOEM's protection because the regulations would require that the financial assurance provided secures all lease and grant obligations.

The proposed rule would also allow BOEM to cancel a third-party guarantee under the same terms and conditions that apply to cancellation of other types of financial assurance, as provided in proposed § 556.906(d)(2).

Lastly, the existing regulation refers to both a ''guarantee'' and an ''indemnity agreement'' (which BOEM intended to mean the same thing), and the proposed rule clarifies that the regulations contemplate only one agreement: the guarantee agreement.

B. Decommissioning Accounts

Section 556.904 currently allows lessees to establish a lease-specific abandonment account to satisfy any supplemental financial assurance required by § 556.901(d). BOEM proposes to rename these accounts ''Decommissioning Accounts,'' the terminology used by the industry, to remove any perceived limitation of this type of account to a single lease, and to signify that these accounts may be used to ensure compliance with supplemental financial assurance requirements for a RUE and ROW grant, as well as a lease. To make these accounts more attractive to parties who may desire to use this method of providing supplemental financial assurance, BOEM also proposes to remove the requirement to pledge Treasury securities to fund the account before the funds equal the maximum amount insurable by the Federal Deposit Insurance Corporation (FDIC) (currently capped at $250,000). BOEM notes that, due to this current requirement, lessees may have been unwilling to use decommissioning accounts.

C. Transfers of Lease Interests to Other Lessees or Operating Rights Holders

The proposed rule would update subparts G and H of the Department's existing part 556 regulations to clarify that BOEM will not approve the transfer of a lease interest, whether a record title interest or an operating rights interest, until the transferee complies with all applicable regulations and orders, including the financial assurance requirements. As discussed above, many of the facilities currently on the OCS have decommissioning obligations where the cost of performance greatly exceeds the amount of financial assurance currently available to the Department of the Interior. To address this problem, BOEM is proposing that it may prohibit approval of any new transfer or assignment of any lease interest unless and until the financial assurance demands have been satisfied.

VI. BOEM Evaluation Methodology

A. Credit Ratings

In this rulemaking, BOEM proposes to use an ''Issuer credit rating'' to evaluate the financial health of OCS lessees, grant holders, and guarantors. A review of S&P and Moody's rating methodologies showed that the analyses they perform to determine an issuer credit rating are wide-ranging and include factors beyond corporate financials (such as history, senior management, and commodity price outlook). An issuer credit rating provides the rating agencies' opinions of the entity's ability to honor senior unsecured debt and debt-like obligations. It is common for lessees to have both an issuer credit rating and a bond issuance rating. However, bond issuance ratings are opinions of the credit quality of a specific debt obligation only, which can vary based on the priority of a creditor's claim in bankruptcy or the extent to which assets are pledged as collateral. Due to the varying priority of claims associated with debt and the limited purpose of bond issuance ratings, BOEM proposes to accept only issuer credit ratings from a NRSRO, and references to credit rating in this rulemaking refer only to an issuer credit rating (or a ''proxy rating'' where so noted as appropriate). BOEM proposes to add ''Issuer credit rating,'' as defined by S&P, as a newly defined term in 30 CFR parts 550 and 556.

If an entity does not have an issuer credit rating, BOEM proposes to permit companies to request the Regional Director to determine a proxy credit rating based on audited financial information for the most recent fiscal year, including an income statement, a balance sheet, a statement of cash flows, and the auditor's certificate. By ''most recent fiscal year'' BOEM means a period that includes a 12-month period within the 24 months prior to the Regional Director's determination for which supplemental financial assurance is required. One benefit of this approach is to reduce the adverse effects of the rule on small businesses.

BOEM proposes to use S&P Global's Credit Analytics credit model to calculate proxy credit ratings.[13] However, BOEM proposes to reserve the right to use a different model if it determines that a different model more accurately reflects those factors relevant to the financial evaluation of companies operating on the OCS. The purpose of using S&P Global's Credit Analytics credit models is to provide an accurate and objective method to assess any given company's probability of default on its financial obligations based on its audited financial statements. S&P Global's Credit Analytics credit models would allow BOEM to reliably score and efficiently model BOEM's potential risk exposure from a lessee that could potentially become unable to meet its decommissioning obligations. Credit modeling would allow BOEM to compare the company with similar public companies in the same industry segment. BOEM invites comments on the appropriateness of relying on S&P Global's Credit Analytics credit model, or other similar, widely accepted credit rating models to generate proxy credit ratings. Additionally, BOEM invites comments on the appropriateness of using a proxy credit rating when determining the need to provide financial assurance.

BOEM's financial assurance program is intended to ensure that private companies have the capacity to meet their financial and non-financial (*i.e.,* performance) obligations. In order to both ensure that companies do not ''cause [unmitigated] damage to the environment or to property, or endanger life or health,'' 43 U.S.C. 1332(6), and to promote ''expeditious and orderly development,'' 43 U.S.C. 1332(3), BOEM seeks to balance the financial risk to the government and the taxpayer while minimizing regulatory burdens. See also 43 U.S.C. 1801(7), 1802(1) & (2).

BOEM has determined that establishing an issuer credit rating threshold of BBB- (S&P) or Baa3 (Moody's), an equivalent credit rating provided by another SEC-recognized NRSRO, or an equivalent proxy credit rating, is the best means for accomplishing these objectives. The Moody's Baa3 credit rating is equivalent to the S&P BBB- credit rating. If S&P and Moody's provide different ratings for the same company, BOEM will use the higher rating as the lessee's rating. As discussed in the IRIA, out of the 276 companies analyzed, none of the companies were rated at or above BBB-

[13] *https://www.spglobal.com/marketintelligence/en/documents/mi_risk_609827_credit-analytics_brochure_letter_fd.pdf.*

at the time of bankruptcy nor within 10 years prior to bankruptcy, therefore, BOEM has selected BBB- as the credit rating threshold for providing additional financial assurance. Additionally, under the proposed rule, BOEM would have adequate time to secure needed financial assurance if a company were to drop below the proposed investment grade threshold as BOEM monitors company rating changes throughout the year.

BOEM reviewed historical default rates across the entire credit rating spectrum, as well as the credit profile of oil and gas sector bankruptcies arising from the commodity price downturn in 2014, to determine an appropriate level of risk. As would be expected, the average S&P historical one-year default rates increase significantly with lower ratings. The average S&P one-year default rate [14] for BBB- rated companies from 1981 to 2020 was 0.24 percent. Comparatively, the average one-year default rate for BB- rated companies was 1.21 percent, for B − rated companies was 8.73 percent, and for C rated companies was 24.92 percent. BOEM believes that one-year default rates are an appropriate measure of risk, given BOEM's policy of reviewing the financial status of lessees, ROW holders, and RUE holders at least on an annual basis (the review typically corresponding with the release of audited annual financial statements). In addition, throughout the year, BOEM monitors company credit rating changes, market reports, trade press, articles in major news media and quarterly financial reports to review the financial status of lessees, ROW holders, and RUE holders, and the regulation would not preclude a demand for supplemental financial assurance through the Regional Director's regulatory authority at any time.

BOEM has identified a circumstance in which the use of a proxy credit rating may not adequately account for the potential risk of default. This circumstance would occur in a situation where a company has a substantial contingent liability for decommissioning OCS facilities (*i.e.,* decommissioning exposure by virtue of being a co-lessee) associated with its minority ownership of such facilities if the majority owners are unable or unwilling to meet their obligations. This is particularly the case in the OCS context because existing Department regulations stipulate that all co-owners of any OCS lease, regardless of their ownership share, are jointly and severally liable for all the obligations associated with the lease. Contingent liabilities that are deemed unlikely to financially materialize are not required to be booked as a liability on a balance sheet under Financial Accounting Standards Board (FASB) accounting rules for Asset Retirement Obligations, so would not be included in audited financial statements, and therefore may not be taken into consideration in the generation of proxy credit ratings.

For offshore lessees with a NRSRO issuer credit rating, the current average net worth of investment grade lessees is $115 billion dollars, with average book assets of $155 billion dollars. This implies that the financial risk of non-performance on co-lessee liability exposure from these companies is very low. Given that total U.S. offshore liability is lower than half the average net worth of offshore investment grade companies, such lessees are likely to have the financial capacity to cover the contingent liabilities of co-lessees that have not themselves provided financial assurance.

However, where a non-publicly traded company (*i.e.,* a company without an issuer credit rating) has substantial minority co-ownership interests in OCS leases, the proxy credit rating derived for the minority owner may not adequately represent the risk exposure in circumstances where (1) The ownership interests of the other co-owners are disproportionately large compared to the ownership interest of the minority owner, and; (2) The credit ratings of the majority co-owners are not investment grade. This possibility is relatively likely due to BOEM's historical practice of declining to require supplemental financial assurance from any co-lessees who share ownership of a lease with any company with an investment grade proxy credit rating, regardless of the financial circumstance of the co-owner or the relative ownership share of any co-owner.

In these circumstances, a company may have contingent decommissioning liabilities that are not adequately captured in the company's financial statements. It may be that such decommissioning liabilities amount to a disproportionate share compared to the total assets of the company, such that the company may not have the financial capacity to satisfy these contingent liabilities. If, for example, a small company with a high proxy credit rating were a one percent co-lessee of a lease with financially weak co-lessees, the small company may not have sufficient assets to meet its decommissioning obligations for the remaining ninety-nine percent of the decommissioning costs (which it may be required to satisfy under the joint-and-several liability provisions of the regulations) in the event that its co-lessees were to default on their financial obligations.

For this reason, BOEM is proposing to add a new provision to the regulations that would authorize BOEM to require a company requesting a proxy credit rating to provide information on its ownership of other OCS facilities and leases. This new provision authorizes BOEM to take the contingent liabilities associated with the company's co-ownership of these assets into consideration in determining the appropriate proxy credit rating.

BOEM invites comments on the appropriateness of this approach of relying on lessee and grant holder credit ratings, including whether BOEM has proposed an appropriate credit rating threshold of BBB-, and if not, what threshold or set of thresholds would best protect taxpayer interests while not imposing undue burdens on industry. Also, BOEM invites comments on alternative options for determining the need for financial assurance other than credit ratings. Additionally, BOEM invites comments on whether financial assurance should be required of all companies, regardless of credit rating, and the impacts such a requirement might have on OCS investment and on potential taxpayer liabilities.

B. Valuing Proved Oil and Gas Reserves

Under this proposed rule, if BOEM considers the proved reserves on a particular lease when determining whether supplemental financial assurance is required, BOEM would require the lessee to submit a reserve report for the proved oil and gas reserves (as defined by the SEC regulations at 17 CFR 210.4–10(a)(22)) located on a given lease. The reserve report provided to BOEM would contain the projected future production quantities of proved oil and gas reserves on a per lease basis, the production cost for those reserves also on a per lease basis, and the discounted future cash flows from production. The reserve report would also provide the value of the proved oil and gas reserves per lease, determined under the accounting and reporting standards set forth in SEC Regulation S–X at 17 CFR 210.4–10 and SEC Regulation S–K at 17 CFR, subpart

[14] The one-year default rate represents the percentage of companies having any given credit rating that have failed to meet their financial obligations during any given twelve-month period. For example, for companies having had BBB − rating in 2020, 0.24 percent defaulted on their financial obligations in the subsequent twelve-month period (*i.e.,* approximately one out of every 400 companies having a BBB − credit rating).

229.1200.[15] BOEM proposes to use SEC regulations on reserve reporting because they are commonly accepted and understood by offshore oil and gas companies and are already produced by publicly traded companies. This also allows BOEM to rely on the established SEC regulations on the definitions, qualifications, and requirements for proven reserves, rather than attempting to recreate these regulations. BOEM would use this proved oil and gas reserves per-lease value when determining whether the value of the reserves on any given lease exceeds three times the cost of the P70 decommissioning estimate associated with the production of those reserves.

BOEM believes that a property with a sufficient ''reserves-to-decommissioning cost'' ratio would likely be purchased by another company if a current lessee defaults on its obligations, thereby reducing the risk that decommissioning costs would be borne by the government, and consequently reducing the need for supplemental financial assurance.

A reserves-to-decommissioning cost ratio of one-to-one would mean that the estimated value of remaining oil and gas reserves on a lease is equal to the cost of decommissioning. BOEM does not expect any other company to purchase a lease interest with a ratio of one-to-one, as the new lessee would not receive any return on its investment once it bears the cost of decommissioning. A reserves-to-decommissioning cost ratio below three-to-one might be considered adequate to encourage a new lessee to take on the cost of purchasing the lease and assuming liability for all of the existing decommissioning obligations, however there may be other factors that would reduce the lease's commercial appeal (*e.g.,* macro-economic conditions, maintenance conditions, or higher than typical operating costs).

In BOEM's judgment, a reserves-to-decommissioning cost ratio that meets or exceeds three-to-one provides enough risk reduction to justify a Regional Director determination that the lessee is not required to provide supplemental financial assurance for that lease. Establishing an appropriate reserves-to-decommissioning cost ratio protects the taxpayer during periods of commodity price volatility. If commodity prices decline in a manner similar to late 2014 through early 2016, for example, BOEM believes a ratio of at least three-to-one assures the property would most likely retain its economic viability and financial attractiveness to potential buyers. BOEM requests comment on whether this is an appropriate threshold, or if there are better approaches and/or data sets available for analysis that would provide BOEM with better certainty that taxpayer interests will ultimately be protected.

[15] Unlike this proposed regulation, the SEC regulations at 17 CFR 229.1202(a)(2) say: ''Disclose, in the aggregate and by geographic area and for each country containing 15 percent or more of the registrant's proved reserves, expressed on an oil-equivalent-barrels basis, reserves estimated . . . .'' Although BOEM would require that lessees apply the methodology of the SEC, it would require the analysis on a lease-specific basis.

VII. Phased Compliance With Supplemental Financial Assurance Orders

BOEM recognizes that the proposed regulations may have a significant financial impact on affected companies. For that reason, BOEM is proposing to phase in the new bonding requirements over a three-year period for existing leaseholders. As part of this proposal, BOEM would require that any company receiving a supplemental financial assurance demand post one-third of the total amount by the deadline listed on the demand letter. A second one-third would be required by the end of the second year (*i.e.,* within 24 months of the receipt of the demand letter). The final one-third payment would be due within 36 months of the receipt of the demand letter. If a lessee's credit rating improves to investment grade during the three-year period, BOEM will discontinue collection of the remaining financial assurance and return any supplemental financial assurance previously provided.

BOEM is requesting comments from potentially affected parties about this phased approach and how it could most effectively be implemented to minimize any unnecessarily adverse effects from an increased supplemental financial assurance requirement.

VIII. Appeals Bonds

When BOEM issues a supplemental financial assurance demand, the affected party has the option to appeal the demand to the Department of the Interior's Board of Land Appeals (IBLA). In many cases in which an appeal is filed, it is accompanied by a request to stay BOEM's supplemental financial assurance order pending the outcome of the appeal. Currently, if the stay is granted, BOEM has no ability to ensure that a facility is covered by adequate financial assurance until the appeal is decided. It is important that BOEM ensure that the government's interests are protected immediately because IBLA appeals may continue for several years. If the company appealing the supplemental financial assurance demand declares bankruptcy before its appeal is resolved, BOEM has no financial assurance to cover the costs of corrective action. For this reason, BOEM is proposing a new requirement whereby any company seeking to stay a supplemental financial assurance demand pending appeal must, as a condition of obtaining a stay of the order, post an appeals bond in the amount of supplemental financial assurance required. If the appeal is successful, the amount of the appeals bond in excess of the amount of supplemental financial assurance determined to be required would be released. If the appeal is unsuccessful, the appeals bond could be replaced or converted into bonds to cover the supplemental financial assurance demand.

IX. Proposed Revisions to BOEM Definitions

To implement the changes proposed above, BOEM proposes to add or revise several definitions in 30 CFR parts 550 and 556. For proposed 30 CFR part 550, BOEM proposes to add new terms and definitions for ''Issuer credit rating,'' ''Investment grade credit rating,'' and ''Financial assurance,'' and to revise the definition of ''You.'' BOEM proposes to add a new term and definition for ''Right-of-Use and Easement (RUE)'' and remove the separate definitions of ''Right-of-use'' and ''Easement'' in 30 CFR part 550 because those terms are not used separately in the existing or proposed regulatory text. Similarly, for 30 CFR part 556, BOEM proposes to add definitions for the new term ''Issuer credit rating'' and ''Investment grade credit rating,'' remove the existing term and definition of ''Security or securities,'' add a new term and definition for ''Financial assurance,'' and revise the definitions of ''Right-of-Use and Easement (RUE)'' and ''You,'' all of which will match those in proposed 30 CFR part 550.

Additionally, BOEM is replacing the word ''sulphur'' with the more contemporary spelling of ''sulfur'' throughout the regulatory text where it has not been previously changed. This edit is a technical correction and does not change any meaning or intent of the regulatory provisions. BOEM proposes updating the word ''sulfur'' in §§ 550.101, 550.102, and 550.105.

X. Section-by-Section Analysis

BOEM is proposing to revise the following regulations:

Part 550—Oil and Gas and Sulfur Operations in the Outer Continental Shelf

The terms ''bond,'' ''bonding,'' ''surety bond,'' ''security,'' and ''securities'' would be replaced throughout this part with the new term ''financial assurance.''

Subpart A—General

Section 550.105 Definitions

The proposed rule would add a definition of ''Issuer credit rating,'' which is a newly defined term in 30 CFR part 550, for the reasons set forth above.

BOEM would remove the terms ''Easement,'' and ''Right-of-use,'' neither of which is used separately. In lieu of these two terms, and to define the term actually used in 30 CFR part 550, BOEM would add a definition for ''Right-of-Use and Easement (RUE).''

This proposed rule would also add a new term and definition for ''Financial assurance'' to list the various methods that may be used to ensure compliance with OCS obligations.

The proposed rule would add new definitions for the terms ''Transfer'' and ''Assign'' to clarify that these terms are used interchangeably throughout 30 CFR part 550. This change would also serve to clarify that the related terms ''transferee'' and ''transferor'' are interchangeable with ''assignee'' and ''assignor'' respectively.

The proposed rule would add a new definition for the term ''Investment grade credit rating,'' meaning ''an issuer credit rating of BBB- or higher, or its equivalent, assigned to an issuer of corporate debt by a nationally recognized statistical rating organization as that term defined by the United States Securities and Exchange Commission.'' This definition would become the threshold determination according to which BOEM would define whether financial assurance typically would or would not be required.

BOEM would also revise the definition of the term ''You'' to now include, depending on the context of the regulations, a bidder, a lessee (record title owner), a sublessee (operating rights owner), a Federal or State right-of-use and easement grant holder, a pipeline right-of-way grant holder, an assignor or transferor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above. This change to the definition of ''You'' would, in concert with changes proposed in § 550.166, make explicit that any financial assurance provisions applicable to either a State or Federal RUE would apply to the other.

Section 550.160 When will BOEM grant me a right-of-use and easement (RUE), and what requirements must I meet?

The proposed rule would revise the introductory text of this section to clarify that a RUE grant need not cover both leased and unleased lands. Instead, BOEM may grant a RUE on leased lands (*i.e.,* leased to another party), or unleased lands, or both. The paragraph (a) introductory text would be expanded to include additional activities associated with a RUE, such as using or modifying existing devices. The paragraph (a) introductory text would also be expanded to include the words ''seafloor production equipment'' and ''facilities.'' By expanding the RUE requirement to additional activities and devices, BOEM would ensure that all associated activities that may have an impact on the environment of the OCS are included.

BOEM also proposes to revise paragraph (b) to provide that a RUE grant holder must exercise the grant according to the terms of the grant and the applicable regulations of 30 CFR part 550, as well as the requirements of 30 CFR part 250, subpart Q.

BOEM also proposes to revise paragraph (c) to update the cross-reference to BOEM's lessee qualification requirements, §§ 556.400 through 556.402, and to replace the language in this paragraph referencing ''bonding requirements'' with a cross reference to § 550.166, which BOEM also proposes to revise to add specific criteria for financial assurance demands, as provided below.

Section 550.166 If BOEM grants me a RUE, what financial assurance must I provide?

The proposed rule would revise the section heading by removing the reference to ''a State lease'' and replacing ''surety bond'' with ''financial assurance.'' This reflects the change in the text of paragraph (b) of this section that provides that the financial assurance requirements of this section would apply to both a RUE granted to serve a State lease and one serving an OCS lease. The term ''surety bond'' would also be replaced with ''financial assurance'' throughout the section.

BOEM proposes to revise paragraph (a) to require $500,000 in financial assurance that guarantees compliance with the terms and conditions of any OCS RUEs you hold. Previously, paragraph (a) only required $500,000 in financial assurance for RUEs associated with State leases.

BOEM proposes to add paragraph (a)(1) to allow area-wide lease financial assurance to satisfy the requirements of paragraph (a), provided it is in excess of the $500,000 base RUE financial assurance requirement and is amended to guarantee compliance with all the terms and conditions of the RUE(s) it covers.

BOEM proposes to add paragraph (a)(2) to allow the Regional Director to lower the required financial assurance amount for research and other similar types of RUEs, which reflects BOEM's past experience that the total liability exposure can be well below $500,000 for such RUEs.

BOEM proposes to add paragraph (a)(3) to ensure that the financial assurance requirements of § 556.900(d) through (g) and § 556.902 would apply to the requirements stated in paragraph (a).

BOEM would also add to paragraph (b) in this section to provide that, if BOEM grants a RUE that serves either an OCS lease or a State lease, the Regional Director may require the grant holder to provide supplemental financial assurance to ensure compliance with the obligations under the RUE grant. BOEM would use the same issuer credit rating or proxy credit rating criteria found in proposed § 556.901(d)(1) and (2) to evaluate a RUE grant holder as BOEM proposes to apply to lessees, *i.e.,* the Regional Director may require supplemental financial assurance if the grant holder does not have an issuer credit rating or a proxy credit rating that meets the criteria set forth in proposed § 556.901(d)(1). Like lessees, most RUE holders are oil and gas companies, and BOEM would, therefore, use the same financial criteria to determine the need for additional financial assurance from RUE holders to provide consistency.

BOEM proposes to revise paragraph (b)(1) to update the regulatory citation in existing § 550.166(b)(1) to provide that the supplemental financial assurance must meet the requirements for lease surety bonds or other financial assurance provided in § 556.900(d) through (g) and § 556.902.

The proposed rule would also revise § 550.166(b)(2) to include ''BOEM and BSEE orders'' in the list of costs and liabilities, and clarify that RUE holders should also comply with the decommissioning regulations at 30 CFR part 250, subpart Q.

The proposed rule would also add new paragraph (c) to provide that if a RUE grant holder fails to replace any deficient financial assurance upon demand, or fails to provide

supplemental financial assurance upon demand, BOEM may assess penalties, request BSEE to suspend operations on the RUE, and/or initiate action for cancellation of the RUE grant. Proposed paragraph (c) provides for actions similar to those available to BOEM pursuant to proposed § 556.900(h) if a lessee fails to provide sufficient financial assurance.

Section 550.167 How may I obtain or assign my interest in a RUE?

The proposed rule would add § 550.167 to establish the ability to assign a RUE interest. Previously, RUE interests were not assigned, because assignment of RUE interests was not addressed in the existing regulations. This change is being proposed to allow RUE assignments. This new section would also require a RUE assignee to provide the information outlined in existing § 550.161, which currently must be provided only by applicants for a new RUE. Paragraph (a) of § 550.167 would establish that BOEM must approve all assignments of all or part of a RUE interest. Paragraphs (b)(1) through (4) would establish the circumstances in which BOEM may disapprove an assignment of a RUE, mirroring the circumstances under which BOEM may disapprove the assignment of a lease or sublease pursuant to § 556.704. These circumstances are intended to prevent the assignment of a RUE when, for example, the assignment would result in inadequate financial assurance.

Subpart J—Pipelines and Pipeline Rights-of-Way

Section 550.1011 Financial Assurance Requirements for Pipeline Right-of-Way (ROW) Grant Holders

The proposed rule would revise this section in its entirety. The section heading would be revised to read, ''Financial assurance requirements for pipeline right-of-way (ROW) grant holders,'' to clarify that a pipeline ROW grant holder may meet the requirements of this section by providing bonds or other types of financial assurance, in order to expand the language to include forms of financial assurance in addition to bonds.

Currently, § 550.1011(a) requires that an applicant or a holder of a ROW must provide and maintain a $300,000 bond (in addition to bond coverage required in 30 CFR parts 256 and 556), and potentially additional security, if the Regional Director determines the latter is needed. The proposed rule would revise this paragraph to require that assignees, as well as applicants and holders, are required to provide and maintain the $300,000 financial assurance to make clear that financial assurance requirements would apply to an assignment of a ROW grant. The proposed rule would remove the reference to 30 CFR part 256 currently in paragraph (a)(1) because 30 CFR part 256 does not contain pipeline bonding requirements. The proposed rule would clarify that the requirement to provide area-wide financial assurance for a pipeline ROW grant is separate and distinct from the financial assurance coverage required for leases in 30 CFR part 556 and that required for RUEs in 30 CFR part 550. Existing paragraph (a)(2) would be removed because supplemental financial assurance requirements would be covered by proposed paragraph (d).

BOEM would also remove existing paragraph (b), which defines the three recognized OCS areas, because it is made redundant by the reference to § 556.900(b) in revised paragraph (a). BOEM proposes to replace the removed paragraph (b) with a new paragraph (b) to provide that the requirement under paragraph (a) to furnish and maintain area-wide financial assurance may be satisfied if the operator or a co-grant holder provides area-wide pipeline right-of-way financial assurance in the required amount that guarantees compliance with the regulations and the terms and conditions of the grant, as discussed in Section IV.C of this preamble.

BOEM also proposes to revise paragraph (c) with a provision stating that the requirements for lease financial assurance in § 556.900(d) through (g) and § 556.902 would apply to the area-wide financial assurance required in paragraph (a) of this section. This cross-reference incorporates the financial assurance provisions from 30 CFR part 556 that specify the required content, form, and administrative handling of financial assurance. BOEM would remove existing paragraphs (c) and (d), which would be made redundant by proposed new paragraph (f).

BOEM would add paragraph (d) to provide that the Regional Director may determine that supplemental financial assurance is necessary to ensure compliance with the obligations under a pipeline ROW grant based on an evaluation of the grant holder's ability to carry out present and future obligations on the pipeline ROW. BOEM proposes to use the same issuer credit rating or proxy credit rating criteria to evaluate a pipeline ROW grant holder, or co-grant holder, as BOEM proposes to apply to lessees in § 556.901(d)(1). BOEM, as noted earlier in this preamble, has found that reliance on credit ratings better evaluates financial stability, and is thus applying the same financial criteria in evaluating financial stability of grant holders.

BOEM also proposes to add additional supplemental financial assurance requirements in new paragraph (e)(1) stating that the supplemental financial assurance must meet the general requirements for lease surety bonds or other financial assurance, as provided in § 556.900(d) through (f) and the proposed revisions to paragraph (g) and § 556.902. This cross-reference incorporates the financial assurance provisions from 30 CFR part 556 that specify the required content, form, and administrative handling of financial assurance. New paragraph (e)(2) proposes that any supplemental financial assurance for a pipeline ROW would be required to cover liabilities for regulatory compliance and compliance with BOEM and BSEE orders, decommissioning of all pipelines or other facilities, and clearance from the seafloor of all obstructions created by the pipeline ROW operations, in accordance with the regulations set forth in 30 CFR part 250, subpart Q. See Section IV.C of this preamble for further discussion.

The proposed rule would also add new paragraph (f) to provide that if a pipeline ROW grant holder fails to replace any deficient financial assurance upon demand or fails to provide supplemental financial assurance upon demand, the Regional Director may assess penalties, request BSEE to suspend operations on the pipeline ROW, and/or initiate action for forfeiture of the pipeline ROW grant in accordance with § 250.1013.

Part 556—Leasing of Sulfur or Oil and Gas and Bonding Requirements in the Outer Continental Shelf

The proposed rule would make a technical correction to the authority citation for part 556 by removing the citation to 43 U.S.C. 1801–1802, because neither of these two sections contains authority allowing BOEM to issue or amend regulations.

The proposed rule would also remove the citation to 43 U.S.C. 1331 note, which is where the Gulf of Mexico Energy Security Act of 2006 is set forth. While this statute required BOEM to issue regulations concerning the availability of bonus or royalty credits for exchanging eligible leases, the deadline for applying for such a bonus or royalty credit was October 14, 2010; therefore, lessees may no longer apply for such credits. BOEM no longer needs the authority to issue regulations under

that statute and has removed all regulations on this topic from 30 CFR part 556, except for § 556.1000, which provides that lessees may no longer apply for such credits.

The terms ''bond,'' ''bonding,'' and ''surety bond'' would be replaced throughout this part with the new term ''financial assurance,'' as discussed earlier in this preamble. This change includes changing the Title of Part 556 from ''Leasing of Sulphur or Oil and Gas and Bonding Requirements in the Outer Continental Shelf'' to ''Leasing of Sulfur or Oil and Gas and Financial Assurance Requirements in the Outer Continental Shelf.''

Subpart A—General Provisions

Section 556.105 Acronyms and Definitions

The proposed rule would add a definition of ''Issuer credit rating'' and ''Investment grade credit rating,'' which are identical to the proposed additions in § 550.105.

The proposed rule would also revise the definition of ''Right-of-Use and Easement (RUE)'' to include the words ''to construct, secure to the seafloor, use, modify, or maintain platforms, seafloor production equipment.'' This definition would be the same as the definition of ''Right-of-Use and Easement (RUE)'' proposed for § 550.105.

The proposed rule would also add a definition for ''Financial assurance'' to clarify that various methods can be used to ensure compliance with OCS obligations. This definition would be the same as the definition of ''Financial assurance'' proposed for § 550.105.

The proposed rule would add definitions for the new terms ''Transfer'' and ''Assign'' to clarify that these terms are used interchangeably throughout 30 CFR part 556. This change would also serve to clarify that the related terms ''transferee'' and ''transferor'' are interchangeable with ''assignee'' and ''assignor,'' respectively.

The proposed rule would also revise the definition of the term ''You'' to include, depending on the context of the regulations, a bidder, a lessee (record title owner), a sublessee (operating rights owner), a Federal or State right-of-use and easement grant holder, a pipeline right-of-way grant holder, assignor or transferor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above. This change to the definition of ''You,'' in concert with changes proposed in § 550.166, would make explicit that any provisions applicable to either a State or Federal RUE would apply to the other, and that any distinctions between the two with respect to financial assurance are being removed. This change is in concert with changes proposed in § 550.105.

Subpart G—Transferring All or Part of the Record Title Interest in a Lease

Section 556.704 When may BOEM disapprove an assignment or sublease of an interest in my lease?

The proposed rule would revise paragraph (a) to clearly state that all parties involved in the assignment of a record title interest in a lease must be in compliance with all applicable regulations and orders, including financial assurance requirements, or BOEM may disapprove an assignment or sublease, consistent with changes to 30 CFR part 550 proposed in this rulemaking. The proposed rule would replace the word ''would'' in the section title with ''may'' to better reflect this discretion.

Subpart H—Transferring All or Part of the Operating Rights in a Lease

Section 556.802 When may BOEM disapprove the transfer of all or part of my operating rights interest?

The proposed rule would revise the existing section heading to replace ''assignment'' with ''transfer'' consistent with the new definitions proposed for both terms. The proposed rule would revise paragraph (a) to clearly state that for the transferee to receive approval for the transfer of operating rights in a lease, the transferee must be in compliance with all applicable regulations and orders to provide financial assurance requirements before BOEM may approve an assignment, consistent with changes to 30 CFR part 550 proposed in this rulemaking. The proposed rule would replace the word ''would'' in the section title with ''may'' to better reflect this discretion.

Subpart I—Bonding or Other Financial Assurance

Section 556.900 Financial Assurance Requirements for an Oil and Gas or Sulfur Lease

The proposed rule would revise the section heading to read, ''Financial assurance requirements for an oil and gas or sulfur lease'' in order to ensure that the term ''bonding'' has been consistently replaced with ''financial assurance'' and to clarify that a number of forms of financial assurance can be provided, and not just surety bonds, consistent with changes to 30 CFR part 550 proposed in this rulemaking.

BOEM proposes to add paragraph (a)(4) to make clear that any supplemental financial assurance required by the Regional Director must be provided before a new lease will be issued or an assignment of a lease approved.

The proposed rule would also revise the introductory text of paragraph (g) to replace the word ''security'' with ''financial assurance,'' and to add the word ''surety'' before ''bond'' in two places to clarify that in those cases the regulation is referring to a ''surety bond.''

The proposed rule would revise the introductory text of paragraph (h) to replace the words ''bond coverage'' with ''financial assurance'' to clarify that surety bonds are not the only means of meeting the requirement. The proposed rule would also revise paragraph (h)(2) in recognition that BSEE, rather than BOEM, is the agency with authority to suspend production or other operations on a lease.

The proposed rule would add paragraph (i) to ensure consistency with the RUE financial assurance requirements by providing that area-wide lease surety bonds pledged to satisfy the financial assurance requirements for RUEs may be called in for performance of obligations on which the holder of a RUE defaults.

Section 556.901 Base Financial Assurance and Supplemental Financial Assurance

The proposed rule would revise the section heading to read, ''Base financial assurance and supplemental financial assurance,'' because this section covers both base financial assurance and supplemental financial assurance requirements.

Section 556.901(a)

The proposed rule would also revise paragraph (a)(1)(i) introductory text to replace the word ''bond'' with ''lease exploration financial assurance'' to be consistent with the terminology used in existing paragraph (a)(1)(ii), which BOEM does not propose to change.

Section 556.901(b)

The proposed rule would eliminate the parenthetical ''(the lessee)'' from the introductory text as it is made redundant by the proposed revised definition of ''You.'' The proposed rule would also revise paragraph (b)(1)(i) introductory text to replace the word ''bond'' with ''lease development financial assurance'' for consistency with the terminology used in existing paragraph (b)(1)(ii), which BOEM does not propose to change.

Section 556.901(c)

The proposed rule would also revise paragraph (c) to remove the words ''authorized officer'' and replace them with ''Regional Director,'' and remove the words ''lease bond coverage'' and ''a lease surety bond'' and replace them in each instance with ''financial assurance'' to clarify that the Regional Director can review whether BOEM would be adequately secured by a surety bond, or another type of financial assurance, for an amount less than the amount proposed in paragraph (b)(1), but not less than the estimated cost for decommissioning.

Section 556.901(d)

BOEM proposes to combine the provisions of the existing paragraph (d) introductory text and the existing introductory paragraph (d)(1) to provide that the Regional Director may determine that supplemental financial assurance is required to ensure compliance with the obligations under a lease if the lessee does not meet at least one of the criteria provided in proposed paragraphs (d)(1) through (4) below. For further discussion, see Section V of this preamble.

Section 556.901(d)(1)

BOEM proposes to revise paragraph (d)(1) to set forth the criteria BOEM would use to evaluate the ability of a lessee to carry out present and future obligations. Under this paragraph, BOEM would use an issuer credit rating from a NRSRO, as defined by the SEC, greater than or equal to either BBB− from Standard & Poor's (S&P) Ratings Service or Baa3 from Moody's Investor Service, or the equivalent from another NRSRO. If different NRSROs provide different ratings for the same company, BOEM would apply the higher rating, as discussed in section IV.A of this preamble.

Section 556.901(d)(2)

BOEM proposes to revise paragraph (d)(2) stating that BOEM could also use a proxy credit rating calculated by BOEM based on audited financial information from the most recent fiscal year (including an income statement, balance sheet, statement of cash flows, and the auditor's certificate) greater than or equal to either BBB− from S&Ps Ratings Service or Ba3 from Moody's Investor Service, or their equivalent from another NRSRO. The proxy credit ratings that BOEM would calculate on behalf of lessees would be structured in the same scale as the standard ratings (*i.e.,* AAA to D). The audited financial information from the most recent fiscal year that BOEM used to determine the proxy credit rating must include a twelve-month period within the twenty-four months prior to the lessee's receipt of the Regional Director's determination that the lessee must provide supplemental financial assurance. When determining a proxy credit rating, the Regional Director will consider any additional liabilities that may encumber a lessee's ability to carry out future obligations. Under the proposed rule, the lessee would be obligated to provide the Regional Director with information regarding its joint-ownership interests and other liabilities associated with OCS leases, which might not otherwise be accounted for in the audited financial information provided to BOEM.

Section 556.901(d)(3)

BOEM proposes to add new paragraph (d)(3) to address the situation where the lessee does not meet the criteria in proposed paragraphs (d)(1) or (2), but one or more co-lessee(s) does meet those criteria. The Regional Director may require a lessee to provide supplemental financial assurance on a lease-by-lease basis if no co-lessee has an issuer credit rating or proxy credit rating that meets the threshold set forth in paragraphs (d)(1) or (2), as discussed in Section IV.A of this preamble.

Section 556.901(d)(4)

BOEM proposes to add new paragraph (d)(4) to set forth the criterion the Regional Director would use if the lessee does not meet the criteria in proposed paragraphs (d)(1), (2), or (3). In this instance, the Regional Director would assess each lease to determine whether the value of the proved oil and gas reserves on the lease exceed three times the estimated cost of the decommissioning associated with the production of those reserves. Under paragraph (d)(4), the Regional Director's assessment would be based on the evaluation of proved oil and gas reserves following the methodology set forth in SEC Regulation S–X at 17 CFR 210.4–10 and SEC Regulation S–K at 17 CFR 229.1200. BOEM also proposes new paragraphs (d)(4)(i) and (ii), which state that, when implementing this criterion, BOEM will use decommissioning cost estimates, including a BSEE-generated probabilistic estimate at the P70 level, when available, or, if such estimate is not available, BOEM will use the BSEE-generated deterministic estimate.

Section 556.901(e)

BOEM proposes to redesignate existing paragraph (d)(2) as paragraph (e) and revise it to provide that a lessee may satisfy the Regional Director's demand for supplemental financial assurance either by increasing the amount of its existing financial assurance or by providing additional surety bonds or other types of acceptable financial assurance.

Section 556.901(f)

BOEM proposes to redesignate existing paragraph (e) as paragraph (f) and revise to remove the word ''bond'' and replace it with ''supplemental financial assurance,'' a term that includes a surety bond or another type of financial assurance. BOEM also proposes to modify the language of new paragraph (f) to establish that, in determining the amount of supplemental financial assurance, the Regional Director will consider the lessee's potential underpayment of royalty and the cumulative decommissioning obligations as established in the manner described in proposed paragraph (d)(3) of this section, *i.e.,* the use of the appropriate BSEE estimate.

Section 556.901(g)

BOEM proposes to redesignate existing paragraph (f) as new paragraph (g) and revise it to replace the word ''security'' with ''financial assurance'' throughout.

Existing 30 CFR 556.901(f)(2) includes a statement to the effect that, if a company requests a reduction of the amount of the original bond required, the Regional Director may agree to such a reduction provided that he or she finds that ''the evidence you submit is convincing.'' BOEM proposes to replace the current regulatory text with the following statement in new paragraph (g)(2): ''Upon review of your submission, the Regional Director may reduce the amount of financial assurance required,'' as discussed in Section IV of this preamble.

Section 556.901(h)

BOEM proposes to add a new paragraph (h) to describe the limited opportunity lessees will have to provide the required supplemental financial assurance in three phased installments during the first three years after the effective date of this regulation, subject to the conditions of proposed paragraphs (h)(1) and (2). A three-year approach would allow companies to raise the relevant capital through operations over a longer period of time, as discussed in section VII of this preamble. Accordingly, it would reduce bankruptcy risk and ensure a greater level of financial protection for the government and taxpayers.

BOEM proposes to add new paragraphs (h)(1)(i) through (iii) to

establish the timing and amounts of phased supplemental financial assurance that would need to be provided. Payments would be required in three installments of one-third that of the demand, the first of which would be required within the timeframe specified in the demand letter, or within 60 calendar days of receiving the demand letter if no timeframe is specified. The second one-third would be required within 24 months from the date of receipt of the original demand letter, and the final payment would be due within 36 months from the date of the receipt of the original demand letter.

BOEM proposes to add a new paragraph (h)(2) to establish a procedure in case a demand that has been approved for phased compliance is not met within the timeframes established by paragraphs (h)(1)(i) through (iii). If a payment is missed, the Regional Director will notify the party of the failure to meet the timeframe and that it will no longer be eligible to meet the supplemental financial assurance demand by using the phased compliance option set forth in proposed paragraph (h). Moreover, the remaining balance of the demand would become due ten calendar days after the Regional Director's notification is received.

Section 556.902 General Requirements for Bonds or Other Financial Assurance

The proposed rule would revise the section heading to read, ''General requirements for bonds or other financial assurance,'' to recognize that other types of financial assurance, such as a dual-obligee bond or a pledge of Treasury securities, may be provided under 30 CFR part 556.

These revisions propose that the same general requirements for surety bonds provided by lessees, operating rights owners, or operators of leases, also apply to surety bonds provided by RUE grant and pipeline ROW grant holders. The proposed rule would therefore also revise paragraph (a) to include ''grant holder'' and to cover surety bonds provided under 30 CFR part 550. The requirements of this section are those that apply broadly to all companies having to provide financial assurance to BOEM for an OCS oil and gas or sulfur lease. Additional requirements appliable specifically to RUEs and ROWs are described in proposed §§ 550.166 and 550.1011, respectively.

The proposed rule would add ''or grant'' after ''lease'' to clarify the change to include grant holders in paragraph (a)(2). The rulemaking would also add compliance with ''all BOEM and BSEE orders'' as a requirement to ensure that providers of financial assurance are aware that such financial assurance guarantees compliance with BOEM and BSEE orders as well as with the regulations and the terms of a lease, ROW, or RUE. This addition is necessary because a requirement to provide supplemental financial assurance arises from a BOEM order. ''BOEM and BSEE orders'' would mean any order issued by the relevant bureau, such as a BSEE order to decommission, or a BOEM order to provide supplemental bond.

The proposed rule would revise paragraph (a)(3) to include the obligations of all record title owners, operating rights owners, and operators on the lease.

The proposed rule would also revise paragraph (e)(2) to clarify that the use of Treasury securities as financial assurance requires a pledge of Treasury securities, as provided in § 556.900(f).

The proposed rule would add a new paragraph (g) to recognize the option to seek an informal resolution of a surety bond demand pursuant to 30 CFR 590.6, which contains information regarding informal resolutions. This paragraph would further provide that a request for an informal resolution of a dispute concerning the Regional Director's decision to require supplemental financial assurance will not affect the applicant's ability to request a phased payment of its supplemental financial assurance demand under proposed § 556.901(h).

The proposed rule would add a new paragraph (h) to address risks arising in connection with the lessee's and grant holder's ability to appeal a demand for supplemental financial assurance to the Interior Board of Land Appeals (IBLA) pursuant to the regulations in 30 CFR part 590. The proposed rule would add an additional requirement to the IBLA appeals process whereby, if an appellant requests that the IBLA stay the supplemental financial assurance demand, the appellant would be required to post an appeals surety bond equal to the amount of supplemental financial assurance that the appellant seeks to stay before any stay could go into effect. Because IBLA appeals may continue for several years, it is important that BOEM ensure that the government's interests are protected. The appeals surety bond requirement would prevent the government from being left with no security if the appellant filed bankruptcy before the appeal process ended.

Section 556.903 Lapse of Financial Assurance

The proposed rule would replace the word ''bond'' in the section title with ''financial assurance'' for consistency with the terminology change made throughout the rulemaking. The proposed rule would revise paragraph (a) to add after the word ''surety'', ''guarantor, or the financial institution holding or providing your financial assurance'' and to include references to the financial assurance requirements for RUE grants (§ 550.166) and pipeline ROW grants (§ 550.1011). The proposed rule would also revise paragraph (a) by removing the words ''terminates immediately'' and substituting ''must be replaced.'' The proposed rule would replace the word ''promptly'' with a specific timeline of within seven calendar days of learning of a negative event for the financial assurance provider and would also add a 30-calendar day timeframe in which the party must provide other financial assurance from a different financial assurance provider.

BOEM also proposes to revise the first sentence of paragraph (b) by inserting ''or financial institution'' after ''guarantor,'' to make the provision apply to all types of financial assurance providers, including those offering decommissioning accounts. BOEM also proposes to revise the second sentence of paragraph (b) for consistency in terminology by inserting the words ''or other financial assurance'' after the word ''bonds'' and inserting the words ''guarantor, or financial institution'' after the word ''surety'', so that all surety bonds or other financial assurance instruments must require all financial assurance providers to notify the Regional Director within 72 hours of learning of an action filed alleging that the lessee or grant holder, or their financial assurance provider, is insolvent or bankrupt.

Section 556.904 Decommissioning Accounts

The proposed rule would revise the section heading and the term ''abandonment accounts'' throughout the section to read ''decommissioning accounts,'' in accordance with BOEM policy and accepted terminology used in the industry. The words ''lease-specific'' would be removed throughout this section to remove the implication that such an account could only pertain to one lease, thereby clarifying that a decommissioning account could be used for one lease or several leases, a RUE grant, or a pipeline ROW grant, or a combination thereof, as discussed in section V.B of this preamble.

BOEM proposes to revise paragraph (a) to remove the term ''lease-specific'' and replace it with ''decommissioning,'' and to add references to the base and

supplemental financial assurance regulation (proposed § 556.901(d)), as well as the financial assurance regulations for RUE grants (proposed § 550.166(b)) and pipeline ROW grants (proposed § 550.1011(d)), consistent with the changes mentioned in the preceding paragraph. Although the paragraph (a) introductory text would continue to allow a lessee or grant holder to establish a decommissioning account at a federally insured financial institution, this proposed rule would eliminate the existing restriction in paragraph (d) that such deposits not exceed the FDIC/FSLIC insurance limits and the reference to paragraph (a)(3), which is being revised and is no longer relevant to withdrawal of funds from a decommissioning account.

The proposed rule would re-arrange the existing sentence constituting § 556.904(a)(1). The proposed rule would also revise paragraph (a)(2) to remove the words ''as estimated by BOEM'' to clarify that BOEM does not estimate decommissioning costs, but rather uses the estimates of decommissioning costs determined by BSEE. The proposed rule would also revise paragraph (a)(2) to require funding of a decommissioning account ''pursuant to a schedule that the Regional Director prescribes,'' as opposed to ''within the timeframe the Regional Director prescribes'' as existing § 556.904(a)(2) now states.

The proposed rule would revise paragraph (a)(3) to remove the requirement to provide binding instructions to purchase Treasury securities for a decommissioning account under certain circumstances. The proposed rule would replace the existing language with a new provision providing that if you fail to make the initial payment or any scheduled payment into the decommissioning account, you must immediately submit, and subsequently maintain, a surety bond or other financial assurance in an amount equal to the remaining unsecured portion of your estimated decommissioning liability. This change reflects BOEM's current policy to order a surety bond or other financial assurance in the event the payments into the decommissioning account are not timely made.

The proposed rule would revise paragraph (b) by removing ''lease-specific'' and substituting ''decommissioning.''

The proposed rule would also remove existing paragraphs (c) and (d), which concern the use of pledged Treasury securities to fund a decommissioning account, as discussed in section V.B of this preamble. Removing the requirement in existing paragraph (d) that the account holder must purchase Treasury securities when the amount in the account equals the maximum amount insurable by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation will make these accounts more attractive to parties who may desire to use this method of providing supplemental financial assurance. The removal of existing paragraphs (c) and (d) would not preclude the use of Treasury securities to fund a decommissioning account. Existing paragraph (e) would be redesignated as paragraph (c) except that the word ''pledged'' would be removed, and ''other revenue stream'' would be added to the list of financial assurance options.

The proposed rule would add a revised paragraph (d), which would describe the Regional Director's discretion to authorize BOEM to provide funds from a decommissioning account to a liable party that performs the decommissioning.

Section 556.905 Third-Party Guarantees

The proposed rule would revise the section heading to read, ''Third-party guarantees.'' The proposed rule would also revise the section throughout to remove the introductory titles of each paragraph to ensure consistency in the proposed rule's format.

Section 556.905(a)

BOEM proposes to revise paragraph (a) to include a cross-reference to proposed § 550.166(b) (related to RUEs) and proposed § 550.1011(d)) (related to pipeline ROWs) in addition to the existing reference to proposed § 556.901(d) (related to base financial assurance for leases), to clarify that a third-party guarantee may be used as a type of supplemental financial assurance for not only leases, but for RUE grants and pipeline ROW grants as well. This is further discussed in Section V.A of this preamble.

BOEM would also revise paragraph (a)(1) to require that the guarantor, not the guarantee, as provided in the existing regulation, must meet the criteria in proposed § 556.901(d)(1), as the factors in proposed § 556.901(d) more properly apply to an entity, such as a guarantor, than to a document, such as a guarantee. See section V.A of this preamble for further discussion. BOEM would retain existing paragraph (a)(2), but would revise it to include a requirement, which is found in existing paragraph (a)(4), that the guarantor or guaranteed party must submit a third-party guarantee ''containing each of the provisions in proposed paragraph (d) of this section.'' As discussed below, paragraph (d) is being revised to no longer use the term ''indemnity agreement'' and to provide instead that the provisions that BOEM previously required a lessee or grant holder to include in indemnity agreements must be included in a third-party guarantee agreement. This terminology is changed to clarify that the government is not required to incur the expenses of decommissioning before demanding compensation from the guarantor. The proposed rule would also remove existing paragraphs (a)(3) and (a)(4), which would be superseded by other revisions to this section.

Section 556.905(b)

The proposed rule would redesignate existing paragraph (b) as paragraph (c) and revise the introductory text to remove the reference to existing paragraph (c)(3) of this section because the requirements in that paragraph would be superseded in this proposed rule. The proposed rule would replace this reference with a reference to paragraph (a)(1) of this section in paragraph (c) as it is proposed to be revised. The proposed rule would add new paragraph (b) to allow guarantors to limit their guarantees to a fixed dollar amount as agreed to by BOEM. BOEM is proposing this change because the existing regulations do not clearly limit the liability of a guarantor to a fixed monetary amount stated in the guarantee. Therefore, few parties were willing to use third-party guarantees in the past. Because the cessation of production is neither desirable nor easily accomplished by an operator, the proposed rule would also revise existing paragraph (b)(2) to remove the requirement that, when a guarantor becomes unqualified, you must ''cease production until you comply with the surety bond coverage requirements of this subpart.'' Instead, the language in revised redesignated paragraph (c) would be revised to provide that you must, within 72 hours, ''[s]ubmit and subsequently maintain a surety bond or other financial assurance covering those obligations previously secured by the third-party guarantee.''

The proposed rule would remove existing paragraph (c) as the language would be superseded by the new language in § 556.905(a).

Section 556.905(d)

The proposed rule would revise paragraph (d)(1) introductory text to read ''If you fail to comply with the terms of any lease or grant covered by the guarantee, or any applicable

regulation, your guarantor must either:'' to be consistent with the revision of paragraph (a) to allow the use of a third-party guarantee for a RUE grant or a pipeline ROW grant.

The proposed rule would revise paragraph (d)(1)(i) to clarify that the corrective action required is to bring the lease or grant into compliance with its terms, or any applicable regulation, to the extent covered by the guarantee.

The proposed rule would revise paragraph (d)(1)(ii) to clarify that the liability only extends to that covered by the guarantee and that payment does not result in the cancelation of the guarantee, but only a reduction in the remaining value equal to the amount provided.

The proposed rule would remove existing subparagraph (d)(2) to be consistent with the revision to remove existing paragraph (c). As a result, existing paragraph (d)(3) would be redesignated as paragraph (d)(2) and existing paragraph (d)(4) would be redesignated as paragraph (d)(3).

The proposed rule would revise the redesignated paragraphs (d)(2)(ii) and (iii) to remove the words ''your guarantor's'' and replace them with the word ''the'' to clarify that redesignated paragraph (d)(2) would apply to the guarantee itself.

The proposed rule would revise proposed paragraph (d)(3) to replace the term ''a suitable replacement security instrument'' with ''acceptable replacement financial assurance'' for clarity and would include the requirement that appears in existing § 556.905(d)(4) that any replacement financial assurance must be provided before the termination of the period of liability of the third-party guarantee.

Section 556.905(e)

The proposed rule would also revise paragraph (e) to provide that BOEM will cancel a third-party guarantee under the same terms and conditions as those proposed in §§ 556.906(b) and (d)(3).

Section 556.905(f) Through (k)

BOEM also proposes to add new paragraphs (f) through (k) to replace the provisions of existing paragraph (e). The new paragraphs mirror the provisions of existing paragraph (e) while making minor adjustments to accommodate the new format and add clarification. The term ''indemnity agreement'' would be replaced with ''third-party guarantee agreement'' throughout.

Section 556.906 Termination of the Period of Liability and Cancellation of Financial Assurance

The proposed rule would replace the words ''security'' and ''surety bond'' with ''financial assurance'' and ''surety'' with ''financial assurance provider'' for consistency with the changes throughout the proposed rule. The section title would also be revised so that ''a bond'' is replaced with ''financial assurance.''

The proposed rule would revise existing paragraph (b)(1) to remove the word ''terminated'' in two instances and replace it with ''cancelled'' to be consistent with the existing paragraph (b) introductory text, which provides that the Regional Director will cancel your previous financial assurance when you provide a replacement, subject to the conditions provided in existing paragraphs (b)(1) through (3). BOEM would also remove the word ''for'' before ''by the bond'' in paragraph (b)(1) for grammatical reasons.

The proposed rule would revise existing paragraph (b)(2) to also add cross-references to § 550.166, which is the financial assurance regulation for RUE grants, and § 550.1011, which is the financial assurance regulation for pipeline ROW grants, and would revise existing paragraph (b)(3) to also reference supplemental financial assurance regulations for RUE grants (proposed § 550.166(b) and pipeline ROW grants (proposed § 550.1011(d)). BOEM proposes to delete the word ''base'' in front of financial assurance in existing paragraph (b)(2) to propose that the new financial assurance would replace whatever financial assurance that previously existed, whether that financial assurance consisted of a base bond and/or any prior supplemental financial assurance.

The proposed rule would revise the paragraph (d) introductory text to cover financial assurance cancellations and return of pledged financial assurance and, in the table, would remove the middle column entitled, ''The period of liability will end,'' because it is redundant with the provisions in proposed paragraphs (a) through (c).

In existing paragraph (d), in the column in the table entitled ''For the following type of bond,'' BOEM proposes to remove the words ''type of bond'' and replace those words with a colon at the top of the table so that this paragraph would apply to surety bonds or other financial assurance, as applicable. Paragraph (d)(1) would also be revised to include a cross-reference to base financial assurance submitted under proposed § 550.166(a) (for RUE grants) and proposed § 550.1011(a) (for pipeline ROW grants). BOEM would also revise paragraph (d)(2) in the same column to include a reference to supplemental financial assurance submitted under proposed § 550.166(b) and proposed § 550.1011(d).

The proposed rule would revise paragraph (d) to amend the heading of the column entitled, ''Your bond will be cancelled,'' to read, ''Your financial assurance will be reduced or cancelled, or your pledged financial assurance will be returned,'' to clarify that financial assurance may be reduced or cancelled and pledged financial assurance, or a portion thereof, may be returned, and to specify other circumstances under which the Regional Director may cancel supplemental financial assurance or return pledged financial assurance. While the existing criteria identify most instances when cancellation of financial assurance is appropriate, occasionally there are other circumstances where cancellation would be warranted. The proposed rule would allow cancellation when BOEM determines, using the criteria set forth in proposed § 556.901(d), 550.166(b), or 550.1011(d), as applicable, that a lessee or grant holder no longer needs to provide supplemental financial assurance for its lease, RUE grant, or pipeline ROW grant when the operations for which the supplemental financial assurance was provided ceased prior to accrual of any decommissioning obligation; or when cancellation of the financial assurance is appropriate because BOEM determines such financial assurance never should have been required under the regulations.

The proposed rule would add a new paragraph (d)(3) in the table in paragraph (d) to address the cancellation of a third-party guarantee. In the past, parties have expressed concern to BOEM that the regulations, although they expressly allow for the termination of the period of liability, do not clearly allow for the cancellation of the guarantee. This addition would allow BOEM to cancel a third-party guarantee under the same terms and conditions that apply to cancellation of other types of financial assurance, as provided in proposed § 556.906(d)(2).

The proposed rule would revise the introductory text in paragraph (e) to remove the words ''or release'' because the term ''release'' is undefined and not used in practice. Likewise, the proposed rule would remove the words ''or released'' from paragraph (e)(2). No substantive change is intended; rather BOEM seeks to clarify the meaning of the existing provision.

The proposed rule would also revise paragraph (e) to reference RUE grants and pipeline ROW grants to provide that the Regional Director may reinstate the financial assurance on the same grounds as currently provided for reinstatement of lease financial assurance.

Section 556.907 Forfeiture of Bonds or Other Financial Assurance

The proposed rule would replace the words ''security,'' ''surety bond,'' or ''third-party guarantee'' with ''financial assurance'' and ''surety'' with ''financial assurance provider'' for consistency with the changes throughout the proposed rule.

The proposed rule would revise the section heading to read, ''Forfeiture of bonds or other financial assurance'' because the use of ''or'' is sufficient in this instance. The proposed rule would revise paragraph (a)(1) to include surety bonds or other financial assurance for RUE grants and pipeline ROW grants, in addition to leases, in the forfeiture provisions of this section. BOEM also proposes to clarify that the Regional Director may call for forfeiture of all or part of a surety bond or other form of financial assurance, or demand performance from a guarantor, if the lessee or grantee covered by the financial assurance refuses or is unable to comply with any term or condition of a lease, a RUE grant, or a pipeline ROW grant, as well as any regulation. Throughout this section, BOEM proposes to add references to a grant, a grant holder, and grant obligations to implement the revisions in proposed paragraph (a)(1). BOEM proposes to revise (a)(2) to replace ''other form of security'' with ''other form of financial assurance'' for consistent terminology.

BOEM proposes to revise paragraph (b) to include surety bonds ''or other financial assurance'' so that BOEM may pursue forfeiture of a surety bond or other financial assurance. The word ''lessee'' would also be replaced with ''record title holder'' to ensure that co-lessees are included.

BOEM proposes to revise paragraph (c)(1) to include ''financial institution holding or providing your financial assurance'' as one of the parties the Regional Director would notify of a determination to call for forfeiture because a bank or other financial institution may hold funds subject to forfeiture.

The proposed rule would revise paragraph (c)(1)(ii) to acknowledge limitations authorized by § 556.902(a)(3) by more precisely stating that the Regional Director will use an estimate of the cost of the corrective action needed to bring a lease into compliance when determining the amount to be forfeited, subject, in the case of a guarantee, to any limitation authorized by proposed § 556.902(a)(3).

BOEM proposes to replace existing paragraphs (c)(2)(ii) and (iii) with a new paragraph (c)(2)(ii) that would specify that to avoid forfeiture by promising to take corrective action, any financial assurance provider would have to agree to, and demonstrate that it will complete the required corrective action to bring the relevant lease into compliance within the timeframe specified by the Regional Director, even if the cost of such compliance exceeds the limit of the financial assurance. The proposed changes make clear that existing paragraphs (c)(2)(ii) and (iii) apply to all forms of financial assurance, including the caveat that corrective action must be completed even if the cost of compliance exceeds the limit of the financial assurance.

BOEM proposes to revise existing paragraphs (d) and (e)(2) by replacing ''leases'' with ''lease or grant'' to extend the applicability of these provisions to include holders of RUE and ROW grants.

BOEM proposes to revise paragraph (f)(1) to include ''grant'' as well as lease. BOEM also proposes to revise paragraph (f)(2) to clarify that BOEM may recover additional costs from a third-party guarantor only to the extent covered by the guarantee. This would be consistent with the change made at § 556.902(a)(3) to allow the use of limited third-party guarantees.

This rulemaking would also reword paragraph (g) for clarity.

In some circumstances, predecessor lessees that have been notified about the failure of their successor organizations to fulfill their decommissioning obligations will initiate the requisite decommissioning activities. In these cases, predecessor lessees or grantees are likely to incur costs that could be funded from financial assurance posted with BOEM on behalf of the current lessee. Some of this financial assurance may be forfeited by the current lessee or by other successor lessees. BOEM proposes to add a paragraph (h) to make clear that BOEM may provide funding collected from forfeited financial assurance to predecessor lessees or grant holders or to third parties taking corrective actions on the lease or grant.

Part 590—Appeal Procedures

Subpart A—Offshore Minerals Management Appeal Procedures

Section 590.4 How do I file an appeal?

BOEM proposes to add paragraph (c) to specify that, while a demand for supplemental financial assurance may be appealed to the IBLA, a stay can only be granted if an appeal surety bond for an amount equal to the demand is posted. This is intended to mitigate the risk to the government that, after the appeal is decided, a company will be unable to perform its obligations because of its financial deterioration during pendency of the appeal.

Severability

BOEM proposes to include in the final rule that, should any court hold unlawful and/or set aside portions of this rulemaking, the remaining portions are severable and therefore should not be remanded to the agency. The proposed rule contains three main components: (1) Streamlining requirements for supplemental financial assurance; (2) Establishing ''P70'' as the relevant estimate for the amount of any supplemental financial assurance, and (3) Making several, less significant changes to, among other things. right-of-use and easement and right-of-way grants and decommissioning accounts. See preamble sections IV.B through V.C.

These three components operate largely independent of each other: the first component considers whether a lessee is at risk of default based on the lessee's credit rating or the proved reserves on the lease; the second component considers the appropriate requirements in light of that risk; and the third component addresses several longstanding and technical matters that do not bear directly on the first two components. Indeed, these three components are sufficiently distinct that their severability does not depend on the specifics of this proposed rule. For example, if, in the final rule, BOEM sets the appropriate level of supplemental financial assurance at a different P-value, that decision would remain severable from the threshold determination regarding *whether* to collect supplemental financial assurance and from the other separate technical changes proposed by this rule.

XI. Additional Comments Solicited by BOEM

In addition to those comment requests stated above, BOEM also requests comments on the topics below:

- BOEM is considering the inclusion of offshore joint and several decommissioning liabilities (of the co-lessees that would otherwise have exempted the lessee from providing supplemental financial assurance) in the determination of a proxy credit rating when these liabilities are ''disproportionately high'' and may encumber that co-lessee's ability to

carry out future obligations. BOEM is requesting comments on the appropriate criteria to determine what constitutes ''disproportionately high'' offshore liabilities, for example, a ratio of decommissioning liabilities to the net worth of the co-lessee above X times, or other financially significant and reasonable criteria on how these liabilities should best be incorporated into the proxy credit rating that BOEM will derive.

- The use of End-of-Life (Years) in the evaluation of asset value as an alternative to using the decommissioning costs ratio. BOEM requests comments on the use of a minimum number of years of production remaining criterion to qualify for an exemption from supplemental financial assurance. Possibly, End-of-Life criteria could be an alternative to the 3:1 ratio of value of reserves to decommissioning costs.
- The consideration of bond issuance ratings, in addition to issuer credit ratings, in determining the financial risk posed by lessees and grant holders. BOEM also invites comments on determining an appropriate threshold for bond issuance ratings, such as general unsecured debt ratings.
- Should BOEM exclude third-party guarantors from the requirement of § 556.902(a)(3) that guarantees must ''guarantee compliance with all obligations of all lessees, operating rights, owners and operators on the lease'' in addition to allowing a third-party guarantee to be limited in amount?

XII. Procedural Matters

A. Executive Order 12866: Regulatory Planning and Review, as Amended by Executive Order 14094—Modernizing Regulatory Review, and Executive Order 13563: Improving Regulation and Regulatory Review

Executive Order 12866, as amend by Executive Order 14094 provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant rules. OIRA has reviewed this proposed rule and determined that it is a significant action under Executive Order 12866, as amend by Executive Order 14094 Sec 3 (f)(1). This rulemaking will result in an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of 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.

Executive Order 13563 reaffirms the principles of Executive Order 12866, as amend by Executive Order 14094, while calling for improvements in the Nation's regulatory system to promote predictability and reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. Executive Order 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. BOEM has developed this proposed rule in a manner consistent with these requirements.

BOEM's proposed changes are estimated to increase the private cost to lessees in the form of bonding or other financial assurance premiums. BOEM has drafted an initial regulatory impact analysis (IRIA) detailing the estimated impacts of this proposed rule. The IRIA reflects both monetized and non-monetized impacts; the costs and benefits of the non-monetized impacts are discussed qualitatively in the document. BOEM's IRIA is available in the public docket for this rulemaking.

BOEM expects this proposed rule may increase the total amount of financial assurance, increasing the aggregate private cost to lessees of financial assurance premiums. The table below summarizes BOEM's estimate of the cost in financial assurance premiums paid by lessees over a 20-year time horizon if this proposed rule is finalized less the premiums associated with BOEM's existing current financial assurance portfolio. Additional information on the estimated transfers, costs, and benefits can be found in the IRIA posted in the public docket for this proposed rule.

TOTAL ESTIMATED INCREASE IN BONDING FINANCIAL ASSURANCE PREMIUMS ASSOCIATED WITH BOEM'S PROPOSED AMENDMENTS

[2022–2041, 2021$ millions]

2022–2041	Discounted at 3%	Discounted at 7%
Total Compliance Cost	$4,867	$3,379
Annualized Compliance Cost	327.1	318.9

B. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires agencies to analyze the economic impact of regulations when a significant economic impact on a substantial number of small entities is likely and to consider regulatory alternatives that will achieve the agency's goals while minimizing the burden on small entities. BOEM has provided an initial regulatory flexibility analysis (IRFA), which assesses the impact of this proposed rule on small entities. The IRFA is available in the public docket for this rulemaking.

As defined by the Small Business Administration (SBA), a small entity is one that is ''independently owned and operated and which is not dominant in its field of operation.'' What characterizes a small business varies from industry to industry. The proposed rule would affect OCS lessees and RUE grant holders and pipeline ROW grant holders on the OCS. The analysis shows that this includes roughly 536 companies with ownership interests in OCS leases and grants. Entities that would operate under this proposed rule are classified primarily under North American Industry Classification System (NAICS) codes 211120 (Crude Petroleum Extraction), 211130 (Natural Gas Extraction), and 486110 (Pipeline Transportation of Crude Oil and Natural Gas). For NAICS classifications 211120 and 211130, the SBA defines a small business as one with fewer than 1,250 employees; for NAICS code 486110, a business with fewer than 1,500 employees.

Based on these criteria, approximately 407 (76 percent) of the businesses operating on the OCS subject to this proposed rule are considered small; the remaining businesses are considered large entities. All of the operating businesses meeting the SBA ''small business'' classification are potentially impacted; therefore, BOEM expects that the proposed rule would affect a substantial number of small entities. Small and large oil and gas companies have different business models. Large

oil and gas companies tend to focus their business efforts on new exploration and development projects. Such projects tend to be large in scale, low in frequency, and focused on deep water operations; as a result, the rate of their oil and gas reserve depletion is low. In contrast, most small oil and gas companies tend to focus on late-stage oil and gas production intended to maximize the residual output from established facilities; as a result, the rate of their oil and gas reserve depletion is high. For this reason, smaller companies tend to operate large numbers of old facilities, which are likely to require decommissioning sooner than newer facilities. Accordingly, the prospective decommissioning costs of small oil companies are likely to be high relative to their net tangible assets, making these companies disproportionately susceptible to any change in decommissioning costs and the associated costs of providing supplemental financial assurance. Because BOEM's financial assurance program is intended to ensure that all current lessees meet their obligations, and thereby avoid the need for the taxpayer to assume these obligations in the event of default, any action taken by BOEM to ensure financial responsibility of lessees would necessarily significantly impact smaller companies.

BOEM estimated the annualized increase in private costs to lessees and allocated those costs to small and large entities based on their decommissioning liabilities. BOEM's analysis concludes that the proposed regulatory changes could cause small companies to incur $252.6 million (at a 7 percent discount rate) in annualized compliance costs. BOEM recognizes that there will be incremental cost burdens to most affected small entities. BOEM seeks specific comment and feedback from affected small entities on the costs associated with this rulemaking. Additional information about these conclusions can be found in the IRFA for this proposed rule.

ESTIMATED IMPACT IN PRIVATE COST FOR SMALL LESSEES

[2021, $millions]

2021–2041	Discounted at 3%	Discounted at 7%
Total Compliance Cost	$3,820	$2,676
Annualized Compliance Cost	256.8	252.6

The proposed changes are designed to balance the risk of non-performance with the costs and disincentives to production that are associated with the requirement to provide supplemental financial assurance. The IRIA and the IRFA include three regulatory alternatives which were considered and not selected by BOEM. This section walks through the alternatives (which are discussed in more detail in the IRIA) and discusses how these alternatives impact small businesses and why they were not selected.

Regulatory Alternatives

There are three regulatory alternatives to the proposed action analyzed in the IRIA:

1. *No Action Alternative:* Continue the policies of partial implementation of NTL No. 2016–N01.
2. *More Stringent Regulatory Alternative:* Full implementation of NTL No. 2016–N01.
3. *Less Stringent Regulatory Alternative:* Lower Tier 1 [16] cutoff to BB− and include a waiver for lessees with Tier 1 predecessor lessees.

Under the no action alternative, BOEM would continue to partially implement NTL No. 2016–N01, which only requires high-risk, Tier 2 lessees (lessees with a credit rating below BB−) to provide bonds or other financial assurance and only for their sole liability properties.[17] Only Tier 2 lessees that do not have another lessee in the chain of title would be required to provide supplemental financial assurance. This alternative differs from the proposed rule in that the proposed rule would change the Tier 2 demarcation to those lessees with ratings below BBB−. The proposed rule also would require supplemental financial assurance for Tier 2 lessees who do not have a Tier 1 (low risk) co-lessee, grant holder, or co-grant-holder regardless of the presence of any predecessor lessee or grantee, even a Tier 1 predecessor. This alternative is more fully described in the IRIA as the baseline.

Under the more stringent alternative, BOEM would fully implement NTL No. 2016–N01. The NTL included guidance on how BOEM would evaluate the five criteria for determining a company's ability to meet its OCS obligations for self-insurance, which are described in more detail in the IRIA. The result of NTL No. 2016–N01, as written, was that not even the subsidiaries of highly rated companies could provide sufficient financial assurance for the full amount of their OCS liabilities. More information on the more stringent alternative is included in the IRIA.

Under the less stringent alternative, BOEM analyzed an alternative that would maintain the baseline threshold demarcation between Tier 1 and Tier 2 companies at BB−. The less stringent option also would include the baseline's consideration of predecessor lessees but would require that at least one predecessor lessee be a Tier 1 company in order for the current lessee to avoid having to provide supplemental financial assurance. This alternative would require Tier 2 lessees who have Tier 2 predecessor lessees to provide supplemental financial assurance; they would not be required to do so under the baseline. As opposed to the proposed rule, lessees with a BB−, BB, or BB+ rating would not be required to provide supplemental financial assurance under this alternative. Further, under this alternative, any Tier 2 lessee with a Tier 1 lessee in the chain of title would not be required to provide supplemental financial assurance, unlike under the proposed rule. BOEM fully outlines this alternative in the IRIA.

[16] The IRIA alternatives describe lessees as Tier 1 or Tier 2 depending on whether BOEM would require the lessee to provide supplemental financial assurance. Tier 1 lessees are considered low risk and would not be required to provide supplemental financial assurance, while Tier 2 lessees are considered high risk and would be required to do so.

[17] This does not fully reflect the current policy, and therefore is not literally a ''no action'' alternative: BOEM broadened the scope of its financial assurance requirement relative to a partial implementation of NTL No. 2016–N01 last year. See BOEM Expands Financial Assurance Efforts | Bureau of Ocean Energy Management, *https://www.boem.gov/newsroom/notes-stakeholders/boem-expands-financial-assurance-efforts.* However, there have been relatively few companies affected by the new policy to date, and it is too recent for this policy change to have had a discernible impact on financial assurance demands; therefore, the alternative used in the IRIA best estimates the baseline.

Discussion of Regulatory Alternatives

Under the no action alternative, the current level of financial risk would remain the same. However, BOEM reviewed NTL No. 2016–N01 after several recent bankruptcies and determined that changes were necessary to comprehensively identify, prioritize, and manage the health, safety, and environmental risks associated with industry activities on the OCS.

In its IRIA analysis, BOEM estimates that implementation of the more stringent alternative would significantly increase the compliance cost over the baseline and over the proposed rule. BOEM acknowledges that there could be some additional risk reduction by bonding a greater number of liabilities, but, given joint and several liability with multiple co-lessees and predecessor lessees, the relative risk reduction from this alternative would be very small. Although the more stringent option would reduce the risk that the U.S. Government might have to assume performance of the lessee's obligations, the $647 million annualized compliance cost of this alternative could be a significant cost burden on the U.S. offshore oil and gas industry.

The less stringent alternative would differ in two problematic ways from the proposed action. First, the less stringent option would maintain the baseline demarcation between Tier 1 and Tier 2, which is lower than that of the proposed rule. This would not meaningfully help to mitigate default risk to the taxpayer on decommissioning liabilities. Second, the less stringent alternative would not require financial assurance should a Tier 1 predecessor lessee be in the chain of title. Although the less stringent alternative would result in lower bonding costs for industry and small businesses than the proposed rule, consideration of predecessor lessees and grantees encourages moral hazard by incentivizing current lessees to pass risk to predecessors rather than proactively prepare for decommissioning and related obligations. Therefore, BOEM did not select this alternative. See the IRIA for more detailed information about the alternative bonding and risk profiles.

BOEM decided against the less stringent alternative. Instead, BOEM will require supplemental financial assurance from all financially weak lessees that lack either financially strong co-lessees or sufficiently valuable proved oil and gas reserves to attract a buyer if needed. Eschewing reliance on predecessor lessees ensures that financial responsibility for decommissioning rests with current lessees and encourages those lessees to financially prepare for decommissioning costs, rather than pass those expenses to predecessor lessees and possibly the taxpayer. BOEM finds the less stringent alternative would not adequately reduce default risk and would not require all lessees to fully internalize the cost of decommissioning. This alternative is also discussed in more detail below and in the IRIA.

As part of this less stringent alternative, potential adverse impacts to small businesses could be reduced if BOEM kept the Tier 2 threshold at BB− relative to the proposed rule, which increases such threshold to BBB− to match the investment grade standard. BOEM has determined that the use of an investment grade standard for waiving supplemental financial assurance is the most appropriate threshold because this approach minimizes credit default risk to the taxpayer without overburdening offshore companies with the cost of providing financial assurance in low credit risk scenarios.

BOEM finds that the less stringent alternative would slightly increase the likelihood that decommissioning costs would be borne by the taxpayer as lowering the floor of Tier 1 would expand the number of companies not subject to financial assurance to include those with higher 1-year default rates.

Although credit ratings are objective criteria that are intended to accurately reflect the risk of default and the potential that the Federal Government could be forced to undertake performance obligations of OCS lessees, BOEM recognizes that the proportion of small companies adversely affected by the proposed rule would be higher than that of large companies. However, this disproportionate effect on small companies is not attributable to the proposed rule, but results from the need to ensure that decommissioning obligations are fulfilled.

This less stringent alternative also relies on predecessor lessees and grantees when determining if and how much supplemental financial assurance will be required, which BOEM's proposed rule does not. By not allowing reliance on predecessors to excuse supplemental financial assurance, BOEM requires that all lessees take into account the full cost of decommissioning as they will have provided financial assurance that prevents the need to turn to predecessor lessees. Any entity that owned a lease at any point in time is jointly and severally liable for the costs of decommissioning facilities on that lease during their tenure, along with the current and prior owners, until such time as the facility has been permanently decommissioned. Therefore, if the current lessee is unable or unwilling to decommission it at the end of its useful life, BSEE can order the prior lessee to complete the decommissioning obligations for facilities that existed on the lease at the time of ownership. If BOEM were to take into account the financial capacity of predecessor lessees in determining the amount of supplemental financial assurance required of a current owner, the financial burden on small companies would be substantially reduced compared to that resulting from the proposed rule, because a much smaller number of them would be required to post supplemental financial assurance. Given that the required amount of supplemental financial assurance relative to the net assets of such companies is often substantial, and considering that the premiums on the underlying bonds can be significant relative to the net income of such companies, taking into account predecessor lessee strength could substantially reduce the potential adverse impacts of requiring financial assurance from small business.

Though allowing the presence of a predecessor lessee or grantee to change financial assurance requirements would reduce the potential adverse impacts to small businesses, BOEM does not recommend waiving supplemental financial assurance from current lessees based only on the existence of financially viable predecessor lessees. Financial consideration for the decommissioning liability has already been discounted from the asset purchase price paid by the current lessee. As a corollary, a lessee knows that BOEM may demand supplemental financial assurance from it to cover its obligations, including decommissioning obligations for which it shares liability with a predecessor lessee. Armed with this knowledge, all lessees can plan ahead and include the possible need to provide supplemental financial assurance in their business plans. Therefore, there is no need to insulate current lessees from supplemental financial assurance demands by relying on the financial ability of strong predecessor lessees. Along the same lines, allowing current lessees not to provide supplemental financial assurance based on a predecessor lessee's strength may incentivize current lessees to not consider decommissioning costs in their business decisions or to take risks they would not have otherwise taken if they had financial resources at risk in the event

of non-performance. This ''moral hazard'' could distort the market for lease transfers by allowing a buyer and seller to conduct a transaction without calculating in end-of-life decommissioning cash outflows, the buyer relying on end-of-life bankruptcy instead of decommissioning, and may ultimately result in predecessor lessees and grantees having to perform decommissioning for which they had not planned.

While waiving supplemental financial assurance for companies having financially viable predecessor lessees and grantees would mitigate the impact the proposed rule on small businesses, BOEM has determined that this benefit would not be acceptable given that, under these circumstances, lessees may not always fully internalize the cost of their decommissioning obligations into their operations as they can rely on the predecessor lessee if needed and avoid having to pay financial assurance premiums. Additional moral hazard implications of implementing such a retroactive policy are described in more detail in the IRIA. Reliance on predecessor lessees would likely also cause them to require the buyer provide them financial assurance prior to selling their leases to new owners (which would also result in a cost for small businesses). For these reasons, BOEM has determined that any waiver of financial responsibility based on business relationships should be limited to situations where the liable party voluntarily becomes a current co-lessee or co-grantee and therefore, knowingly assumes its liabilities.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule would revise the financial assurance requirements for OCS lessees and grant holders and would require supplemental financial assurance where the risk is highest. BOEM's proposed changes would: (1) Modify the evaluation process for requiring additional security, (2) Simplify and strengthen the evaluation criteria, and (3) Remove restrictive provisions for third-party guarantees and decommissioning accounts. These proposed changes reflect an interest in relying on current lessees and grant holders to provide required financial assurance, aligning the evaluation criteria with banking and finance industry practices, providing greater flexibility for industry, and protecting taxpayers from exposure to the consequences of noncompliance with DOI regulations and OCS lease obligations, particularly the nonperformance of decommissioning obligations.

This proposed rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act, because implementation of this rulemaking will have an annual effect on the economy of $100 million or more.

For more information on the small business impacts, see the IRFA analysis and the discussion in section XII.B of this preamble. 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 to the Regional Small Business Regulatory Fairness Board. 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 BSEE or BOEM, call 1–888–REG–FAIR (1–888–734–3247).

D. Unfunded Mandates Reform Act (UMRA)

This proposed rule does not impose an unfunded mandate on State, local, or tribal governments of $85 million per year.[18] This proposed rule does not have a significant or unique effect on State, local, or tribal governments. Moreover, the proposed rule would not have disproportionate budgetary effects on these governments.

BOEM has determined that this proposed rule would impose costs on the private sector of more than $182 million in a single year. The IRIA includes information on the costs of the proposed rule and its alternatives. The UMRA (2 U.S.C. 1531 *et seq.*) requires BOEM to perform a cost-benefit assessment and to provide the legal authority for the rulemaking, a description of the macro-economic effects, and a summary of the State, local, or tribal government concerns. These items are described in more detail in the IRIA.

Because all of the anticipated private sector expenditures that may result from the proposed rule are analyzed in the IRIA and IRFA (*i.e.,* expenditures of the offshore oil and gas industry), these documents satisfy the UMRA requirement to estimate any disproportionate budgetary effects of the proposed rule on a particular segment of the private sector. As explained in the IRIA, the rulemaking is anticipated to have annualized net estimated compliance costs of $319 million annually (7 percent discounting) but provides strengthened financial assurance to protect taxpayers from the costs of decommissioning offshore infrastructure. Under the proposed action, BOEM will evaluate the financial strength of OCS lessees and grant holders that could affect their ability to meet OCS obligations. The IRIA outlines both a less stringent and more stringent regulatory alternative. The more stringent option was not selected as the added benefits did not justify the increased compliance burden. BOEM's less stringent option includes a lower credit rating of BB − to be classified as low risk and allows predecessor lessee or grantee strength to be included in the financial assurance evaluation. This alternative was not selected as BB rated companies are considered speculative and below investment grade and relying on predecessor lessees and grantees introduces a moral hazard and does not require each current lessee to internalize its decommissioning obligations.

E. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This proposed rule does not affect a taking of private property or otherwise have takings implications under Executive Order 12630. Therefore, a takings implication assessment is not required.

F. Executive Order 13132: Federalism

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. Therefore, a federalism summary impact statement is not required.

G. Executive Order 12988: Civil Justice Reform

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this proposed rule:

(1) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

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

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 defines policies that have tribal implications as

[18] 2021 values are available here: *https://crsreports.congress.gov/product/pdf/R/R40957.*

regulations, legislative comments or proposed legislation, and other policy statements or actions that will or may have a substantial direct effect on one or more Indian Tribes, or on the relationship between the Federal Government and one or more Indian Tribes.

BOEM strives to strengthen its government-to-government relationships with American Indian and Alaska Native Tribes through a commitment to consultation with those tribes and recognition of their right to self-governance and tribal sovereignty. The DOI's consultation policy for Tribal Nations, as described in Departmental Manual part 512 chapter 4, expands on the above definition from E.O. 13175, and defines a Departmental Action with Tribal Implications as—

''[a]ny regulation, rulemaking, policy, guidance, legislative proposal, plan, programmatic or operational activity, or grant or funding formula change that may have a substantial direct effect on a Tribe in matters including but not limited to: (1) Tribal cultural practices; lands; treaty rights; resources; ancestral lands; sacred sites, including sites that are submerged; and lands Tribes were removed from, or access to traditional areas of cultural or religious importance on Federally managed lands and waters; (2) the ability of a Tribe to govern or provide services to its members; (3) a Tribe's formal relationship with the Department, be it nation-to-nation or beneficiary-to-trustee; or, (4) any action planned by a non-federal entity that involves funding, approval, or other final agency action provided by the Department, unless the Tribe is a party to the action. Substantial direct effects on Tribes may include, but are not limited to, effects as shown in the Consensus-Seeking Model (Figure 1).'' 512 DM 4.3.B. (November 30, 2022). DOI's procedures for consultation with Tribal Nations also provide that:

''Bureaus/Offices must invite Indian Tribes early in the planning process to consult whenever a Departmental plan or action with Tribal Implications arises. Bureaus/Offices should operate under the assumption that all actions with land or resource use or resource impacts may have Tribal implications and should extend consultation invitations accordingly.'' 512 DM 5.4. (November 30, 2022).

Additionally, we are also respectful of our responsibilities for consultation with Alaska Native Claims Settlement Act (ANCSA) Corporations. The DOI's consultation policy defines a Departmental Action with ANCSA Corporation Implications as—

''[a]ny regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an ANCSA Corporation, including but not limited to: (1) any activity that may substantially affect land, water, areas, or resources owned or selected by ANCSA Corporation; (2) any activity that may impact the ability of an ANCSA Corporation to participate in Departmental programs for which it qualifies; (3) any activity that may impact the ability of ANCSA shareholders to access and use ANCSA lands, water areas, or resources; (4) any activity that may impact the ability of Alaska Native people to maintain their traditional way of life and subsistence practices on ANCSA Corporation lands, waters, or adjacent federal lands; or, (5) any activity that may have a direct effect on the ability of an ANCSA Corporation to fulfil the purposes for which it was established under ANCSA.'' 512 DM 6.3.C. (November 30, 2022).

DOI consultation procedures for ANSCA corporations also provides: ''Bureaus and Offices should operate under the assumption that all actions with land or resource use or resource impacts may have ANCSA Corporation implications and should extend consultation invitations accordingly. When ANCSA Corporations indicate that there is substantial and direct effect of the Departmental Action with ANCSA Corporation Implications, the Department must engage in consultation.'' 512 DM 7.4.A. (November 30, 2022).

This rulemaking proposes to modify the criteria for determining whether oil, gas, and/or sulfur lessees, RUE grant holders, and pipeline ROW grant holders may be required to provide bonds or other financial assurance, above the current regulatorily prescribed base bond amounts, to ensure compliance with their OCSLA obligations. It also proposes to remove certain restrictive provisions for third-party guarantees and decommissioning accounts and would add new criteria under which a bond, or third-party guarantee, that was provided as supplemental financial assurance, may be cancelled. Additionally, this proposed rule would clarify bonding requirements for RUEs serving Federal leases.

We have evaluated this proposed rule under the DOI's consultation policy and under the criteria in Executive Order 13175, and have determined that, while this rulemaking will likely not cause any substantial direct effects on environmental or cultural resources, there may be resource or economic impacts to one or more federally recognized Indian tribes or ANCSA Corporations as a result of this proposed rule.

In developing the 2020 Joint Notice of Proposed Rulemaking (85 FR 65924), BOEM determined that the rulemaking would have no substantial direct effects on environmental or cultural resources. However, BOEM determined there was the potential for economic impacts to one Tribal Nation and one ANCSA Corporation. In August 2018, BOEM invited consultation with this Tribal Nation and the ANCSA Corporation. BOEM consulted with the Tribal Nation in September 2018. The ANCSA Corporation did not request to consult. At that time, BOEM discussed the possible impacts from the 2020 proposal, as documented in the memorandum to the docket titled ''2018 Outreach on the Financial Assurance Proposal.''

On March 31, 2023, BOEM sent letters to all Tribes and ANCSA Corporations to ensure they are aware of this preparation for a new proposed rulemaking, to answer any immediate questions they may have, and to invite formal consultation if they would like to consult. To date, only one Tribe has requested consultation, however we will formally consult with any Tribes or ANCSA corporations at any stage in this rulemaking as it advances if consultation is requested.

I. Paperwork Reduction Act (PRA)

This proposed rule references existing information collections (ICs) previously approved by OMB and adds new IC requirements for BOEM regulations that require OMB review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Therefore, an information collection request for BOEM is being submitted to OMB for review and approval. The ICs related to this rulemaking concern the requirements under 30 CFR parts 550 and 556. BOEM may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

OMB has reviewed and approved the information collection requirements associated with risk management and financial assurance for OCS lease and grant obligations and assigned the following OMB control numbers:

- 1010–0006 (BOEM), ''Leasing of Sulfur or Oil and Gas in the Outer Continental Shelf (30 CFR parts 550, Subpart J; 556, Subparts A through I, and K; and 560, Subparts B and E) (expires 03/31/2026), and
- 1010–0114 (BOEM), ''30 CFR 550, Subpart A, General, and Subpart K, Oil and Gas Production Requirements (expires 05/31/2026).

This proposed rule would modify collections of information under 30 CFR part 550, subparts A and J, and 30 CFR part 556, subpart I, concerning financial assurance requirements (such as bonding) for leases, pipeline ROW grants, and RUE grants. OMB has reviewed and approved the information collection requirements associated with financial assurance regulations for leases (30 CFR 556.900 through 907), pipeline ROW grants (30 CFR 550.1011), and RUE grants (30 CFR 550.160 and 550.166).

BOEM estimates that the number of information collection burden hours for the proposed rule overall are close to the same as for the existing regulatory framework. If this proposed rule becomes final and effective, the new and changed provisions would increase the overall annual burden hours for OMB Control Number 1010–0006 by 77 hours (totaling 19,131 annual burden hours) and 268 responses (totaling 10,575 responses) as justified below. The changed provisions for OMB Control Number 1010–0114 would add new and revise requirements in 30 CFR part 550, subpart A, but would not impact the overall burden hours for this control number because the burdens for these provisions are counted under OMB Control Number 1010–0006. However, the regulatory descriptions of new and modified requirements would be extensive enough to require an update of the OMB control number.

When needed, BOEM would submit future burden changes (either increases or decreases) of the OMB control numbers with reasoning to OMB for review and approval. Every 3 years, BOEM would also review the burden numbers for changes, seek public comment, and submit any request for changes to OMB for approval.

Title of Collection: 30 CFR part 550, ''Oil and Gas and Sulfur Operations in the Outer Continental Shelf,'' and 30 CFR part 556, ''Leasing of Sulfur or Oil and Gas and Bonding Requirements in the Outer Continental Shelf.''

OMB Control Number: 1010–0006 and 1010–0114.

Form Number: None.

Type of Review: Revision of currently approved collections.

Respondents/Affected Public: Federal OCS oil, gas, and sulfur operators and lessees, and RUE grant and pipeline ROW grant holders.

Total Estimated Number of Annual Responses: 10,575 responses for 1010–0006, and 5,302 responses for 1010–0114.

Total Estimated Number of Annual Burden Hours: 19,131 hours for 1010–0006, and 18,323 hours for 1010–0114.

Respondent's Obligation: Responses to these collections of information are mandatory or are required to obtain or retain a benefit.

Frequency of Collection: The frequency of response varies but is primarily on the occasion or as per the requirement.

Total Estimated Annual Non-hour Burden Cost: No additional non-hour costs.

The following is a brief explanation of how the proposed regulatory changes would affect the various subparts' hour and non-hour cost burdens for OMB Control Number 1010–0114.

Right-of-Use and Easement

BOEM's existing regulations concerning RUE grants for an OCS lessee and a State lessee are found in 30 CFR 550.160 through 550.166. The burdens related to 30 CFR 550.160 and 550.166 are identified in OMB Control Number 1010–0114 but accounted for in OMB Control Number 1010–0006.

Section 550.160 provides that an applicant for a RUE that serves an OCS lease must meet bonding requirements, but the regulation does not prescribe a base surety bond amount. The proposed rule would replace this requirement with a cross-reference to the specific criteria governing financial assurance demands in proposed § 550.166. Therefore, BOEM is proposing to establish a Federal RUE base financial assurance requirement matching the existing base surety bond requirement for State RUEs. The annual burden hour likely would not change since RUEs that serve OCS leases are currently already meeting bonding requirements under BOEM's agreement-specific conditions of approval. The proposed regulations will be more specific and clarify the meaning of ''meeting bonding requirements.''

BOEM is proposing to establish a $500,000 area-wide RUE financial assurance requirement for any RUE-holder that owns one or more RUEs, regardless of whether they serve a State or Federal lease. BOEM is also proposing to allow any lessee that has posted an area-wide lease surety bond to modify that lease surety bond to also cover any RUE(s) held by the same entity.

BOEM is also proposing to revise the RUE regulations to clarify that any RUE grant holder, whether the RUE serves a State or Federal lease, may be required to provide supplemental financial assurance for the RUE if the grant holders do not meet the credit rating or proxy credit rating criteria. The existing regulations authorized demands for supplemental financial assurance but specified no criteria. The annual burden hour would not change based on these clarifications.

The following is the revised burden table and a brief explanation of how the proposed regulatory changes would affect the various subparts' hour and non-hour cost burdens for OMB Control Number 1010–0006:

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Burden Table

[*Italics show expansion of existing requirements*; **bold indicates new requirements**; regular font shows current requirements. Where applicable, updated estimates from the current collection are being used instead of those in the proposed rulemaking.]

30 CFR Part 550 Subpart J	Reporting Requirement*	Hour Burden	Average No. of Annual Responses	Annual Burden Hours
1011(a)	Provide *area-wide financial assurance* (form BOEM-2030) and if required, supplemental financial assurance, and required information.	GOM 0.25	52	13
		Pacific 3.5	3	11
1011(d)	**Demonstrate financial worth/ability to carry out present and future financial obligations, request approval of another form of *financial assurance*, request reduction in amount of supplemental bond required on BOEM-approved forms, *or requested phased financial assurance.* Monitor and submit required information.**	Burden included in 30 CFR 556.901(d).		
	30 CFR 550, Subpart J, TOTAL		**55 Responses**	**24 Hours**

30 CFR Part 556 and NTLs	Reporting Requirement*	Hour Burden	Average No. of Annual Responses	Annual Burden Hours
		Non-Hour Cost Burdens		
	Subpart A			
104(b)	Submit confidentiality agreement.	0.25	500	125
106	Cost recovery/service fees; confirmation receipt.	Cost recovery/service fees and associated documentation are covered under individual reqts. throughout part.		0
107	Submit required documentation electronically through BOEM-approved system; comply with filing specifications, as directed by notice in the *Federal Register* in accordance with § 560.500.	Burden covered in § 560.500.		0
107	File seals, documents, statements, signatures, etc., to establish legal status of all future submissions (paper and/or electronic).	10 min.	400	67
		Subtotal	900	192
	Subpart B			
201-204	Submit nominations, suggestions, comments, and information in response to Request for Information/Comments, draft and/or proposed 5-year leasing program, etc., including information from States/local governments, Federal agencies, industry, and others.	Not considered IC as defined in 5 CFR 1320.3(h)(4).		0
201-204	Submit nominations & specific information requested in draft proposed 5-year leasing program, from States/local governments.	4	69	276
		Subtotal	69	276
	Subpart C			
301; 302	Submit response & specific information requested in Requests for Industry Interest and Calls for Information and Nominations, etc., on areas proposed for leasing; including information from States/local governments.	Not considered IC as defined in 5 CFR 1320.3(h)(4)		0
302(d)	Request summary of interest (non-proprietary information) for Calls for Information/Requests for Interest, etc.	1	5	5
305; 306	States or local governments submit comments, recommendations, other responses on size, timing, or location of proposed lease sale. Request extension; enter agreement.	4	25	100
		Subtotal	30	105
	Subpart D			
400-402; 405	Establish file for qualification; submit evidence/certification for lessee/bidder qualifications. Provide updates; obtain BOEM approval & qualification number.	2	107	214
403(c)	Request hearing on disqualification.	Requirement not considered IC under 5 CFR 1320.3(h)(8).		0
403; 404	Notify BOEM if you or your principals are excluded, disqualified, or convicted of a crime—Federal non-procurement debarment and suspension requirements; request exception; enter transaction.	1.5	50	75

405	Notify BOEM of all mergers, name changes, or change of business.	Requirement not considered IC under 5 CFR 1320.3(h)(1).		0
		Subtotal	157	289
	Subpart E			
500; 501	Submit bids, deposits, and required information, including GDIS & maps; in manner specified. Make data available to BOEM.	5	2,000	10,000
500(e); 517	Request reconsideration of bid decision.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
501(e)	Apply for reimbursement.	Burden covered in 1010-0048, 30 CFR part 551.		0
511(b); 517	Submit appeal due to restricted joint bidders list; appeal bid decision.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
513; 514	File statement and detailed report of production. Make documents available to BOEM.	2	100	200
515	Request exemption from bidding restrictions; submit appropriate information.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
516	Notify BOEM of tie bid decision; file agreement on determination of lessee.	3.5	2	7
520; 521; 600(c)	Execute lease (includes submission of evidence of authorized agent/completion and request effective date of lease); submit required data and rental.	1	852	852
520(b)	Provide acceptable bond for payment of a deferred bonus.	0.25	1	1
		Subtotal	2,955	11,060
	Subparts F, G, H			
Subpart F, G, H	References to requests of approval for various operations or submit plans or applications. Burden included with other approved collections for BOEM 30 CFR part 550 (Subpart A 1010-0114; Subpart B 1010-0151) and for BSEE 30 CFR part 250 (Subpart A 1014-0022; Subpart D 1014-0018).			0
701(c); 716(b); 801(b); 810(b)	Submit new designation of operator (BOEM-1123).	Burden covered in 1010-0114.		0
700-716	File application and required information for assignment/transfer of record title/lease interest (form BOEM-0150; form is 30 min.) (includes sell, sublease, sever, exchange, transfer); request effective date/confidentiality; provide notifications.	1	1,414	1,414
		$198 fee x 1,414 forms = $279,972		
800-810	File application and required information for assignment/transfer of operating interest (Form BOEM-0151) (includes sale, sublease, segregation exchange, severance, transfer); request effective date; provide notifications.	1	421	421
		$198 fee x 421 forms = $83,358		
715(a); 808(a)	File required instruments creating or transferring working interests, etc., for record purposes.	1	2,369	2,369
		$29 fee x 2,369 filings = $68,701		
715(b); 808(b)	Submit "non-required" documents, for record purposes that respondents want BOEM to file with the lease document. *(Accepted on behalf of lessees as a service; BOEM does not require nor need them.)*	$29 fee x 11,518 filings = $334,022		
		Subtotal	4,204	4,204
			$766,053	
	Subpart I			
900(a)-(e); **901**; 902; 903(a); **905**	Submit OCS Mineral Lessee's and Operator's Bond (Form BOEM-2028) *and, if required, provide supplemental financial assurance*; execute bond.	0.33	405	135
900(c), (d), (f), *(g)*; 901(c), *(h)*, **901(d)**, (f); 902; **904**	Demonstrate financial worth/ability to carry out present and future financial obligations, request approval of another form of *financial assurance*, request reduction in amount of supplemental bond required on BOEM-approved forms, *or requested phased financial assurance*. Monitor and submit required information.	3.5	160	560

900(e); 901; 902; 903(a)	Submit OCS Mineral Lessee's and Operator's Supplemental Plugging & Abandonment Bond (Form BOEM-2028A); execute bond.	0.25	141	35
900(f), *(g), (i)*	Submit authority for Regional Director to sell Treasury or alternate type of securities *or financial assurance*.	2	12	24
901	Submit EP, DPP, DOCDs.	IC burden covered in 1010-0151, 30 CFR part 550, subpart B.		0
901*(g)*	Submit oral/written comment on adjusted *financial assurance* amount and information.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
902 (g), (h) NEW	**Request informal resolution or file an appeal of supplemental financial assurance demand**.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
903 *(a), (b);* 905 (c)	Notify BOEM of any lapse in *financial assurance* coverage/action filed alleging lessee, surety, guarantor or financial institution is insolvent or bankrupt or had its charter or license suspended or revoked.	3	4	12
904	*Establish decommissioning account proportional to estimated decommissioning obligation*.	12	2	24
905	Provide third-party guarantee, agreement, financial and required information, related notices, reports, and annual update; notify BOEM if guarantor becomes unqualified.	19	46	874
905(d); 906	Provide notice of and request approval to terminate period of liability, cancel *financial assurance*; provide required information.	0.5	378	189
907(c)(2)	Provide information to demonstrate lease will be brought into compliance.	16	5	80
		Subtotal	1,157	1,933
	Subpart K			
1101	Request relinquishment (form BOEM-0152) of lease; submit required information.	1	247	247
1102	Request additional time to bring lease into compliance.	1	1	1
1102(c)	Comment on cancellation.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
		Subtotal	248	248
	30 CFR Part 556 TOTAL		9,720 Responses	18,307 Hours
			$766,053 Non-Hour Cost Burdens	
30 CFR Part 560	**Reporting Requirement***	**Hour Burden**	**Average No. of Annual Responses**	**Annual Burden Hours**
560.224(a)	Request BOEM to reconsider field assignment of a lease.	Requirement not considered IC under 5 CFR 1320.3(h)(9)		0
560.500	Submit required documentation electronically through BOEM-approved system; comply with filing specifications, as directed by notice in the *Federal Register* (*e.g.*, financial assurance info.).	1	800	800
	30 CFR Part 560 TOTAL		**800 Responses**	**800 Hours**
	TOTAL REPORTING FOR COLLECTION		**10,575 Responses**	**19,131 Hours**
			$766,053 Non-Hour Cost Burdens	

BILLING CODE C

Pipelines and Pipeline Right-of-Way Grants

Proposed § 550.1011(d) relates to BOEM's determination of whether supplemental financial assurance is necessary to ensure compliance with the obligations under a pipeline ROW grant. This determination would be based on whether pipeline ROW grant holders have the ability to carry out present and future obligations. The criteria proposed for the financial determination include an issuer credit rating or a proxy credit rating. The issuer credit rating and the audited financial information on which BOEM determines a proxy credit rating already exist. The burden of determining a proxy credit rating falls on BOEM. The annual burdens placed on the grant holder would be minimal (providing to BOEM information the grant holder already has) and would be included in the burden estimates for 30 CFR 556.901(d).

Proposed § 550.1011(d)(2) provides that BOEM would consider the issuer credit rating or proxy credit rating of a co-grant holder, because they are liable

for accrued decommissioning obligations for facilities and pipelines on their ROW. The burden for determining credit rating falls mostly on BOEM. The annual burdens placed on the grant holder would be minimal (providing to BOEM information the grant holder already has) and would be included in the burden estimates for 30 CFR 556.901(d).

Bond or Other Financial Assurance Requirements for Leases

Proposed § 556.900(a)(4) proposes to add that supplemental financial assurance required by the Regional Director must be provided before a new lease is issued or an assignment of a lease is approved. The burden increase for this requirement would be included in OMB Control Number 1010–0006. Supplemental financial assurance required by this provision would likely not significantly impact the burdens due to low occurrence, but BOEM would account for the change in the burden table.

Base Financial Assurance and Supplemental Financial Assurance

Proposed § 556.901(d) relates to BOEM's determination of whether supplemental financial assurance is necessary to ensure compliance with the obligations under a lease. New proposed § 556.901(d)(1) would base this determination on an issuer credit rating or a proxy credit rating determined by BOEM based on audited financial information.

New § 556.901(d)(2) provides that BOEM would consider the issuer credit rating or proxy credit rating of a co-lessee, and new § 556.901(d)(3) provides that BOEM would consider the net present value of proved oil and gas reserves on the lease. Lessees' submission of information on proved reserves would account for additional annual burden hours. The lessee would not need to submit proved reserve information if supplemental financial assurance is not required based on its issuer credit rating or proxy credit rating, or those of its co-lessees.

The existing OMB-approved hour burden for each respondent to prepare and submit the information for the existing evaluation criteria requirements is 3.5 hours. In this proposed rule, the revision of the evaluation criteria would likely result in requiring less time for the respondents to prepare and submit the information, particularly for issuer credit rating. If companies choose to demonstrate that the net present value of proved oil and gas reserves on the lease exceeds three times the decommissioning cost associated with production of those reserves, then the time necessary for companies to prepare and submit information on the proved oil and gas reserves would likely be greater than 3.5 hours. Therefore, BOEM proposes to retain the average 3.5-hour burden to reflect the decrease in time required to prepare and submit issuer credit ratings and audited financials and the increase in time required for preparing and submitting information on proved reserves. When the final rule becomes effective, the related burden hours for all respondents (lessee, co-lessee, grant holder, and co-grant holder) would be included in OMB Control Number 1010–0006.

The OMB-approved number of respondents who currently submit financial information under the existing provision is 166 respondents. Recently, BOEM has seen the number of leases decrease in the Gulf of Mexico. BOEM estimates the new number of respondents would be between 150 and 160 respondents. For this request, BOEM will use the higher number of 160 respondents (-6 respondents). This number will be reviewed during the next IC renewal process. When the final rule becomes effective, BOEM will include the new number of respondents in OMB Control Number 1010–0006.

The existing OMB-approved annual burden hours for § 556.901 related to demonstrating financial worth/ability to carry out present and future financial obligations is 581 hours (166 respondents $\times$ 3.5 hours). With the changes provided in the proposed rule and described above, BOEM estimates that the annual hour burden would decrease by approximately 21 annual burden hours, and total annual burden hours would be 560 hours (160 respondents $\times$ 3.5 hours). This decrease in annual burden hours would be reflected in OMB Control Number 1010–0006 when the final rule becomes effective.

BOEM proposes to add paragraph (h) to § 556.901 to establish the limited opportunity to provide the required supplemental financial assurance demanded in three installments during the first 3 years after the effective date of this regulation. This provision would establish the timing and proportions of phased supplemental financial assurance that would be required in each installment. The lessee would have the option to submit the supplemental financial assurance once or in installments. If the lessee chooses to provide supplemental financial assurance in installments, the number of submissions of supplemental financial assurance would likely increase, but only for the first 3 years after the effective date of this regulation. OMB has currently approved 45 annual burden hours for supplemental financial assurance submissions (135 submissions which take 20 minutes each to submit). BOEM estimates the burden hours for the proposed installment submissions provision to be 135 annual burden hours (405 submissions $\times$ 20 minutes), which is an increase of 90 hours over existing OMB approval.

General Requirements for Bonds and Other Financial Assurance

The scope of proposed § 556.902(a) would include ''grant holder'' and financial assurance posted under the requirements of 30 CFR part 550. This change would clarify that the same general requirements for financial assurance provided by lessees, operating rights owners, or operators also apply to financial assurance provided by RUE and pipeline ROW grant holders. BOEM proposes to keep the burdens the same as the existing OMB burdens.

Decommissioning Accounts

Proposed revisions to § 556.904 would allow the Regional Director to authorize a RUE grant holder and a pipeline ROW grant holder, as well as a lessee, to establish a decommissioning account as supplemental financial assurance required under § 556.901(d), or 550.166(b) or 550.1011(d). Because this change represents a new opportunity for grant holders, there are no existing burdens related to this provision under the current OMB approval. BOEM is capturing the requirement to establish decommissioning accounts in the burden table. BOEM estimates 24 annual burden hours for grant holders and/or lessees to establish their decommissioning account.

A new provision is proposed under § 556.904(a)(3), which would require immediate submission of a surety bond or other financial assurance in the amount equal to the remaining unsecured portion of the supplemental financial assurance demand if the initial payment or any scheduled payment into the decommissioning account is not timely made. In the context of paperwork-burden, this provision replaces the existing provision that requires submission of binding instructions. The annual burden hours will remain the same but will shift to the proposed requirement and would be reflected in OMB Control Number 1010–0006.

Third-Party Guarantees

Proposed § 556.905(a) relates to the guarantor's ability to carry out present

and future obligations. Proposed § 556.905(a)(2) would require the guarantor to submit a third-party guarantee agreement. Paragraph (d) would provide that the terms which the existing regulation requires for indemnity agreements must be included in a third-party guarantee agreement. This change is to avoid any inference that the government must incur the expenses of decommissioning before being indemnified by the guarantor. It is a change of the name of the agreement and does not change the associated burden.

Proposed § 556.905(c)(2) would eliminate the requirement that a lessee must cease production until supplemental financial assurance coverage requirements are met when a guarantor becomes unqualified. The regulatory provision would be replaced with a requirement to immediately submit and maintain a substitute surety bond or other financial assurance. Both the existing and proposed provisions require the lessee to provide replacement surety bond coverage; however, BOEM's current OMB Control Number 1010–0006 does not quantify the burdens. Therefore, BOEM would add approximately 8 annual burden hours to OMB Control Number 1010–0006 for any lessee whose guarantor became unqualified.

Proposed § 556.905(b) would remove the requirement that a guarantee ensure compliance with all lessees' or grant holders' obligations and the obligations of all operators on the lease or grant. This revision would allow a third-party guarantor to limit the obligations covered by the third-party guarantee. In some situations, this change could result in additional paperwork burden due to additional surety bonds or other financial assurance that must be provided to BOEM to cover obligations previously covered by a third-party guarantee. BOEM estimates the number of additional financial assurance demands resulting from this revision to be low and the annual burdens would be included in the existing burden estimates for OMB Control Number 1010–0006, and revised in future IC requests, if needed.

Proposed § 556.905 would replace the indemnity agreement with a third-party guarantee agreement with comparable provisions. This change would not impact annual burden hours. Proposed § 556.905(e) would provide that a lessee or grant holder and the guarantor under a third-party guarantee may request BOEM to cancel a third-party guarantee. BOEM would cancel a third-party guarantee under the same terms and conditions provided for cancellation of additional surety bonds in proposed § 556.906(d)(2). The current OMB-approved burden under §§ 556.905(d) and 556.906 is 189 annual burden hours. BOEM proposes to keep the burdens the same as the current OMB approved burdens at 189 annual burden hours.

Termination of the Period of Liability and Cancellation of Financial Assurance

Proposed § 556.906(d)(2) would be revised to add additional circumstances when BOEM may cancel supplemental financial assurance. Proposed § 556.906(d)(2) would require a cancellation request from the lessee or grant holder, or the surety, based on assertions that one of the stated circumstances is present. BOEM already receives these types of requests and has approved the requests, where warranted, as a departure from the regulations. These burdens are already counted in the existing OMB burden estimate for OMB Control Number 1010–0006.

If this proposed rule becomes effective and OMB approves the information, BOEM would revise the existing OMB control numbers to reflect the changes. The IC does not include questions of a sensitive nature. BOEM will protect proprietary information according to the Freedom of Information Act (5 U.S.C. 552) and DOI implementing regulations (43 CFR part 2), 30 CFR 556.104, *Information collection and proprietary information,* and 30 CFR 550.197, *Data and information to be made available to the public or for limited inspection.*

The PRA requires agencies to estimate the total annual reporting and recordkeeping non-hour cost burden resulting from the collection of information, and we solicit your comments on this item. For reporting and recordkeeping only, your response should split the cost estimate into two components: (1) total capital and startup cost component; and (2) annual operation, maintenance, and purchase of service component. Your estimates should consider the cost to generate, maintain, and disclose or provide the information. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Generally, your estimates should not include equipment or services purchased: (1) before October 1, 1995; (2) to comply with requirements not associated with the information collection; (3) for reasons other than to provide information or keep records for the Government; or (4) as part of customary and usual business or private practices.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Is the proposed information collection necessary or useful for BOEM to properly perform its functions?

(2) Are the estimated annual burden hour increases and decreases resulting from the proposed rule reasonable?

(3) Is the estimated annual non-hour cost burden resulting from this information collection reasonable?

(4) Do you have any suggestions that would enhance the quality, clarity, or usefulness of the information to be collected?

(5) Is there a way to minimize the information collection burden on those who must respond, such as by using appropriate automated digital, electronic, mechanical, or other forms of information technology?

Send your comments and suggestions on this information collection by the date indicated in the **DATES** section to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or via the *www.reginfo.gov* portal (online). You may view the information collection request(s) at *http://www.reginfo.gov/public/do/PRAMain.* Please provide a copy of your comments to the BOEM Information Collection Clearance Officer (see the **ADDRESSES** section). You may contact Anna Atkinson, BOEM Information Collection Clearance Officer at (703) 787–1025 with any questions. Please reference Risk Management, Financial Assurance and Loss Prevention (OMB Control No. 1010–0006), in your comments.

J. National Environmental Policy Act (NEPA)

A detailed environmental analysis under NEPA is not required because the proposed rule is covered by a categorical exclusion (see 43 CFR 46.205). This proposed rule meets the criteria set forth at 43 CFR 46.210(i) for a Departmental categorical exclusion in that this proposed rule is ''of an administrative, financial, legal, technical, or procedural nature.'' We have also determined that the proposed rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Data Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554, app. C, sec. 515, 114 Stat. 2763, 2763A–153–154).

L. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Under Executive Order 13211, agencies are required to prepare and submit to OMB a Statement of Energy Effects for ''significant energy actions.'' This should include a detailed statement of any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) expected to result from the action and a discussion of reasonable alternatives and their effects.

This action, which is a significant regulatory action under Executive Order 12866,[19] is likely to have a significant effect on the supply, distribution, or use of energy. BOEM has prepared a Statement of Energy Effects for this action. BOEM estimates that stronger supplemental financial assurance requirements will increase compliance costs for non-investment grade companies operating on the OCS by approximately $319 million annually (7 percent discounting). Pursuant to OMB's memorandum M–01–27,[20] BOEM recognizes that this action may ''adversely affect[ ] in a material way the productivity, competition, or prices in the energy sector.'' By increasing industry compliance costs, the regulation could adversely make the U.S. offshore oil and gas sector less attractive than regions with lower operating costs. Additionally, increased costs may depress the value of offshore assets or cause continuing production to become uneconomic sooner, leading to shorter-than-otherwise useful life and potentially a loss of production. For additional discussion on the energy effects and regulatory alternatives, please refer to the IRIA for this proposal.

M. Clarity of This Regulation

BOEM is required by Executive Order 12866, Executive Order 12988, and by the Presidential memorandum of June 1, 1998, to write all rules in plain language. This means that each rule BOEM publishes must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that BOEM has not met these requirements, send comments by one of the methods listed in the **ADDRESSES** section. To better help BOEM revise the proposed rule, your comments should be as specific as possible. For example, you should specify the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, and the sections where you feel lists or tables would be useful.

List of Subjects

30 CFR Part 550

Administrative practice and procedure, Continental shelf, Government contracts, Investigations, Mineral resources, Oil and gas exploration, Oil pollution, Outer continental shelf, Penalties, Pipelines, Public lands—rights-of-way, Reporting and recordkeeping requirements, Rights-of-way, Sulfur.

30 CFR Part 556

Administrative practice and procedure, Continental shelf, Environmental protection, Government contracts, Intergovernmental relations, Mineral resources, Oil and gas exploration, Outer continental shelf, Public lands, Reporting and recordkeeping requirements, Rights-of-way.

30 CFR Part 590

Administrative practice and procedure.

Laura Daniel-Davis,

Principal Deputy Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, the Bureau of Ocean Energy Management (BOEM) proposes to amend 30 CFR chapter V as follows:

PART 550—OIL AND GAS AND SULFUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

■ 1. The authority citation for part 550 continues to read as follows:

Authority: 30 U.S.C. 1751; 31 U.S.C. 9701; 43 U.S.C. 1334

■ 2. Revise the heading to part 550 to read as set forth above.

Subpart A—General

■ 3. Amend § 550.101 by revising the introductory paragraph to read as follows:

§ 550.101 Authority and applicability.

The Secretary of the Interior (Secretary) authorized the Bureau of Ocean Energy Management (BOEM) to regulate oil, gas, and sulfur exploration, development, and production operations on the Outer Continental Shelf (OCS). Under the Secretary's authority, the Director requires that all operations:

* * * * *

■ 4. Amend § 550.102 by revising paragraphs (a) and (b)(16) to read as follows:

§ 550.102 What does this part do?

(a) This part contains the regulations of the BOEM Offshore program that govern oil, gas, and sulfur exploration, development, and production operations on the OCS. When you conduct operations on the OCS, you must submit requests, applications, and notices, or provide supplemental information for BOEM approval.

(b) * * *

TABLE—WHERE TO FIND INFORMATION FOR CONDUCTING OPERATIONS

For information about	Refer to
* * * * *	
(16) Sulfur operations	30 CFR part 250, subpart P.
* * * * *	

■ 5. Amend § 550.105 by:

■ a. Adding the definition ''Assign'' in alphabetical order;

■ b. Revising the definitions ''Criteria air pollutant'' and ''Development geological and geophysical (G&G) activities'';

■ c. Removing the definition ''Easement'';

■ d. Revising the definitions ''Exploration'' and ''Facility'';

■ e. Adding the definition ''Financial assurance'' in alphabetical order;

[19] According to E.O. 31211, ''For purposes of this order: (a) ''Regulation'' and ''rule'' have the same meaning as they do in Executive Order 12866 or any successor order. (b) ''Significant energy action'' means any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order,''.

[20] *https://www.whitehouse.gov/wp-content/uploads/2017/11/2001-M-01-27-Guidance-for-Implementing-E.O.-13211.pdf.*

■ d. Revising the definition ''Geological and geophysical (G&G) exploration'';
■ e. Adding the definitions ''Investment grade credit rating'' and ''Issuer credit rating'' in alphabetical order;
■ f. Revising the definitions ''Minerals'', ''Nonattainment area'', ''Pipelines'', and ''Production areas'';
■ g. Removing the definition ''Right-of-use'';
■ h. Adding the definition ''Right-of-Use and Easement (RUE)'' in alphabetical order;
■ i. Removing the definition ''Right-of-way pipelines'';
■ j. Adding the definition ''Right-of-way (ROW) pipelines'';
■ k. Adding the definition ''Transfer'' in alphabetical order;
■ l. Revising the definition ''You'';
■ m. Adding the definition ''Waste of oil, gas, or sulfur'' in alphabetical order; and
■ n. Removing the definition ''Waste of oil, gas, or sulphur.

The revisions and additions read as follows:

§ 550.105 Definitions.

* * * * *

Assign means to convey an ownership interest in an oil, gas, or sulfur lease, ROW grant or RUE grant. For the purposes of this part, ''assign'' is synonymous with ''transfer'' and the two terms are used interchangeably.

* * * * *

Criteria air pollutant means any air pollutant for which the United States Environmental Protection Agency (USEPA) has established a primary or secondary National Ambient Air Quality Standard (NAAQS) pursuant to section 109 of the Clean Air Act.

* * * * *

Development geological and geophysical (G&G) activities means those G&G and related data-gathering activities on your lease or unit that you conduct following discovery of oil, gas, or sulfur in paying quantities to detect or imply the presence of oil, gas, or sulfur in commercial quantities.

* * * * *

Exploration means the commercial search for oil, gas, or sulfur. Activities classified as exploration include but are not limited to:

(1) Geophysical and geological (G&G) surveys using magnetic, gravity, seismic reflection, seismic refraction, gas sniffers, coring, or other systems to detect or imply the presence of oil, gas, or sulfur; and

(2) Any drilling conducted for the purpose of searching for commercial quantities of oil, gas, and sulfur, including the drilling of any additional well needed to delineate any reservoir to enable the lessee to decide whether to proceed with development and production.

Facility, as used in § 550.303, means all installations or devices permanently or temporarily attached to the seabed. They include mobile offshore drilling units (MODUs), even while operating in the ''tender assist'' mode (*i.e.,* with skid-off drilling units) or other vessels engaged in drilling or downhole operations. They are used for exploration, development, and production activities for oil, gas, or sulfur and emit or have the potential to emit any air pollutant from one or more sources. They include all floating production systems (FPSs), including column-stabilized-units (CSUs); floating production, storage and offloading facilities (FPSOs); tension-leg platforms (TLPs); spars, etc. During production, multiple installations or devices are a single facility if the installations or devices are at a single site. Any vessel used to transfer production from an offshore facility is part of the facility while it is physically attached to the facility.

Financial assurance means a surety bond, a pledge of Treasury securities, a decommissioning account, a third-party guarantee, or another form of security acceptable to the BOEM Regional Director, that is used to ensure compliance with obligations under the regulations and under the terms of a lease, a RUE grant, or a pipeline ROW grant.

* * * * *

Geological and geophysical (G&G) explorations means those G&G surveys on your lease or unit that use seismic reflection, seismic refraction, magnetic, gravity, gas sniffers, coring, or other systems to detect or imply the presence of oil, gas, or sulfur in commercial quantities.

* * * * *

Investment grade credit rating means an issuer credit rating of BBB- or higher, or its equivalent, assigned to an issuer of corporate debt by a nationally recognized statistical rating organization (NRSRO) as that term defined by the United States Securities and Exchange Commission (SEC).

Issuer credit rating means a credit rating assigned to an issuer of corporate debt by Standard and Poor's (S&P) Ratings Services (or any of its subsidiaries), by Moody's Investors Service Incorporated (or any of its subsidiaries) or by another NRSRO, as that term is defined by the United States SEC.

* * * * *

Minerals include oil, gas, sulfur, geopressured-geothermal and associated resources, and all other minerals that are authorized by an Act of Congress to be produced.

* * * * *

Nonattainment area means, for any criteria air pollutant, an area which is show by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator of the USEPA to be reliable) to exceed any primary or secondary NAAQS established by the USEPA.

* * * * *

Pipelines are the piping, risers, and appurtenances installed for transporting oil, gas, sulfur, and produced waters.

* * * * *

Production areas are those areas where flammable petroleum gas, volatile liquids or sulfur are produced, processed (*e.g.,* compressed), stored, transferred (*e.g.,* pumped), or otherwise handled before entering the transportation process.

* * * * *

Right-of-Use and Easement (RUE) means a right to use a portion of the seabed, at an OCS site other than on a lease you own, to construct, secure to the seafloor, use, modify, or maintain platforms, seafloor production equipment, artificial islands, facilities, installations, or other devices to support the exploration, development, or production of oil, gas, or sulfur resources from an OCS lease or a lease on State submerged lands adjacent to or accessible from the OCS.

Right-of-way (ROW) pipelines are those pipelines that are contained within:

(1) The boundaries of a single lease or unit, but are not owned and operated by a lessee or operator of that lease or unit;

(2) The boundaries of contiguous (not cornering) leases that do not have a common lessee or operator;

(3) The boundaries of contiguous (not cornering) leases that have a common lessee or operator but are not owned and operated by that common lessee or operator; or

(4) An unleased block(s).

* * * * *

Transfer means to convey an ownership interest in an oil, gas, or sulfur lease, ROW grant or RUE grant. For the purposes of this part, ''transfer'' is synonymous with ''assign'' and the two terms are used interchangeably.

* * * * *

You, depending on the context of the regulations, means a bidder, a lessee (record title owner), a sublessee

(operating rights owner), a Federal or State RUE grant holder, a pipeline ROW grant holder, an assignor or transferor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

Waste of oil, gas, or sulfur means:

(1) The physical waste of oil, gas, or sulfur;

(2) The inefficient, excessive, or improper use, or the unnecessary dissipation of reservoir energy;

(3) The locating, spacing, drilling, equipping, operating, or producing of any oil, gas, or sulfur well(s) in a manner that causes or tends to cause a reduction in the quantity of oil, gas, or sulfur ultimately recoverable under prudent and proper operations or that causes or tends to cause unnecessary or excessive surface loss or destruction of oil or gas; or

(4) The inefficient storage of oil.

* * * * *

■ 6. Amend § 550.160 by

■ a. Revising the section heading;

■ b. Revising the introductory text; and

■ c. Revising paragraphs (a) introductory text, (b), and (c).

The revisions read as follows:

§ 550.160 When will BOEM grant me a right-of-use and easement (RUE), and what requirements must I meet?

BOEM may grant you a RUE on leased or unleased lands on the OCS, if you meet these requirements:

(a) You must require the RUE to construct, secure to the seafloor, use, modify, or maintain platforms, seafloor production equipment, artificial islands, facilities, installations, or other devices at an OCS site other than an OCS lease you own, that are:

* * * * *

(b) You must exercise the RUE according to the terms of the grant and the regulations of this part, as well as the regulations in 30 CFR part 250, subpart Q.

(c) You must meet the qualification requirements at 30 CFR 556.400 through 556.402 and the financial assurance requirements in § 550.166 and 30 CFR part 556, subpart I.

* * * * *

■ 7. Revise § 550.166 to read as follows:

§ 550.166 If BOEM grants me a RUE, what financial assurance must I provide?

(a) Before BOEM grants you a RUE on the OCS, you must maintain financial assurance of $500,000 that guarantees compliance with the regulations and the terms and conditions of the RUEs you hold.

(1) You are not required to submit and maintain the financial assurance of $500,000 pursuant to this paragraph (a) if you furnish and maintain area-wide lease financial assurance in excess of $500,000 pursuant to 30 CFR 556.901(a), provided that the area-wide lease financial assurance also guarantees compliance with all the terms and conditions of the RUEs you hold.

(2) The Regional Director may reduce the amount required in this paragraph (a) upon a determination that the reduced amount is sufficient to guarantee compliance with the regulations and the terms and conditions of the RUE grant.

(3) The requirements for financial assurance in 30 CFR 556.900(d) through (g) and 30 CFR 556.902 apply to the financial assurance required under this paragraph (a).

(b) If BOEM grants you a RUE that serves either an OCS lease or a State lease, the Regional Director may require supplemental financial assurance, above the amount required by paragraph (a) of this section, to ensure compliance with the obligations under your RUE grant based on an evaluation of your ability to carry out present and future obligations on the RUE using the criteria set forth in 30 CFR 556.901(d)(1) and (2). This supplemental financial assurance must:

(1) Meet the requirements of 30 CFR 556.900(d) through (g) and 30 CFR 556.902; and

(2) Cover costs and liabilities for compliance with regulations, compliance with BOEM and the Bureau of Safety and Environmental Enforcement (BSEE) orders, and well abandonment, platform and structure removal, and site clearance of the seafloor of the RUE, in accordance with the regulations at 30 CFR part 250, subpart Q.

(c) If you fail to replace any deficient financial assurance upon demand or fail to provide supplemental financial assurance upon demand, the Regional Director may:

(1) Assess penalties under subpart N of this part;

(2) Request BSEE to suspend operations on your RUE; and/or

(3) Initiate action for cancellation of your RUE grant.

■ 8. Add § 550.167 under the undesignated center heading ''Right-of-Use and Easement'' to read as follows:

§ 550.167 How may I obtain or assign my interest in a RUE?

(a) To obtain or assign a RUE, you must file an application and provide the information contained in § 550.161 and you must obtain BOEM's approval.

(b) BOEM may disapprove an assignment in the following circumstances:

(1) When the assignee has unsatisfied obligations under the regulations in this chapter or in 30 CFR chapters II or XII, or under any BOEM or BSEE order;

(2) When an assignment is not acceptable as to form or content (*e.g.,* containing incorrect legal description, not executed by a person authorized to bind the corporation, assignee does not meet the requirements of 30 CFR 556.401 through 556.405);

(3) When the assignment does not comply with or would conflict with these regulations, or any other applicable laws or regulations (*e.g.,* Departmental debarment rules);

(4) When the assignee does not meet the applicable financial assurance requirements in § 550.166 and 30 CFR 556.900 through 556.907, or an order issued thereunder, with respect to the interest being assigned.

■ 9. Amend § 550.199 by revising paragraph (b) to read as follows:

§ 550.199 Paperwork Reduction Act statements—information collection.

* * * * *

(b) Respondents are OCS oil, gas, and sulfur lessees and operators. The requirement to respond to the information collections in this part is mandated under the Act (43 U.S.C. 1331 *et seq.*) and the Act's Amendments of 1978 (43 U.S.C. 1801 *et seq.*). Some responses are also required to obtain or retain a benefit or may be voluntary. Proprietary information will be protected under § 550.197, *Data and information to be made available to the public or for limited inspection;* 30 CFR parts 551 and 552; and the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations at 43 CFR part 2.

* * * * *

Subpart J—Pipelines and Pipeline Rights-of-Way

■ 10. Revise § 550.1011 to read as follows:

§ 550.1011 Financial assurance requirements for pipeline right-of-way (ROW) grant holders.

(a) When you apply for, attempt to assign, or are the holder of a pipeline right-of-way (ROW) grant, you must furnish and maintain $300,000 of area-wide financial assurance that guarantees compliance with the regulations and the terms and conditions of all the pipeline ROW grants you hold in an OCS area as defined in 30 CFR 556.900(b). The requirement to furnish and maintain area-wide financial assurance for a pipeline ROW grant is separate and distinct from the requirement to provide financial assurance for a lease or right-of-use and easement (RUE).

(b) The requirement to furnish and maintain area-wide pipeline ROW financial assurance under paragraph (a) of this section may be satisfied if your operator or a co-grant holder provides such financial assurance in the required amount that guarantees compliance with the regulations and the terms and conditions of the grant.

(c) The requirements for lease financial assurance in 30 CFR 556.900(d) through (g) and 30 CFR 556.902 apply to the area-wide financial assurance required in paragraph (a) of this section.

(d) The Regional Director, using the criteria set forth in 30 CFR 556.901(d)(1) and (2), may require supplemental financial assurance (*i.e.,* above the amount required by paragraph (a) of this section) to ensure compliance with the obligations under your pipeline right-of-way grant based on an evaluation of your ability to carry out present and future obligations on the pipeline ROW.

(e) The supplemental financial assurance required under paragraph (d) of this section must:

(1) Meet the requirements of 30 CFR 556.900(d) through (g) and 30 CFR 556.902, and

(2) Cover costs and liabilities for regulatory compliance and compliance with BOEM and BSEE orders, decommissioning of all pipelines or other facilities, and clearance from the seafloor of all obstructions created by your pipeline ROW operations in accordance with the regulations at 30 CFR part 250, subpart Q.

(f) If you fail to replace any deficient financial assurance upon demand or fail to provide supplemental financial assurance upon demand, the Regional Director may:

(1) Assess penalties under subpart N of this part;

(2) Request BSEE to suspend operations on your pipeline ROW; and/or

(3) Initiate action for forfeiture of your pipeline ROW grant in accordance with 30 CFR 250.1013.

PART 556—LEASING OF SULFUR OR OIL AND GAS AND FINANCIAL ASSURANCE REQUIREMENTS IN THE OUTER CONTINENTAL SHELF

■ 11. The authority citation for part 556 is revised to read as follows:

Authority: 31 U.S.C. 9701; 42 U.S.C. 6213; 43 U.S.C. 1334.

■ 12. Revise the heading to part 556 to read as set forth above.

Subpart A—General Provisions

■ 13. Amend § 556.105 by:

■ a. In paragraph (a), removing the acronym ''EPA''; and

■ b. In paragraph (b):

■ i. Adding the definition ''Assign'' in alphabetical order;

■ ii. Revising the definition ''Eastern Planning Area'';

■ iii. Adding the definitions ''Financial assurance'', ''Investment grade credit rating'', and ''Issuer credit rating'' in alphabetical order;

■ iv. Revising the definition ''Right-of-Use and Easement (RUE)'';

■ v. Removing the definition ''Security or securities'';

■ vi. Adding the definition ''Transfer''; and

■ vii. Revising the definition ''You''.

The revisions and additions read as follows:

§ 556.105 Acronyms and definitions.

* * * * *

(b) * * *

Assign means to convey an ownership interest in an oil, gas, or sulfur lease, ROW grant or RUE grant. For the purposes of this part, ''assign'' is synonymous with ''transfer'' and the two terms are used interchangeably.

* * * * *

Eastern Planning Area means that portion of the Gulf of Mexico that lies southerly and westerly of Florida.

* * * * *

Financial assurance means a surety bond, a pledge of Treasury securities, a decommissioning account, a third-party guarantee, or another form of security acceptable to the BOEM Regional Director, that is used to ensure compliance with obligations under the regulations and under the terms of a lease, a RUE grant, or a pipeline ROW grant.

* * * * *

Investment grade credit rating means an issuer credit rating of BBB − or higher, or its equivalent, assigned to an issuer of corporate debt by a nationally recognized statistical rating organization (NRSRO) as that term defined by the United States Securities and Exchange Commission (SEC).

* * * * *

Issuer credit rating means a credit rating assigned to an issuer of corporate debt by Standard and Poor's (S&P) Rating Services (or any of its subsidiaries), by Moody's Investors Service Incorporated (or any of its subsidiaries), or by another NRSRO as that term is defined by the United States SEC.

* * * * *

Right-of-Use and Easement (RUE) means a right to use a portion of the seabed at an OCS site other than on a lease you own, to construct, secure to the seafloor, use, modify, or maintain platforms, seafloor production equipment, artificial islands, facilities, installations, or other devices to support the exploration, development, or production of oil, gas, or sulfur resources from an OCS lease or a lease on State submerged lands adjacent to or accessible from the OCS.

* * * * *

Transfer means to convey an ownership interest in an oil, gas, or sulfur lease, ROW grant or RUE grant. For the purposes of this part, ''transfer'' is synonymous with ''assign'' and the two terms are used interchangeably.

* * * * *

You, depending on the context of the regulations, means a bidder, a lessee (record title owner), a sublessee (operating rights owner), a Federal or State RUE grant holder, a pipeline ROW grant holder, an assignor or transferor, a designated operator or agent of the lessee or grant holder, or an applicant seeking to become one of the above.

Subpart G—Transferring All or Part of the Record Title Interest in a Lease

■ 14. Amend § 556.704 by revising the section heading, and paragraphs (a) introductory text and (a)(1) to read as follows:

§ 556.704 When may BOEM disapprove an assignment or sublease of an interest in my lease?

(a) BOEM may disapprove an assignment or sublease of all or part of your lease interest(s):

(1) When the transferor, transferee, or sublessee is not in compliance with all applicable regulations and orders, including financial assurance requirements;

* * * * *

Subpart H—Transferring All or Part of the Operating Rights in a Lease

■ 15. Amend § 556.802 by revising the section heading, introductory text, and paragraph (a) to read as follows:

§ 556.802 When may BOEM disapprove the transfer of all or part of my operating rights interest?

BOEM may disapprove a transfer of all or part of your operating rights interest:

(a) When the transferee is not in compliance with all applicable regulations and orders, including financial assurance requirements;

* * * * *

Subpart I—Bonding or Other Financial Assurance

■ 16. Amend § 556.900 by:
■ a. Revising the section heading and introductory text;
■ b. Revising paragraph (a)(3), and adding paragraph (a)(4);
■ c. Revising paragraphs (g) introductory text and (h); and
■ d. Adding paragraph (i).

The revisions and additions read as follows:

§ 556.900 Financial assurance requirements for an oil and gas or sulfur lease.

This section establishes financial assurance requirements for the lessee of an OCS oil and gas or sulfur lease.

(a) * * *

(3) Maintain a lease or area-wide bond in the amount required in § 556.901(a) or (b); and

(4) Provide any supplemental financial assurance required by the Regional Director.

* * * * *

(g) You may provide alternative types of financial assurance instead of providing a surety bond if the Regional Director determines that the alternative financial assurance protects the interests of the United States to the same extent as a surety bond.

* * * * *

(h) If you fail to replace deficient financial assurance or to provide supplemental financial assurance upon demand, the Regional Director may:

(1) Assess penalties under part 550, subpart N of this subchapter;

(2) Request BSEE to suspend production and other operations on your lease in accordance with 30 CFR 250.173; and/or

(3) Initiate action to cancel your lease.

(i) In the event you amend your area-wide surety bond covering lease obligations, or obtain a new area-wide lease surety bond, to cover the financial assurance requirements for any RUE(s), your area-wide lease surety bond may be called in whole or in part to cover any or all the obligations on which you default that are associated with your RUE(s) located in the area covered by such area-wide lease surety bond.

■ 17. Amend § 556.901 by:
■ a. Revising the section heading;
■ b. Revising paragraphs (a) introductory text and (a)(1)(i);
■ c. Revising paragraphs (b) introductory text and (b)(1)(i);
■ d. Revising paragraphs (c) through (f); and
■ e. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

§ 556.901 Base financial assurance and supplemental financial assurance.

(a) This paragraph (a) explains what financial assurance you must provide before lease exploration activities commence.

(1) * * *

(i) You must furnish the Regional Director $200,000 in lease exploration financial assurance that guarantees compliance with all the terms and conditions of the lease by the earliest of:

* * * * *

(b) This paragraph (b) explains what financial assurance you must provide before lease development and production activities commence.

(1) * * *

(i) You must furnish the Regional Director $500,000 in lease development financial assurance that guarantees compliance with all the terms and conditions of the lease by the earliest of:

* * * * *

(c) If you can demonstrate to the satisfaction of the Regional Director that you can satisfy your decommissioning and other lease obligations for less than the amount of financial assurance required under paragraphs (a)(1) or (b)(1) of this section, the Regional Director may accept financial assurance in an amount less than the prescribed amount but not less than the amount of the cost for decommissioning.

(d) The Regional Director may determine that supplemental financial assurance (*i.e.,* financial assurance above the amounts prescribed in 30 CFR 550.166(a), 30 CFR 550.1011(a), § 556.900(a) or paragraphs (a) and (b) of this section) is required to ensure compliance with your lease obligations, including decommissioning obligations; the regulations in this chapter; and the regulations in 30 CFR chapters II and XII. The Regional Director may require you to provide supplemental financial assurance if you do not meet at least one of the following criteria:

(1) You have an Investment grade issuer credit rating. If any SEC-recognized NRSRO provides a credit rating that differs from any other SEC-recognized NRSRO credit rating, BOEM will apply the highest rating for the purposes of determining your financial assurance requirements.

(2) You have a proxy credit rating determined by the Regional Director, which must be based on audited financial information for the most recent fiscal year (which must include an income statement, balance sheet, statement of cash flows, and the auditor's certificate).

(i) The audited financial information for your most recent fiscal year must cover a continuous twelve-month period within the twenty-four-month period prior to the lessee's receipt of the Regional Director's determination that you must provide supplemental financial assurance.

(ii) In determining your proxy credit rating, the Regional Director may include the value of the contingent liabilities associated with any lease(s) or grants in which you have an ownership interest. Upon the request of the Regional Director, you must provide the information that the Regional Director determines is necessary to properly evaluate your contingent liabilities, including joint ownership interests and liabilities associated with your OCS leases and grants.

(3) Your co-lessee or co-grant-holder has an issuer credit rating or a proxy credit rating that meets the criteria set forth in paragraph (d)(1) of this section; however, the Regional Director may require you to provide supplemental financial assurance for decommissioning obligations for which such co-lessee or co-grant-holder is not liable.

(4) There are proved oil and gas reserves on the lease, as defined by the SEC Regulation S–X at 17 CFR 210.4–10 and SEC Regulation S–K at 17 CFR 229.1200, the value of which exceeds three times the estimated cost of the decommissioning associated with the production of those reserves, and that value must be based on reserve reports submitted to the Regional Director and reported on a per-lease basis. BOEM will determine the decommissioning costs associated with the production of your reserves on a per-lease basis, and will use the following decommissioning cost estimates:

(i) Where BSEE-generated probabilistic estimates are available, BOEM will use the estimate at the level at which there is a 70 percent probability that the actual cost of decommissioning will be less than the estimate (P70).

(ii) If there is no BSEE probabilistic estimate available, BOEM will use the BSEE-generated deterministic estimate.

(e) You may satisfy the Regional Director's demand for supplemental financial assurance by increasing the amount of your existing financial assurance or providing additional surety bonds or other types of acceptable financial assurance.

(f) The Regional Director will determine the amount of supplemental financial assurance required to guarantee compliance. In making this determination, the Regional Director will consider potential underpayment of royalty and cumulative

decommissioning obligations using the methodology set forth in paragraph (d)(3) of this section.

(g) If your cumulative potential obligations and liabilities either increase or decrease, the Regional Director may adjust the amount of supplemental financial assurance required.

(1) If the Regional Director proposes an adjustment, the Regional Director will:

(i) Notify you and your financial assurance provider of any proposed adjustment to the amount of financial assurance required; and

(ii) Give you an opportunity to submit written or oral comment on the adjustment.

(2) If you request a reduction of the amount of supplemental financial assurance required, or oppose the amount of a proposed adjustment, you must submit evidence to the Regional Director demonstrating that the projected amount of royalties due to the United States Government and the estimated costs of decommissioning are less than the required financial assurance amount. Upon review of your submission, the Regional Director may reduce the amount of financial assurance required.

(h) At any time during the first three years from the effective date of this regulation, you may request that the Regional Director allow you to provide, in three equal installments payable according to the schedule provided under this paragraph (h), the full amount of supplemental financial assurance required.

(1) If the Regional Director allows you to provide the amount required on such a phased basis, you must comply with the following:

(i) You must provide the initial one-third of the total supplemental financial assurance required within the timeframe specified in the demand letter or, if no timeframe is specified, within 60 calendar days of the date of receipt of the demand letter.

(ii) You must provide the second one-third of the required supplemental financial assurance to BOEM within 24 months of the date of receipt of the demand letter.

(iii) You must provide the final one-third of the required supplemental financial assurance to BOEM within 36 months of the date of receipt of the demand letter.

(2) If the Regional Director allows you to meet your supplemental financial assurance requirement in a phased manner, as set forth in this section, and you fail to timely provide the required supplemental financial assurance to BOEM, the Regional Director will notify you of such failure. You will no longer be eligible to meet your supplemental financial assurance requirement in the manner prescribed in this paragraph (h), and the remaining amount due will become due 10-calendar days after such notification is received.

■ 18. Amend § 556.902 by revising the section heading, paragraphs (a) and (e)(2), and adding paragraphs (g) and (h) to read as follows:

§ 556.902 General requirements for bonds or other financial assurance.

(a) Any surety bond or other financial assurance that you, as record title owner, operating rights owner, grant holder, or operator, provide under this part, or under 30 CFR part 550, must:

(1) Be payable upon demand to the Regional Director;

(2) Guarantee compliance with all your obligations under the lease or grant, the regulations under 30 CFR chapters II and XII, and all BOEM and BSEE orders; and

(3) Guarantee compliance with the obligations of all record title owners, operating rights owners, and operators on the lease, and all grant-holders on a grant.

* * * * *

(e) * * *

(2) A pledge of Treasury securities as provided in § 556.900(f).

* * * * *

(g) If you believe that BOEM's supplemental financial assurance demand is unjustified, you may request an informal resolution of your dispute in accordance with the requirements of 30 CFR 590.6. Your request for an informal resolution will not affect your right to request to meet your supplemental financial assurance requirement in a phased manner under § 556.901(h).

(h) You may file an appeal of a supplemental financial assurance demand with the Interior Board of Land Appeals (IBLA) pursuant to the regulations in 30 CFR part 590. However, if you request that the IBLA stay the demand pending a final ruling on your appeal, you must post an appeal surety bond equal to the amount of the demand that you seek to stay before any such stay is effective.

■ 19. Revise § 556.903 to read as follows:

§ 556.903 Lapse of financial assurance.

(a) If your surety, guarantor, or the financial institution holding or providing your financial assurance becomes bankrupt or insolvent, or has its charter or license suspended or revoked, any financial assurance coverage from such surety, guarantor, or financial institution must be replaced. You must notify the Regional Director within 7 calendar days of learning of such event, and, within 30 calendar days of learning of such event, you must provide other financial assurance from a different financial assurance provider in the amount required under §§ 556.900, 556.901, 30 CFR 550.166, or 30 CFR 550.1011.

(b) You must notify the Regional Director within 72 hours of learning of any action filed alleging that you are insolvent or bankrupt or that your surety, guarantor, or financial institution is insolvent or bankrupt or has had its charter or license suspended or revoked. All surety bonds or other financial assurance must require the surety, guarantor, or financial institution to timely provide this required notification both to you and directly to BOEM.

■ 20. Revise § 556.904 to read as follows:

§ 556.904 Decommissioning accounts.

(a) The Regional Director may authorize you to establish a decommissioning account(s) in a federally insured financial institution to satisfy a supplemental financial assurance demand made pursuant to § 556.901(d), 30 CFR 550.166(b) or 30 CFR 550.1011(d). The decommissioning account must be set up in such a manner that funds may not be withdrawn without the written approval of the Regional Director.

(1) Funds in the account must be pledged to meet your decommissioning obligations and payable upon demand to BOEM.

(2) You must fully fund the account, pursuant to a schedule that the Regional Director prescribes, to cover all decommissioning costs estimated by BSEE.

(3) If you fail to make the initial payment or any scheduled payment into the decommissioning account, you must immediately submit, and subsequently maintain, a surety bond or other financial assurance in an amount equal to the remaining unfulfilled portion of the supplemental financial assurance demand.

(b) Any interest paid on funds in a decommissioning account will become part of the principal funds in the account unless the Regional Director authorizes in writing the payment of the interest to the party who deposits the funds.

(c) The Regional Director may require you to create an overriding royalty, production payment obligation, or other revenue stream for the benefit of an account established as financial

assurance for the decommissioning of your lease(s) or RUE or pipeline right-of-way grant(s). The required obligation may be associated with oil and gas or sulfur production from a lease other than a lease or grant secured through the decommissioning account.

(d) BOEM may provide funds from the decommissioning account to the liable party that performs the decommissioning to cover the costs thereof.

■ 21. Revise § 556.905 to read as follows:

§ 556.905 Third-party guarantees.

(a) The Regional Director may accept a third-party guarantee to satisfy a supplemental financial assurance demand made pursuant to § 556.901(d), 30 CFR 550.166(b), or 30 CFR 550.1011(d), if:

(1) The guarantor meets the credit rating or proxy credit rating criterion set forth in § 556.901(d)(1); and

(2) The guarantor or guaranteed party submits a third-party guarantee agreement containing each of the provisions in paragraph (d) of this section.

(b) A third-party guarantor may limit its cumulative obligations to a fixed dollar amount as agreed to by BOEM at the time the third-party guarantee is provided.

(c) If, during the life of your third-party guarantee, your guarantor no longer meets the criterion referred to in paragraph (a)(1) of this section, you must, within 72 hours of so learning:

(1) Notify the Regional Director; and

(2) Submit, and subsequently maintain a surety bond or other financial assurance covering those obligations previously secured by the third-party guarantee.

(d) Your third-party guarantee must contain each of the following provisions:

(1) If you fail to comply with the terms of any lease or grant covered by the guarantee, or any applicable regulation, your guarantor must either:

(i) Take corrective action to bring the lease or grant into compliance with its terms or any applicable regulation, to the extent covered by the guarantee; or

(ii) Be liable under the third-party guarantee agreement to provide, within seven calendar days, sufficient funds for the Regional Director to complete such corrective action to the extent covered by the guarantee. Such payment does not result in the cancellation of the guarantee, and instead reduces the remaining value of the guarantee in an amount equal to the payment.

(2) If your guarantor wishes to terminate the period of liability under its guarantee, it must:

(i) Notify you and the Regional Director at least 90-calendar days before the proposed termination date;

(ii) Obtain the Regional Director's approval for the termination of the period of liability for all or a specified portion of the guarantee; and

(iii) Remain liable for all liabilities that accrued prior to the termination and responsible for all work and workmanship performed during the period of liability.

(3) Before the termination of the period of liability of the third-party guarantee, you must provide acceptable replacement financial assurance.

(e) If you or your guarantor request BOEM to cancel your third-party guarantee, BOEM will cancel the guarantee under the same terms and conditions provided for cancellation of supplemental financial assurance and return of pledged financial assurance in § 556.906, paragraphs (b) and/or (d)(3).

(f) The guarantor or guaranteed party must submit a third-party guarantee agreement that meets the following criteria:

(1) The third-party guarantee agreement must be executed by your guarantor and all persons and parties bound by the agreement.

(2) The third-party guarantee agreement must bind, jointly and severally, each person and party executing the agreement.

(3) When your guarantor is a corporate entity, two corporate officers who are authorized to bind the corporation must sign the third-party guarantee agreement.

(g) Your corporate guarantor and any other corporate entities bound by the third-party guarantee agreement must provide the Regional Director copies of:

(1) The authorization of the signatory corporate officials to bind their respective corporations;

(2) An affidavit certifying that the agreement is valid under all applicable laws; and

(3) Each corporation's corporate authorization to execute the third-party guarantee agreement.

(h) If your third-party guarantor or another party bound by the third-party guarantee agreement is a partnership, joint venture, or syndicate, the third-party guarantee agreement must:

(1) Bind each partner or party who has a beneficial interest in your guarantor; and

(2) Provide that each member of the partnership, joint venture, or syndicate is jointly and severally liable for those obligations secured by the guarantee.

(i) When forfeiture is called for under § 556.907, the third-party guarantee agreement must provide that your guarantor will either:

(1) Take corrective action to bring your lease or grant into compliance with its terms, and the regulations, to the extent covered by the guarantee; or

(2) Provide sufficient funds within seven calendar days to permit the Regional Director to complete such corrective action to the extent covered by the guarantee.

(j) The third-party guarantee agreement must contain a confession of judgment. It must provide that, if the Regional Director determines that you are in default of the lease or grant covered by the guarantee or not in compliance with any regulation applicable to such lease or grant, the guarantor:

(1) Will not challenge the determination; and

(2) Will remedy the default to the extent covered by the guarantee.

(k) Each third-party guarantee agreement is deemed to contain all terms and conditions contained in paragraphs (d), (f), and (j) of this section, even if the guarantor has omitted these terms from the third-party guarantee agreement.

■ 22. Revise § 556.906 to read as follows:

§ 556.906 Termination of the period of liability and cancellation of financial assurance.

This section defines the terms and conditions under which BOEM will terminate the period of liability of financial assurance. Terminating the period of liability ends the period during which obligations continue to accrue, but does not relieve the financial assurance provider of the responsibility for obligations that accrued during the period of liability. Canceling a financial assurance instrument relieves the financial assurance provider of all liability. The liabilities that accrue during a period of liability include obligations that started to accrue prior to the beginning of the period of liability and had not been met, and obligations that begin accruing during the period of liability.

(a) When you or your financial assurance provider request termination:

(1) The Regional Director will terminate the period of liability under your financial assurance within 90 calendar days after BOEM receives the request; and

(2) If you intend to continue operations, or have not met all decommissioning obligations, you must provide replacement financial assurance of an equivalent amount.

(b) If you provide replacement financial assurance, the Regional Director will cancel your previous

financial assurance and the previous financial assurance provider will not retain any liability, provided that:

(1) The amount of the new financial assurance is equal to or greater than that of the financial assurance that was cancelled, or you provide an alternative form of financial assurance, and the Regional Director determines that the alternative form of financial assurance provides a level of security equal to or greater than that provided by the financial assurance that was cancelled;

(2) For financial assurance submitted under § 556.900(a), § 556.901(a) or (b), 30 CFR 550.166(a), or 30 CFR 550.1011(a) the new financial assurance provider agrees to assume all outstanding obligations that accrued during the period of liability that was terminated; and

(3) For supplemental financial assurance submitted under § 556.901(d), 30 CFR 550.166(b), or 30 CFR 550.1011(d), the issuer of such financial assurance agrees to assume that portion of the outstanding obligations that accrued during the period of liability that was terminated and that the Regional Director determines may exceed the coverage of the base financial assurance. The Regional Director will notify the provider of the new financial assurance of the amount required.

(c) This paragraph (c) applies if the period of liability is terminated, but the financial assurance is not replaced with an equivalent amount. The financial assurance provider will continue to be responsible for accrued obligations:

(1) Until the obligations are satisfied; and

(2) For additional periods of time in accordance with paragraph (d) of this section.

(d) BOEM will cancel the financial assurance for your lease or grant, and the Regional Director will return any pledged financial assurance, as shown in the following:

TABLE 1 TO PARAGRAPH (d)

For the following:	Your financial assurance will be reduced or cancelled, or your pledged financial assurance will be returned:
(1) Financial assurance submitted under § 556.900(a), § 556.901(a) or (b), 30 CFR 550.166(a), or 30 CFR 550.1011(a).	7 years after the lease or grant expires or is terminated, 6 years after the Regional Director determines that you have completed all covered obligations, or at the conclusion of any appeals or litigation related to your covered obligations, whichever is the latest. The Regional Director will reduce the amount of your financial assurance or return a portion of your pledged financial assurance if the Regional Director determines that you need less than the full amount of the financial assurance or pledged financial assurance to cover any potential obligations.
(2) Financial assurance submitted under § 556.901(d), 30 CFR 550.166(a), or 30 CFR 550.1011(d).	(i) When the lease or grant expires or is terminated and the Regional Director determines you have met your covered obligations, unless the Regional Director: (A) Determines that the future potential liability resulting from any undetected problem is greater than the amount of the financial assurance submitted under § 556.900(a), § 556.901(a) or (b), 30 CFR 550.166(a), or 30 CFR 550.1011(a); and (B) Notifies the provider of financial assurance submitted under § 556.901(d), 30 CFR 550.166(b), or 30 CFR 550.1011(d) that the Regional Director will wait 7 years before canceling all or a part of such financial assurance (or longer period as necessary to complete any appeals or judicial litigation related to your secured obligations). (ii) At any time when: (A) BOEM has determined, using the criteria set forth in § 556.901(d)(1) of this part, as applicable, that you no longer need to provide the supplemental financial assurance for your lease, RUE grant, or pipeline ROW grant. (B) The operations for which the supplemental financial assurance was provided ceased prior to accrual of any decommissioning obligation; or, (C) Cancellation of the financial assurance is appropriate because, under the regulations, BOEM determines such financial assurance never should have been required.
(3) Third-party Guarantee under § 556.901(d), 30 CFR 550.166(b), or 30 CFR 550.1011(d).	When the Regional Director determines you have met your obligations secured by the guarantee (or longer period as necessary to complete any appeals or judicial litigation related to your obligations secured by the guarantee).

(e) For all financial assurance, the Regional Director may reinstate your financial assurance as if no cancellation had occurred if:

(1) A person makes a payment under the lease, RUE grant, or pipeline ROW grant, and the payment is rescinded or must be returned by the recipient because the person making the payment is insolvent, bankrupt, subject to reorganization, or placed in receivership; or,

(2) The responsible party represents to BOEM that it has discharged its obligations under the lease, RUE grant, or pipeline ROW grant and the representation was materially false when the financial assurance was cancelled.

■ 23. Revise § 556.907 to read as follows:

§ 556.907 Forfeiture of bonds or other financial assurance.

This section explains how a bond or other financial assurance may be forfeited.

(a) The Regional Director will call for forfeiture of all or part of the bond, or other form of financial assurance, including a guarantee you provide under this part, if:

(1) You, or any party with the obligation to comply refuse to comply with any term or condition of your lease, RUE grant, pipeline ROW grant, or any applicable regulation, or the Regional Director determines that you are unable to so comply; or

(2) You default on one of the conditions under which the Regional Director accepts your bond, third-party guarantee, and/or other form of financial assurance.

(b) The Regional Director may pursue forfeiture of your surety bond or other financial assurance without first making demands for performance against any other record title owner, operating rights owner, grant holder, or other person

authorized to perform lease or grant obligations.

(c) The Regional Director will:

(1) Notify you, your surety, guarantor, or the financial institution holding or providing your financial assurance, of a determination to call for forfeiture of your financial assurance, whether it takes the form of a surety bond, guarantee, funds, or other type of financial assurance.

(i) This notice will be in writing and will provide the reason for the forfeiture and the amount to be forfeited.

(ii) The Regional Director will determine the amount to be forfeited based upon an estimate of the total cost of corrective action to bring your lease or grant into compliance, subject in the case of a guarantee to any limitation in the guarantee authorized by § 556.902(a)(3).

(2) Advise you and your financial assurance provider that forfeiture may be avoided if, within five business days:

(i) You agree to and demonstrate that you will bring your lease or grant into compliance within the timeframe the Regional Director prescribes; or

(ii) The provider of your financial assurance agrees to and demonstrates that it will complete the corrective action to bring your lease or grant into compliance within the timeframe the Regional Director prescribes, even if the cost of compliance exceeds the amount of that financial assurance.

(d) If the Regional Director finds you are in default, the Regional Director may cause the forfeiture of any financial assurance provided to ensure your compliance with the terms and conditions of your lease or grant and the regulations in this chapter and 30 CFR chapters II and XII.

(e) If the Regional Director determines that your financial assurance is forfeited, the Regional Director will:

(1) Collect the forfeited amount; and

(2) Use the funds collected to bring your lease or grant into compliance and to correct any default.

(f) If the amount the Regional Director collects under your financial assurance is insufficient to pay the full cost of corrective actions, the Regional Director may:

(1) Take or direct action to obtain full compliance with your lease or grant and the regulations in this chapter; and

(2) Recover from you, any co-lessee, operating rights owner, grant holder or, to the extent covered by the guarantee, any third-party guarantor responsible under this subpart, all costs in excess of the amount the Regional Director collects under your forfeited financial assurance.

(g) If the amount that the Regional Director collects under your forfeited financial assurance exceeds the cost of taking the corrective action required to bring your lease or grant into compliance with its terms and the regulations in this chapter and 30 CFR chapters II and XII, the Regional Director will return the excess funds to the party from whom they were collected.

(h) The Regional Director may pay the funds from the forfeited financial assurance to a co- or predecessor lessee or third party who is taking the corrective action required to obtain partial or full compliance with the regulations and the terms of your lease or grant.

Subchapter C—Appeals

PART 590—APPEAL PROCEDURES

■ 24. The authority citation for part 590 continues to read as follows:

Authority: 5 U.S.C. 301 *et seq.;* 31 U.S.C. 9701; 43 U.S.C. 1334.

Subpart A—Offshore Minerals Management Appeal Procedures

■ 25. Amend § 590.4 by adding paragraph (c) to read as follows:

§ 590.4 How do I file an appeal?

* * * * *

(c) You may file an appeal of a BOEM supplemental financial assurance demand with the IBLA. However, if you request that the IBLA stay the demand pending a final ruling on your appeal, you must post an appeal surety bond equal to the amount of the demand that you seek to stay before any such stay is effective.

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Part III

Federal Trade Commission

16 CFR Parts 801 and 803
Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Pursuant to Section 7A(d) of the Clayton Act, the Federal Trade Commission (''FTC'' or ''Commission'') is proposing amendments to the premerger notification rules (''the Rules'') that implement the Hart-Scott-Rodino Antitrust Improvements Act (''the Act'' or ''HSR'') and to the Premerger Notification and Report Form (the ''Form'') and Instructions (''Instructions''). These proposed changes would result in a redesign of the premerger notification process through both a reorganization of the information currently required and the addition of new information and document requirements. In addition, these changes would implement the Merger Filing Fee Modernization Act of 2022. The proposed amendments would involve changes to both the Rules and the Instructions, and the Commission proposes explanatory and ministerial changes to the Rules as well as necessary amendments to the Instructions to effect the proposed changes.

DATES: Comments must be received on or before August 28, 2023.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. File your comment online at *https://www.regulations.gov/* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024, or by telephone at (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Overview

The Act and Rules currently require the parties to certain mergers and acquisitions to submit premerger notification filings (''HSR Filings'') to the Commission and to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') (collectively, ''the Agencies''), and to wait a short period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. 18, if consummated and, when appropriate, to seek an injunction in federal court in order to enjoin anticompetitive acquisitions prior to consummation.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

In this notice of proposed rulemaking (''NPRM''), the Commission proposes amending the Rules (Part 801 and Part 803 and its appendices), the Form, and the Instructions to reorganize the information currently required with an HSR Filing and to require additional information critical to the Agencies' initial review. These changes would improve the efficiency and effectiveness of that initial review by providing the information the Agencies need to identify during the initial 30-day waiting period any transaction that may pose competition concerns and potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation of the proposed transaction. These amendments also incorporate the changes to implement the collection of information mandated by the Merger Filing Fee Modernization Act of 2022 (''2022 Amendments'') contained within the Consolidated Appropriations Act, 2023 (Pub. L. 117–328, 136 Stat. 4459) to Section 7(a) of the Clayton Act, 15 U.S.C. 18a. Finally, the Commission proposes explanatory and ministerial changes to the Rules as well as necessary amendments to the Instructions to effect the proposed changes.

Background

The premerger notification program is designed to provide the Commission and the Assistant Attorney General with the information and documentary material necessary and appropriate for an initial evaluation of the potential anticompetitive impact of transactions. The HSR premerger notification program is an essential tool for effective and efficient merger enforcement because it enables the Agencies to investigate acquisitions that may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and to challenge them before they are consummated and the businesses of the two companies are ''scrambled'' or integrated such that effective post-merger relief is much more difficult. Congress intended that premerger review would ''strengthen the enforcement of Section 7 by giving the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated.'' [1] Premerger notification and review, including a mandatory waiting period during which they cannot consummate the transaction, gives the Agencies the procedural tools necessary to seek to prevent mergers in court before they cause harm or the operations of the firms become so integrated that the premerger state of competition cannot be restored.

The HSR Act and Rules specify that transactions subject to the HSR Act cannot be consummated until 30 days for most transactions (cash tender offers and certain types of bankruptcies observe a 15-day waiting period) [2] after the parties submit an HSR Filing to the Agencies. These statutory deadlines for conducting an initial review are extraordinarily short, and the Agencies must work quickly to determine whether to take steps to prevent the consummation of potentially anticompetitive transactions. During the initial waiting period, the FTC's

[1] H.R. Rep. No. 94–1373 at 5 (1976).

[2] 15 U.S.C. 18a(b)(1)(B); 11 U.S.C. 363(b)(2).

Premerger Notification Office (''PNO'') staff must review each HSR Filing to ensure it complies with the HSR Rules. Staff at both Agencies initially review the information and documents for substantive antitrust concerns, identify and assess the relevant facts, conduct a preliminary antitrust analysis, form preliminary recommendations regarding the investigation's direction, and communicate those recommendations within each Agency. As staff formulate recommendations, they must also initiate clearance from the other agency for those transactions that merit collection of additional information to avoid any duplication of effort and ensure that only one agency investigates the transaction. Senior leadership at the investigating agency must review staff's recommendations and determine whether to issue a Request for Additional Information (''Second Request''),[3] which starts the second phase of the agency's merger investigation. If there are other jurisdictions investigating, Agency staff coordinate with relevant state Attorneys General or international counterparts. All of this must happen during the initial waiting period, which is typically 30 days.

Given the large number of HSR Filings submitted each year, the Agencies must use their resources efficiently and effectively to focus primarily on transactions that may harm competition. Information submitted as part of the HSR premerger notification process is a key starting point, and the information contained in the HSR Filing should be sufficient to allow the Agencies to conduct a thorough but quick evaluation of whether the proposed transaction is one that requires more in-depth investigation through the issuance of Second Requests.

However, after a comprehensive review of the premerger notification process and based on the Agencies' experience conducting in-depth investigations of challenged mergers, the Commission believes that the information currently reported in an HSR Filing is insufficient. In fact, the challenges of premerger review have expanded considerably over time as result of several factors. First, there has been tremendous growth in sectors of the economy that rely on technology and digital platforms to conduct business and, given the dynamic nature of these markets and the importance of acquisition strategies to success and market growth, mergers and acquisitions in these sectors present a unique challenge for the Agencies.[4] In these sectors, some transactions involve firms whose premerger relationship is not clearly horizontal or vertical; rather, merger activity in these sectors increasingly involves firms in related business lines where the Agencies must closely examine the potential for direct competition in the future.

In addition, the very nature of HSR-reportable transactions has become more complex over time. Transaction structures have evolved to include not only the Ultimate Parent Entity (UPE) and its acquiring entity,[5] but also other entities within the acquiring person. For instance, there can be numerous entities between the UPE and acquiring entity, and other investors can have a stake in any one of these entities. As a result, these investors could have a direct role in effectuating the transaction. Individuals or entities other than the those directly involved in the transaction may be able to exert influence over the transaction as well. The existence of subsidies or loans, among other means, may subject the buyer to additional pressures from individuals or entities not directly a party to the reportable transaction. Indeed, the use of board observers has become a more frequent way for outside players to gain direct access to company strategy. Each of these factors can affect a transaction's impact on the competitive landscape.

Consistent with this concern, the Commission's NPRM also proposes changes to implement the collection of information about certain subsidies, as mandated by the 2022 Amendments. Congress determined that foreign subsidies can distort the competitive process or otherwise change the incentives of the firm in ways that undermine competition following an acquisition and are particularly problematic when provided by entities or countries that are strategic or economic threats to the United States.[6] The proposed changes require filing parties to provide information about subsidies received from foreign entities of concern, as discussed in more detail below.

Another factor that has an impact on the complexity of premerger review is that consistent with the law and binding judicial precedent, the Agencies have stepped up efforts to review transactions for *all* their potential competitive impacts. The Agencies are responding to evidence that the U.S. economy is becoming increasingly concentrated overall.[7] This concentration may reflect decreased competition, which can result in higher prices for consumers, decreased innovation, reduction in output, and lower wages for workers. For example, economists have estimated that workers' share of national income has fallen sharply since 2000, such that the workers' share of income today is now 6 to 8 percentage points below the 1980 level.[8] These findings reveal that despite the Agencies' efforts to prevent market consolidation through merger enforcement, many markets suffer from a lack of robust competition and mergers continue to cause harm.[9] As President Biden noted in his Executive Order on Promoting Competition, industry consolidation and weakened competition ''deny Americans the benefits of an open economy,'' with ''workers, farmers, small businesses, and consumers paying the price.'' [10]

[3] 15 U.S.C. 18a(e).

[4] *See, e.g.,* Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 23–24 (2021).

[5] 16 CFR 801.1(a).

[6] Title II of the Merger Filing Fee Modernization Act of 2022, Public Law 117–329, Div. GG, sec. 201(a)(1) at 3826, 136 Stat. 4459. Congress pointed to remarks of former Commissioner Noah Phillips that ''one area where antitrust needs to reckon with the strategic interests of other nations is when we scrutinize mergers or conduct involving state-owned entities . . . companies that are controlled, by varying degrees, by the state . . . [and] often are a government tool for implementing industrial policies or to protect national security.'' *Id.* at sec. 201(a)(5).

[7] *See, e.g.,* Council of Econ. Advisers Issue Brief, Benefits of Competition and Indicators of Market Power at 4 (Apr. 2016), *https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf* (noting change in revenue share earned by the 50 largest firms in each sector); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms,* 135 Q.J. Econ. 645 (2020) (finding that the top 4 firms in the top sectors of the economy became steadily and significantly more concentrated); Thomas Philippon, *Causes, Consequences, and Policy Responses to Market Concentration,* in *Aspen Economic Strategy Group, Maintaining the Strength of American Capitalism* (2019) (reviewing literature on concentration in the U.S. economy).

[8] *See, e.g.,* Gene M. Grossman and Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share,* 14:1 Ann. Rev. Econ. 93–124 (2022).

[9] *See, e.g.,* Keith Brand, Chris Garmon, Ted Rosenbaum, *In the Shadow of Antitrust Enforcement: Price Effects of Hospital Mergers from 2009–2016,* (forthcoming in J.L. Econ.); Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,* 134 Q.J. Econ. 51 (2019); Gautam Gowrisankaran, Aviv Nevo, and Robert Town, *Mergers When Prices are Negotiated: Evidence from the Hospital Industry,* 105 Am. Econ. Rev. 172 (2015); Orley Ashenfelter, Daniel Hosken, and Matthew C. Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers,* 57 J.L. & Econ. S67 (2014).

[10] Exec. Order No. 14,036, 86 FR 36,987 (July 14, 2021). *See also* The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-onpromoting-competition-in-the-american-*

Continued

Each year, many of the transactions that are investigated by the Agencies are also investigated by another jurisdiction under their laws and procedures and this adds to the complexity of premerger review. Moreover, the Agencies' experience gained while cooperating with international competition agencies that are conducting their own merger investigation reveals that better information can help address the increased complexity of premerger review and improve its efficiency. As compared to the Form, most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data. Importantly, many other jurisdictions rely on narrative responses from the parties that contain basic information about business lines or company operations, and several require the parties to self-report overlaps.

For all these reasons, the Commission believes that the information currently collected by the Form is insufficient for the Agencies to conduct an effective and efficient initial evaluation of a transaction's likely competitive impact on all of those who might be affected, including consumers, small businesses, and workers. In the Agencies' experience, the current Form does not provide their staff with complete information, including information about the transaction; the filers' business operations and those of any related entities; the premerger relationship between the acquiring person and the acquired entity; individuals or entities that may have influence over the operation of the relevant business lines; the full range of potential competitive implications of the transaction, including effects on workers; and prior acquisitions.

To supplement the shortcomings of HSR Filings, Agency staff must often rely on voluntary cooperation from third parties—customers and competitors of the merging parties—during the initial waiting period to learn basic information about the parties' business dealings and the markets in which they compete. In addition, staff needs to conduct independent research using publicly available information to supplement the modest amount of material submitted with the HSR Filing. Neither of these is reliable as a substitute for information provided by the parties themselves and certified as a complete response. Moreover, the additional effort required to discover basic business information about the parties to the transaction and their premerger relationship is inefficient and can result in both too few in-depth investigations when the information collected does not uncover a significant premerger competitive relationship as well as in-depth investigations that are either too broad or too narrow due to the insufficient detail about those relationships that is currently provided in HSR Filings. The information collected by the parties for their own premerger assessment of the transaction is paramount for the Agencies' antitrust assessment and should be collected and submitted with the initial filing.[11] The Commission therefore proposes additional questions and document requests to provide the Agencies with the information necessary to facilitate their initial review, as discussed further in this NPRM.

At the same time, it has become clear to the Commission that certain required information currently submitted in the Form to aid the Agencies' review is not as helpful as originally intended. For instance, as a general screening tool, reporting revenue by specific dollar amounts for specific industry codes, as defined by the North America Industry Classification System (''NAICS''), does not materially assist the Agencies in their initial review. Reporting revenue ranges for the NAICS codes, would sufficiently convey which lines of business of the filing person generate the most revenue. In addition, the requirement to report manufacturing revenues at a granular level has become less helpful to the Agencies during their initial review as a result of changes made by the United States Census Bureau (''Census'') to one of its revenue classification systems. Finally, the Commission believes that the identification of minority investors in target entities, other than those that will ''roll over'' their investments post-consummation, is of limited use. The Commission therefore proposes deleting these requirements, as discussed in further detail below.

The Commission anticipates that the proposed reorganization and collection of additional information in HSR Filings would greatly enhance the Agencies' ability to complete the review of a reportable transaction in a short period of time, and that they are necessary and appropriate in order for the Agencies to vigorously enforce the nation's antitrust laws. The changes would improve the efficiency and effectiveness of the Agencies' initial review process and reduce the need to rely on the voluntary submission of additional information by the parties and third-party industry sources during the initial waiting period.

Finally, the Commission notes that since the implementation of the Act and Rules in the late 1970s, there has never been a large-scale reorganization of the information required in an HSR Filing. As a result, the Commission is proposing a comprehensive redesign of the premerger notification process through both a reorganization of the information currently required and the addition of new information requirements. As the Agencies are currently working to complete an electronic filing (''e-filing'') platform, the exact structure of the redesign is unclear at this time. The Commission believes that the development and roll-out of an e-filing platform will mark a significant improvement in the submission and processing of HSR Filings, with benefits for both filers and the Agencies. Thus, in this NPRM, the Commission is providing an overview of the proposed reorganization of the information currently required and the proposed new information requirements. The exact form of the redesign and how filers will submit this information will be more clearly laid out in any Final Rule after the Commission reviews all comments to this NPRM.

Proposed Changes to the Rules

I. Proposed Changes to Part 801

A. Section 801.1: Proposed Definitions of ''Foreign Entity or Government of Concern'' and ''Subsidy''

On December 29, 2022, the President signed into law the Consolidated Appropriations Act, 2023, which included amendments to the HSR Act in t2022 Amendments. Public Law 117–328, 136 Stat. 4459. Congress found that foreign subsidies, particularly those from ''countries or entities that constitute a strategic or economic threat

economy/ (noting that ''Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.'').

[11] ''The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.'' 122 Cong. Rec. H30877 (Sept. 16, 1976) (remarks of Rep. Rodino).

to United States interests,'' [12] ''can distort the competitive process by enabling the subsidized firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition'' [13] post-merger. The 2022 Amendments require the Commission, with concurrence of the Assistant Attorney General, and in consultation with Chairperson of the Committee on Foreign Investment in the United States, the Secretary of Commerce, the Chair of the United States International Trade Commission, the United States Trade Representative, and heads of other appropriate agencies (''Relevant Agencies''), to promulgate a rule to require persons making an HSR Filing to disclose subsidies received from countries or entities that are strategic or economic threats to the United States. Congress identified those threats as ''foreign entities of concern'' as defined in section 40207 of the Infrastructure and Jobs Act, 42 U.S.C. 18741(a), and required the Commission to collect information about subsidies from these entities as part of HSR Filings.

After conducting its own internal diligence to draft a rule and in consultation with the Relevant Agencies on this topic, the Commission proposes amending § 801.1 to add proposed paragraphs (r)(1) and (2), which define ''foreign entity or government of concern'' and ''subsidy,'' respectively.

1. Section 801.1(r)(1) Foreign Entity or Government of Concern

In the 2022 Amendments, Congress found that foreign subsidies are particularly problematic when granted by countries or entities that constitute a strategic or economic threat to U.S. interests. To identify such subsidies, the Commission proposes new rule § 801.1(r)(1). This proposed rule defines, in proposed subsection (i), subsidies that would have to be disclosed, per Congress' mandate, if received from a ''foreign entity of concern'' as the term is defined in section 40207 of the Infrastructure Investment and Jobs Act (''IIJ Act''), 42 U.S.C. 18741(a). The Commission therefore proposes adopting this definition in § 801.1(r)(1)(i).

The Commission recognizes, however, that the definition of a ''foreign entity of concern'' in the IIJ Act does not explicitly include foreign governments or government agencies. To the extent that HSR filers have received any subsidy directly from the government of a country designated by 42 U.S.C. 18741(a)(5)(C), the Commission believes that including these subsidies would be consistent with Congress' mandate to capture information regarding subsidies when granted by entities posing a strategic and economic threat to the United States. Indeed, the Agencies' understanding of the subsidies' competitive significance would be incomplete without including subsidies granted by foreign governments or government agencies of foreign countries that are covered nations under 42 U.S.C. 18741(a)(5)(C). Therefore, the Commission proposes requiring persons making an HSR Filing to report subsidies received from governments (and their agencies) of foreign countries that are covered nations under 42 U.S.C. 18741(a)(5)(C) in proposed § 801.1(r)(1)(ii).

Finally, the Commission proposes that proposed §§ 801.1(r)(1)(i) and (ii) retain the references to the respective sections of the IIJ Act rather than incorporating the current text of these sections to assure that the proposed rule remains consistent with any subsequent amendments to these sections within the IIJ Act.

2. Section 801.1(r)(2) Subsidy

The 2022 Amendments found that ''[f]oreign subsidies, which can take the form of direct subsidies, grants, loans (including below-market loans), loan guarantees, tax concessions, preferential government procurement policies, or government ownership or control, can distort the competitive process.'' [14] Thus, the 2022 Amendments require the Commission to collect information about such subsidies to enable the Agencies to determine whether the transaction, if consummated, would violate the antitrust laws. But the statute does not define the term ''subsidy'' and its specific definition has, in fact, been heavily debated and negotiated in both U.S. legislation and international treaties in other contexts. The Commission is mindful of the relevant caselaw and expertise of other U.S. agencies that have developed over decades and, after consultation with the Relevant Agencies on this topic, the Commission proposes the adoption of the definition of subsidies in Title VII of the Tariff Act of 1930 (''Tariff Act''), 19 U.S.C. 1677(5)(B).

The Tariff Act definition of ''subsidy'' is consistent with the definition in the World Trade Organization's Agreement on Subsidies and Countervailing Measures (''SCM''), to which the United States is a party.[15] The Commission believes that because this definition is found both in U.S. law and in the SCM, both U.S. and foreign filing parties, or the law firms that represent them, should be familiar with and able to apply. The Commission also believes this definition is consistent with the Congressional mandate in the 2022 Amendments.

The Commission thus proposes adopting this definition in § 801.1(r)(2) and that the proposed rule retain the reference to the Tariff Act definition rather than incorporating the current text of that section to assure that the proposed rule remains consistent with any subsequent amendments to the Tariff Act.

The incorporation of this proposed change into the Instructions is discussed below at III.E.1.

II. Proposed Changes to Part 803

A. Sections 803.2, 803.5, and 803.10: Adoption of Electronic Filing

The Commission proposes amending §§ 803.2(e) and (f); 803.5(a)(1), (3), and (b); and 803.10(c)(1)(i) and (ii) to eliminate references to paper and DVD filings to physical offices. In March 2020, the COVID–19 pandemic and resulting closures of federal office buildings prevented the Commission and Assistant Attorney General from physically accepting HSR Filings, as had been the practice since the original adoption of the Rules in 1978. As a result, on March 17, 2020, the Agencies began accepting filings electronically.[16] Given the success of that system, the Commission proposes amending the Rules as noted above to adopt electronic filing and eliminate references to paper and DVD filings. This change benefits both the Agencies and filing parties by reducing reliance on the delivery and acceptance of paper filings or DVDs.

B. Section 803.2: Requiring Separate Forms for Acquiring and Acquired Persons

The Commission proposes amending § 803.2(a) and deleting § 803.2(b)(1)(v) so that filing persons that are both the acquiring and acquired person are required to make separate filings. Currently, the Rules, Instructions, and Form permit filers that are both an acquiring and an acquired person in a transaction to file only one Form. This

[12] Title II of the Merger Filing Fee Modernization Act of 2022, Public Law 117–329, Div. GG, sec. 201(a)(2) at 3826, 136 Stat. 4459.

[13] *Id.* at sec. 201(a)(1).

[14] *Id.*

[15] 19 U.S.C. 3511(d)(12).

[16] Press Release, Fed. Trade Comm'n, Premerger Notification Office Implements Temporary e-Filing System (March 13, 2020), *https://www.ftc.gov/news-events/news/press-releases/2020/03/premerger-notification-office-implements-temporary-e-filing-system.*

scenario arises most commonly when a seller will receive voting securities of the buyer as consideration for the sale of the target. In such transactions, both the acquisition of the target by the buyer and the acquisition of the buyer's voting securities by the seller may be reportable. Thus, the buyer and seller can each be an acquiring and an acquired person.

Although the Rules permit filers to use one Form for the two transactions in these cases, § 803.2(b)(1)(v) requires that separate responses be provided for Items 5 through 8, one set of responses as the acquiring person and one set as the acquired person. In the Commission's experience, filers that opt to combine the information on a single Form often do not include everything that is required, and these filings are, in fact, very confusing for the Agencies to review. In contrast, when filers choose to submit two separate Forms for such transactions, these filings provide all the required information and in a much clearer format. The Commission thus proposes amending § 803.2(a) and deleting § 803.2(b)(1)(v) to require acquiring persons and acquired persons to submit separate HSR Filings, one as the acquiring person and one as an acquired person, in instances where filers qualify as both. This proposed approach would make the Agencies' initial review much easier by more clearly separating information related to the acquiring person from the acquired person. No new information would be required, and technology allows parties to save copies of filings to reduce the need to input repetitive information.

C. Section 803.5(b): Requiring Draft Agreements or Term Sheets

The Commission proposes amending § 803.5(b) to require filers who have not executed a definitive transaction agreement before making an HSR Filing to submit a draft agreement or term sheet that describes with sufficient detail the scope of the entire transaction that will be consummated after observing the waiting period required by the Act. Section 803.5(b) currently allows filers in any non-§ 801.30 acquisition to file on the basis of ''a contract, agreement in principle or letter of intent to merge or acquire [that] has been executed'' and an affidavit attesting to that execution as well as the good faith intention to complete the transaction. In permitting parties to file before the signing of a definitive agreement, the Commission has relied on the assumption that the filings would ''contain sufficiently definitive information about the transaction to permit accurate analysis.'' [17] In the Commission's experience, however, filings submitted on the basis of bare preliminary agreements, such as an indication of interest, non-binding letter of intent, or agreement in principle (''Preliminary Agreements''), typically do not meet this standard.

Often, Preliminary Agreements reflect only very early discussions between the parties, and since there is currently no obligation to file a draft or final agreement once the HSR Filing is submitted, the Agencies must spend time during the initial waiting period simply trying to discover the scope and timing of the transaction. Moreover, given the preliminary nature of such a filing, the parties have often not yet undertaken a robust analysis of the transaction and therefore have drafted few, if any, documents responsive to Items 4(c) or 4(d) of the current Form. Permitting parties to submit an HSR Filing prior to a complete substantive analysis of the transaction, and at times even before the parties have done diligence on rationales or justifications for the transaction, puts the Agencies at a distinct disadvantage during the initial waiting period in determining what the transaction is and whether it may violate the antitrust laws if consummated.

Additionally, HSR Filings made during the early phases of negotiations may be too uncertain to merit review. The original Statement of Basis and Purpose from 1978 (''1978 SBP'') provides clear guidance that ''[b]ecause of the time and resource constraints upon the agency staffs,'' the Agencies should not expend resources to review transactions so lacking in specifics that they could be considered merely ''hypothetical.'' [18] Yet allowing for the submission of a filing on the basis of a Preliminary Agreement often triggers the use of limited resources for hypothetical transactions, first to discover the full range of potential viable transactions, and then to assess the competitive impact of those potential iterations.

The Commission therefore proposes amending § 803.5(b) to eliminate the ability to submit an HSR Filing on any Preliminary Agreement without providing a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to allow the Agencies to understand the scope of the transaction and to confirm that the transaction is more than hypothetical. The Commission also proposes a corresponding change to the Instructions, as noted at III.C.6. Because detailed term sheets or draft agreements are often prepared in the ordinary course of deal negotiations, the Commission does not expect this change would impose a significant burden on filing parties. However, the Commission recognizes that eliminating the parties' ability to make filings prior to the negotiation of such documents may change the timing of filing and would likely result in more robust filings that would take additional time to prepare. On balance, the Commission believes that this proposed change is consistent with the original intent of the Rules to prevent expending scarce Agency resources on hypothetical transactions and would allow the Agencies to focus on transactions definitive enough to permit accurate analysis.

D. Section 803.8: Translation of Documents

The Commission proposes amending § 803.8 to require submission of English-language translations for all foreign-language documents submitted with the initial HSR Filing. Section 803.8(a) currently provides that parties need not translate foreign-language materials submitted with the initial filing, and that English-language outlines, summaries, extracts, or verbatim translations need only be provided if they already exist. Section 803.8(b), in contrast, has required since 1983 that all foreign-language documents responsive to a Second Request be provided with English translations.[19]

In the Commission's experience since the early 1980s when Rule 803.8 was first adopted, it is no longer enough to require translations of only those foreign-language documents submitted in response to Second Requests because today's HSR Filings quite frequently contain foreign-language materials. These materials typically include key documents, such as the transaction agreements submitted in response to current Item 3(b) of the Form, the relevant financials submitted in response to current Item 4(b), and the documents submitted in response to current Items 4(c) and 4(d) of the Form. Parties often submit foreign-language materials in their HSR Filings with no translation at all or with only rough English-language outlines, summaries, or extracts, which may not accurately and fully convey the contents of the foreign-language document. As a result, the Agencies must either obtain their

[17] 43 FR 33450, 33511 (July 31, 1978).

[18] *Id.* at 33510–511.

[19] The Commission proposed mandatory translation in 1981, 46 FR 38710 (July 29, 1981), and issued a final rule in 1983, 48 FR 34427 (July 29, 1983).

own translations of these documents or miss out on potentially critical information, leaving the Agencies at a disadvantage during their initial review. Given the wide variety of foreign languages the Agencies typically see, it would be very costly for the Agencies to retain translation services for each filing that may contain some foreign-language material. Further, obtaining translations adds significant delay within the already time-constrained initial waiting period and would not allow for filing parties to review the translations for errors. These translations may be especially important for those transactions that report foreign subsidies.

To address this issue, the Commission proposes combining §§ 803.8(a) and 803.8(b). Proposed § 803.8 would therefore be one paragraph requiring that verbatim English translations be provided with all foreign-language materials submitted as part of an HSR Filing or in response to a Second Request. For either an initial HSR Filing or in response to a Second Request, both the original document and the English translation would need to be submitted. Proposed § 803.8 would not require any particular method of translation but would specify that, whatever translation method the parties choose, all verbatim translations must be understandable, accurate, and complete. This proposed change would also be reflected in the Instructions, as specified below in III.A.4.

Although the Commission noted in its 1983 final rulemaking that requiring translations created a burden for filing parties,[20] the Commission now believes that translation tools available to the parties have become more abundant and that these tools provide many options for translation that should significantly reduce the burden of providing translations. Translations of foreign-language documents would greatly benefit the Agencies in allowing staff to know the content of responsive documents submitted in a foreign language. The Commission invites comment on whether there are categories of documents identified in this NPRM that would present a significant burden to translate and what other alternatives might achieve the Commission's goal of being able to understand and assess foreign-language documents while creating less burden for filing parties.

[20] 48 FR 34427, 34440 (July 29, 1983).

E. Section 803.10: Commencement of Waiting Periods

The Commission proposes amending § 803.10(c)(1)(i) to clarify when filings made electronically are to be credited as received by the Agencies. Specifically, the Commission proposes amending this rule to clarify that compliant filings will be credited as received on the date filed if: (i) the electronic submission is complete by 5:00 p.m. Eastern Time; and (ii) such date is not a Saturday, Sunday, legal public holiday (as defined in 5 U.S.C. 6103(a)), or the observed date of such legal public holidays.

These clarifications are consistent with current and historical practices. Of course, historically, the Rules did not need to specify this information, since the receipt of physical filings (either on paper or DVD) required the offices of the Assistant Attorney General and Commission to be open. But because electronic filing platforms can allow submission of filings even when Agency staff is not available to receive the filings, the proposed amendments make clear that filings are only credited as received during regular business hours on regular business days. These proposed changes would provide clarity and thus benefit both filing parties and the Agencies.

F. Section 803.12: Information To Be Updated With Refiling

The Commission proposes amending § 803.12(c) to specify which responses to the items in the proposed Instructions would need to be updated if the acquiring person chooses to withdraw its HSR Filing and refile it (an ''Updated HSR Filing''). The procedure for voluntary withdrawal and refiling permits the acquiring person to restart the initial waiting period, so long as no material changes have been made to the transaction, to provide the Agencies an additional 15 or 30 days (depending on the transaction type) to review the transaction without issuing a Second Request. If the Updated HSR Filing is received within two business days of withdrawal, no new fee is required, but filers currently must provide a new affidavit and certification and update current Item 4 of the Form to provide the Agencies with more recent information that is likely relevant to the continued review.

The Commission proposes eliminating the requirement to provide updated financials, currently required by Item 4(a) and (b), in the Updated HSR Filing. The Commission's experience has shown that, given that the withdraw and refile procedure is completed within approximately one month of the original filing, the financial documents required by Item 4(a) and (b) are rarely changed and therefore updating them is not essential in this phase of its investigation.

The Commission proposes requiring updated Transaction-Related Documents with the Updated HSR Filing, which, as discussed below in III.D.1.a., would comprise the current Item 4(c) and (d) documents subject to proposed modifications of the custodians and clarifications. Documents responsive to current Item 4(c) and (d) typically reflect the most relevant thinking of key individuals with knowledge of the transaction within the acquiring person and are required as part of an Updated HSR Filing. Therefore, the Commission believes these documents are essential to the Agencies' initial antitrust assessment of the transaction.

The Commission also proposes adding two new requirements for the Updated HSR Filing: updated transaction agreements and updated information about subsidies from Foreign Entities of Concern. Though the voluntary withdrawal and refiling process is only available if the transaction is materially the same, the Commission believes that the Agencies would benefit from having a complete understanding of all aspects of the status of and rationale for the transaction, including any changes that have occurred since the day the HSR Filing was submitted. Therefore, the Commission proposes requiring that the Updated HSR Filing include the latest version of the transaction agreements, including the most recent drafts, if a final version has not been executed. The Commission believes this proposed requirement would not impose a substantial burden, since this would be a limited set of documents that should be readily available to the acquiring person.

The Commission also proposes requiring that the Updated HSR Filing include updated information regarding Subsidies from Foreign Entities or Governments of Concern, which is discussed below at III.E.1. The Commission believes that most updated HSR Filings would reflect no new information related to subsidies given the short period of time since the original HSR Filing. However, if new information about subsidies from foreign entities of concern were to become available, the Commission believes that it would be consistent with Congressional intent for the Agencies to have access to this information.

Proposed Changes to the Instructions

III. Part 803 Appendix A and Appendix B

As mentioned above, the Agencies are developing an e-filing platform through which filers would submit information required by the HSR Rules via an online portal. As a result, this NPRM does not contain a new draft Form. Instead, this NPRM presents the information requirements as Instructions for collecting and submitting documents and information required by the HSR Rules. The proposed Instructions reorganize the information to reflect the planned layout of the e-filing platform in development, which would be described in any final rule. Prior to the implementation of the e-filing platform, the proposed Instructions contemplate filers would submit the proposed requests for information and narratives via uploads in a standard format such as PDF and Excel.

The proposed changes to the information that filing parties would be required to provide are detailed below. The Commission recognizes that, in total, these proposed changes would be significant and impose additional burden on some filing parties. Some proposed changes ask for additional information or documents that the Commission believes are in the possession of the filing persons in a form that could be readily uploaded into the e-filing platform. Other proposed changes would require filing parties to compile or generate the requested information specifically for the HSR Filing, such as items requesting narrative responses, which would involve additional effort. As explained below, the Commission has determined that the additional burden associated with these proposed changes is justified because the requested documentary material and information is necessary and appropriate for effective and efficient review of HSR Filings to determine within the initial waiting period whether the transaction may, if consummated, violate the antitrust laws.[21]

Based on the Agencies' experience conducting merger investigations, and as discussed above, the Commission believes that the limited information currently available to the Agencies in the HSR Filing is no longer sufficient to conduct an effective initial screening of the transaction for all types of competitive harm that may result from the transaction. The proposed set of reorganized revenue information, additional documents, and narrative responses would create a much more complete, accurate, and robust basis on which to screen the transaction for the various potential competitive effects, including those that arise from non-horizontal transactions or combinations involving competing employers. These proposals would also provide a more reliable and robust set of information to determine when the transaction does not warrant an in-depth investigation, which often requires a substantial investment of time and resources for both the investigating agency and the merging parties. Based on the Agencies' experience in reviewing and challenging illegal mergers, the proposals target the information that is most relevant and readily available to filing persons and would require it to be presented in a coherent and organized way that will facilitate quick antitrust review by the Agencies during the initial waiting period. But the Commission welcomes comments on the burden associated with and the appropriate balance of having to provide information in the form of revenues, documents, and narratives as part of the proposed changes in this NPRM and invites alternative proposals that meet the objectives described below.

At their core, the proposed changes are motivated by the fundamental purpose of the HSR Act, which is to allow the Agencies, within a short period of time to review the information submitted with the Filing and identify potentially problematic transactions prior to consummation, and, where appropriate, initiate an in-depth review by issuing Second Requests. The fact that the Agencies must conduct their evaluation in an initial waiting period of 15 or 30 days, depending on the transaction type, means that the Agencies must have enough information to consider a wide range of potential effects on competition on an expedited basis. Based on the cumulative learning of the Commission and Assistant Attorney General over the course of decades of investigations, the Commission proposes requiring new information and narratives to address particular areas where the Agencies have found specific deficiencies in the type of information currently required by the Form. In addition, this NPRM would implement changes required by the 2022 Amendments, which are consistent with the need for sufficient information to screen for all types of competitive concerns.

Despite the added burden for filing persons, on balance, the Commission believes that the benefit to the Agencies' merger review would be significant and would help address information asymmetries between Agency staff and the filing persons in the initial waiting period. The Agencies expend substantial resources during the initial waiting period to discover and confirm basic business information about the filing persons, information that is well-known to them but not to Agency staff and is not available from any other source. These information asymmetries have become more acute as deals and companies have become more complex. In the Commission's experience, the inefficiency created by information asymmetries can overwhelm the initial review process, especially when the volume of HSR reportable transactions is high.[22] The proposed changes would also benefit filing persons where information contained in an HSR Filing would demonstrate to the Agencies that the transaction at issue does not need further investigation. Indeed, both the Agencies and filing persons have an interest in ensuring that HSR Filings are robust enough for the Agencies to quickly identify transactions that do not require further investigation during the initial waiting period. It is the Commission's aim to be cognizant of all such interests in proposing the substantial changes contained in this NPRM.

For ease of reference, the Commission includes the following materials regarding the proposed changes in this NPRM:

- An outline of the reorganization contemplated in the proposed Instructions,
- A chart that identifies proposed new locations of the current Items of the Form including whether substantive changes are proposed, and
- A chart of proposed new categories of required information.

These materials appear immediately below.

Proposed Instructions Outline

- General Instructions and Information
- Ultimate Parent Entity Information
  - UPE Details
  - Organization Structure
- Transaction Information
  - Parties
  - Filing Fee
  - Transaction Details

[21] 15 U.S.C. 18a(d).

[22] The Agencies experienced a surge in HSR reportable transactions during 2021 and 2022. For instance, FY 2021 HSR reportable transactions were double those of FY 2020 (1,637 versus 3,520), and in FY 2022, reportable HSR transactions remained high, at over 3,200. The pace and volume of HSR filings (generally two filings per transaction) during that time (in addition to on-going merger investigations) required the Agencies to adjust their HSR review process, including suspending the granting of requests for early termination of the waiting period.

- Transaction Description
- Joint Ventures
- Agreements and Timeline
- Competition and Overlaps
  - Business Documents
  - Competition Analysis
  - NAICS Codes
  - Controlled-Entity Overlaps
  - Minority-Held Entity Overlaps
  - Prior Acquisitions
- Additional Information
  - Subsidies from Foreign Entities or Governments of Concern
  - Defense or Intelligence Contracts
  - Identification of Communications and Messaging Systems
  - Other Jurisdictions
- Certification
- Affidavits

CROSS REFERENCE BETWEEN CURRENT FORM AND PROPOSED INSTRUCTIONS

Current form item	New location	Substantive changes?
Fee Information	Transaction Information/Filing Fee	No.
Corrective Filing	Transaction Information/Transaction Details	No.
Cash Tender Offer	Transaction Information/Transaction Details	No.
Bankruptcy	Transaction Information/Transaction Details	No.
Foreign Jurisdictions	Additional Information/Other Jurisdictions	Yes.
Early Termination	Transaction Information/Transaction Description	No.
Item 1(a)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(b)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(c)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(d)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(e)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(f)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 1(g)	Ultimate Parent Entity Information/UPE Details	No.
Item 1(h)	Ultimate Parent Entity Information/UPE Details	Yes.
Item 2(a)	Transaction Information/Parties	No.
Item 2(b)	Transaction Information/Transaction Details	No.
Item 2(c)	Transaction Information/Transaction Details	No.
Item 2(d)	Transaction Information/Transaction Details	No.
Item 3(a) (Entities)	Transaction Information/Parties	No.
Item 3(a) (Description)	Transaction Information/Transaction Description	Yes.
Item 3(b)	Transaction Information/Agreements and Timeline	Yes.
Item 4(a)	Ultimate Parent Entity Information/UPE Details	No.
Item 4(b)	UPE Information/UPE Details	No.
Item 4(c)	Competition and Overlaps/Business Documents	Yes.
Item 4(d)	Competition and Overlaps/Business Documents	Yes.
Item 5(a)	Competition and Overlaps/NAICS Codes	Yes.
Item 5(b)	Transaction Information/Joint Ventures	Yes.
Item 6(a)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 6(b)	Ultimate Parent Entity Information/Organization Structure	Yes.
Item 6(c)(i)	Competition and Overlaps/Minority-Held Entity Overlaps	Yes.
Item 6(c)(ii)	Competition and Overlaps/Minority-Held Entity Overlaps	Yes.
Item 7(a)–(d)	Competition and Overlaps/Controlled-Entity Overlaps	Yes.
Item 8(a)	Competition and Overlaps/Prior Acquisitions	Yes.

PROPOSED NEW REQUIREMENTS AND CATEGORIES OF INFORMATION

Proposed new sections	Location
New Definitions	General Instructions and Information.
Document Log	General Instructions and Information.
Translations	General Instructions and Information.
Organization of Controlled Entities	Ultimate Parent Entity Information/Organization Structure.
Identification of d/b/a or f/k/a names	Passim.
Identification of Additional Minority Interest Holders	Ultimate Parent Entity Information/Organization Structure.
Narrative Describing Ownership Structure of the Acquiring and Acquired Entities	Ultimate Parent Entity Information/Organization Structure.
Organizational Chart for Funds and Master Limited Partnerships	Ultimate Parent Entity Information/Organization Structure.
Identification of Other Types of Interest Holders that May Exert Influence	Ultimate Parent Entity Information/Organization Structure.
Identification of Officers and Directors	Ultimate Parent Entity Information/Organization Structure.
Description of Acquiring Person	Ultimate Parent Entity Information/Transaction Details.
Narrative Describing Transaction Rationale	Ultimate Parent Entity Information/Transaction Details.
Diagram of the Transaction	Ultimate Parent Entity Information/Transaction Details.
Identification of Related Transactions	Ultimate Parent Entity Information/Transaction Details.
Expansion of Transaction Agreements to be Produced	Ultimate Parent Entity Information/Agreements and Timeline.
Production of other Agreements between the Acquiring and Acquired Persons	Ultimate Parent Entity Information/Agreements and Timeline.
Provision of a Transaction Timeline	Ultimate Parent Entity Information/Agreements and Timeline.
Production of Certain Documents of the Supervisory Deal Team Lead(s)	Competition and Overlaps/Business Documents.
Production of Certain Strategic Plans	Competition and Overlaps/Business Documents.
Production of Certain Drafts	Competition and Overlaps/Business Documents.
Organizational Chart of Authors and Certain Recipients of Documents	Competition and Overlaps/Business Documents.
Narrative Describing Horizontal Overlaps	Competition and Overlaps/Competition Analysis.
Narrative Describing Supply Relationships	Competition and Overlaps/Competition Analysis.
Narrative Describing Labor Markets	Competition and Overlaps/Competition Analysis.

PROPOSED NEW REQUIREMENTS AND CATEGORIES OF INFORMATION—Continued

Proposed new sections	Location
Identification of Minority Held Entities with Revenue Overlaps	Competition and Overlaps/Minority-Held Entity Overlaps.
Provision of Geolocation for Certain Locations of Operations	Competition and Overlaps/Controlled-Entity Overlaps.
Identification of Additional Prior Acquisitions	Competition and Overlaps/Prior Acquisitions.
Disclosure of Subsidies from Foreign Entities or Governments of Concern	Additional Information.
Identification of Certain Defense or Intelligence Contracts	Additional Information.
Identification of Communications and Messaging Systems	Additional Information.
Mandatory Disclosure of Foreign Filings	Additional Information.
Voluntary Waivers for International Competition Authorities	Additional Information.
Voluntary Waivers for State Attorneys General	Additional Information.
Statement of Penalties for False Statements	Certification.
Prevention of Destruction of Documents	Certification.

The following discussion of the proposed changes in this NPRM tracks the Proposed Instructions Outline above, explaining which information requirements are materially the same as those currently included in the Form and Instructions, which the Commission proposes changing, and which are proposed new categories of required information.

Throughout the proposed Instructions, references to paper and DVDs have been eliminated, as discussed in II.A. above.

A. General Instructions and Information

The Commission proposes creating a General Instructions and Information section within the proposed Instructions that would largely parallel the General section of the current Instructions but would be significantly reorganized. Within the proposed General Instructions and Information section, the Commission proposes substantive changes to the following sections: Filing Person, Definitions, Responses, and Translations, as detailed below.

1. Definitions and Explanation of Terms

The Commission proposes creating two new definitions and deleting an existing definition within the proposed Instructions.

a. Economic Research Service's (ERS's) Commuting Zones (CZ)

The Commission proposes adding a definition for Economic Research Service's Commuting Zones. As discussed below at III.D.2.c., the Commission proposes new questions that would require the submission of information about the filing person's employees to aid the Agencies' evaluation of the potential impact of proposed transactions on labor markets. These proposed questions would require data to be submitted using the Department of Agriculture's Economic Research Service Commuting Zones for the year 2000. These codes are available at *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

b. North American Product Classification System (NAPCS) Data

The Commission proposes eliminating the reporting of 10-digit North American Product Classification System (''NAPCS'') based codes, as discussed in more detail below at III.D.3. Thus, the Commission proposes deleting the NAPCS definition from the proposed Instructions.

c. Standard Occupational Classification

The Commission proposes adding a definition for Standard Occupational Classification. As discussed below at III.D.2.c., the Commission proposes new questions that would require the submission of information about the filing person's employees to aid the Agencies' evaluation of the impact of proposed transactions on competition for workers in labor markets. The proposed definition of Standard Occupational Classification (''SOC'') would require filers to submit data by the first six digits of the relevant code, as published by the United States Bureau of Labor Statistics, available at *https://www.bls.gov/soc/2018/#classification.*

2. Filing

As discussed above at II.B., the Commission proposes amending § 803.2 and deleting § 803.2(b)(1)(v) to require filing persons to submit separate forms when filing as an acquiring and acquired person. The proposed Instructions would also reflect this proposed change.

3. Responses

The Commission proposes replacing the current Responses section with a new Responses section that would provide details on how to provide the information responsive to the proposed new questions. This would include eliminating instructions that are specific to filings made on paper or DVD, see above at II.A. The proposed revised Responses section would also describe the information that filing persons would need to provide in a log of responsive documents and narrative responses to be submitted with an HSR Filing. This information would generally be the same as the information currently required for documents submitted in response to Items 4(c) and 4(d) of the current Form, with two proposed expansions.

First, the Commission proposes requiring the filing person to identify the request(s) to which the document would be responsive. Though the proposed Instructions do not include item numbers at this time, indented and bolded headings in the proposed Instructions should each be considered a separate request. The Commission routinely requires this type of referencing for document submissions pursuant to compulsory process, including in response to a Second Request, and it is extraordinarily helpful in quickly identifying materials responsive to a specific request. This proposed requirement would allow the Agencies to understand the content of filings more quickly by providing a cross-reference between information and documents, facilitating a more efficient review.

Second, the Commission proposes modifying the requirements for identification of authors of documents prepared by third parties. For documents prepared by third parties at the request of a filing person, such as market studies, quality of earnings analyses, confidential information memoranda, management presentations, or board presentations, the Commission proposes that, in addition to providing the name of the third party that prepared the document, the filing person would be required to provide the name, title, and company of the individual within the filing person who supervised the preparation of the document or for whom the document

was prepared. Understanding who, within the filing person, was responsible for overseeing or receiving the work of outside consultants would materially assist the Agencies in identifying key decision-makers for the transaction. In the case of documents that were not commissioned by the filing person, such as subscription market reports, unsolicited banker's books, or documents received from the other filing person, the Commission proposes that the filing person would only be required to list the document title and name of the third party that prepared the document.

These proposed changes would allow the Agencies to quickly assess which documents were key to the decision to pursue the transaction and who within the filing person coordinated the assessment that resulted in that decision.

4. Translations

As noted above at II.D., the Commission proposes amending § 803.8 to require the filing person to submit English translations of all foreign-language documents. The proposed Instructions would also reflect this change.

B. Ultimate Parent Entity Information

The Commission proposes the creation of an Ultimate Parent Entity (UPE) Information section within the proposed Instructions. Currently, information about the structure of the acquiring and acquiring persons is required in various sections of the Form: Item 1 contains basic contact information; Item 2 identifies the ultimate parent entities; Item 3 identifies the acquiring and acquired entities; and Item 6 identifies certain controlled and minority-held entities, as well as certain minority holders of the filing person. The Commission proposes the reorganization, clarification, and expansion of these items to require additional information about the acquiring person and acquired entity(s) in order for the Agencies to receive a more complete picture of the scope of the operations of each, and to identify points of contact for questions about the HSR Filing or potential Second Requests, as well as key interest holders. These proposed changes, discussed below, would fall within the following proposed categories: UPE Details and Organization Structure.

1. UPE Details

The proposed UPE Details section within the proposed Instructions would contain most of the information currently required in Item 1 of the Form. The Commission proposes adding a new Size of Person Stipulation item that would allow the filing person to stipulate that the size of person test is met, when applicable, making it easier for staff to determine that the size of person test is met and streamlining the review process as a result.

The Commission also proposes clarifying which financials are required from acquiring persons who are natural persons. As a result of feedback from filers over the years, the Commission is aware that this item causes confusion. The proposed language in the Instructions would make it clear that natural persons who are acquiring persons must include the annual reports and/or annual audit reports of (1) the acquiring entity(s) and any entity controlled by the natural person whose dollar revenues contribute to a NAICS overlap, and (2) the highest-level entity(s) the natural person controls. It is the intent of the Commission that the Instructions require this information from natural persons, and the proposed change would make that intent clear.

Finally, the Commission proposes requiring all filing persons to identify the person to whom Second Requests should be addressed. Current Item 1(g) requires the identification of two individuals to contact regarding the HSR Filing, and current Item 1(h) requires the identification of an individual located within the United States for the limited purpose of receiving a notice of a Second Request. But the Instructions currently limit application of Item 1(h) to filings made by foreign persons, so for U.S. filers, Second Requests are sent to the person identified in Item 1(g). The Commission now understands that U.S. filing persons sometimes have separate points of contact to answer questions regarding the HSR Filing as compared to questions regarding the receipt of Second Requests. Therefore, the Commission proposes requiring all filing persons to separately provide contacts for questions related to the HSR Filing and Second Requests.

These proposed changes would provide clarity for filing persons, and the Agencies would benefit from receiving more precise information about the UPE.

2. Organization Structure

The proposed Organization Structure section within the proposed Instructions would expand the required information about how the UPE is organized and the identity of other individuals and entities that may have influence over business decisions or access to confidential business information. The proposal would require the identification of entities within the acquiring person or acquired entity, minority shareholders, and other non-controlling entities, and create new requirements to identify certain other interest holders that may exert influence, as well as officers, directors, and board observers.

a. Entities Within the Acquiring Person and Acquired Entity

The proposed Entities Within the Acquiring Person and Acquired Entity section would contain information currently required by Items 1(f) and 6(a) of the Form. Item 1(f) requires the identification of the acquiring entity(s) or acquired entity(s) (as appropriate). Item 6(a) requires the acquiring person to list all entities it controls with total assets of $10 million or more (though foreign entities with no sales into the United States may be omitted). The acquired person currently has the same obligation, but the scope is limited to the acquired entity(s); the acquired person is not required to provide information about entities that are not part of the transaction. The Commission proposes requiring additional information about the reported entities within the filing persons.

First, the Commission proposes requiring filing persons to organize the list of controlled entities by operating company or business. As filing persons have become more complex, an alphabetically or geographically organized list of the controlled entities, which is currently permitted by Item 6(a) of the Form, often does not provide the Agencies with a sufficient overview of the scope of the businesses that the acquiring person and acquired entity(s) control. Some filers currently organize the list of entities held by the acquiring person or acquired entity by operating company, and in the Commission's experience, this is a much more useful way to present the information. Understanding which companies are part of an operating group or portfolio company would allow staff to identify the actual market participants from among all legal entities. The Commission thus proposes requiring that lists of controlled entities be submitted in this manner to aid the Agencies' review during the initial waiting period.

Second, for each such operating company or business, the Commission proposes that filers identify the name(s) by which the company or business does business, as well as any name(s) by which it formerly did business within the three years prior to filing. While it remains important for the Agencies to receive legal entity names, these names

are often unrelated to the names used in the marketplace and may be unfamiliar to industry participants. Being able to connect the legal names to the ''doing business as'' and ''formerly known as'' names would greatly assist the Agencies in understanding the scope of the operations of the acquiring person and acquired entity and allow the identification of other public information about the entity during the initial waiting period.

b. Minority Shareholders and Other Non-Controlling Entities

The proposed Minority Shareholders and Other Non-Controlling Entities section would contain information currently required by Item 6(b) of the Form, which requires identification of holders of 5% or more, but less than 50%, of the acquiring UPE and acquiring entity by the acquiring person, and of the acquired entity(s) by the acquired person. In order to provide the Agencies with a more complete understanding of the individuals or entities that have significant investments in the filing persons, the Commission proposes amending the current Item 6(b) requirements and expanding them to require the identification of additional minority interest holders.[23]

The identification of certain minority holders of the filing persons has been required since the first iteration of the Form in 1978, though the level of detail that has been required has changed over time.[24] Prior to 2011, Item 6(b) only required the identification of holders of minority interests in voting securities. In 2011, Item 6(b) was amended to require the identification of holders of 5% or more but less than 50% of unincorporated entities.[25] The Commission, however, made an exception for limited partnerships and only required the identification of the general partner. At that time, the Commission understood that limited partners had no control over the operations of the fund or portfolio companies and therefore did not see them as essential to the Agencies' initial review.[26] Since that time, the Commission has come to understand that the Agencies would benefit from more complete information about all minority holders of the filing parties, including the identification of limited partners. As a result, the Commission proposes collecting information about minority holders of all entities within the acquiring person that are related to the transaction and requiring the identification of certain limited partners.

The current limitation on providing minority holder information for only the acquiring ultimate parent entity and acquiring entity often prevents the identification of key interest holders. For example, co-investors often do not invest at the UPE or acquiring entity level but may hold a 5% or greater interest in an entity that is in between the UPE and the acquiring entity in the ownership structure. In particular, when funds make acquisitions, it can be the case that more than one fund may be substantively involved in the acquisition, using a variety of corporate or unincorporated entity types. The identification of not only the controlling person but also significant minority investors can be an important component of the Agencies' evaluation of the potential competitive effects of the transaction during the initial waiting period,[27] and obtaining a broader picture of relevant minority investments, where they exist, would aid the Agencies in their assessment of the nature of competitive decision-making within the relevant entity.

In the case of limited partnerships, Item 6(b) currently does not require the identification of limited partners, even if they hold 5% or more. At the time this item was adopted, the Commission understood that limited partners had no control over the operations of the fund or portfolio companies and therefore did not see them as essential to the Agencies' initial review.[28] However, after more than a decade, the Commission now believes that it is inappropriate to make generalizations regarding the role of investors in limited partnership structures. Identification of limited partners can provide valuable information about co-investors and lead to the identification of potentially problematic overlapping investments resulting from the transaction that could violate Section 7.[29] Thus, it is important that the Agencies know the identities of limited partners to understand the transaction in its entirety and to uncover investment relationships that may have competitive significance.

Accordingly, for the acquiring person, the Commission proposes the reporting of certain minority holders of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. For entities affiliated with a master limited partnership, fund, or investment group, the ''doing business as'' or ''street name'' of that group would also be required.

Under these proposals, minority holders that would have to be reported would include all entities or individuals, including limited partners, that hold 5% or more of the voting securities or non-corporate interests of one of the identified entities. To be clear, the Commission proposes requiring limited partnerships to identify all holders of 5% or more, but less than 50%, to harmonize the requirement for limited partnerships with the requirements for limited liability companies and corporations. The requirement to identify the general partner of a limited partnerships would remain the same.

The Commission acknowledges that these proposed requirements may require significant additional information from investment entities, such as funds and master limited partnerships, for which organizational structures are often more complex. But the Commission believes that the disparate treatment of LLCs as compared to limited partnerships is no longer appropriate. Further, the complexity of these organizational structures makes it all the more important that the filing person provide this information with the HSR Filing. The complex structure of investment entities is not adequately captured by the current Form, and there is often no other source for Agencies to learn of these relationships. Though the introduction of the definition of ''associate'' in 2011[30] provides the Agencies with some valuable information with which to identify competitively significant relationships that exist through related holdings, it does not provide enough detail about all of the potential players involved in the structure of the acquiring person. As a result, the Commission believes that the

[23] The acquisition of a minority position may be reportable under the Act, and failure to make an HSR Filing and observe the waiting period may result in significant civil penalties. 15 U.S.C. 18a(g).

[24] *See* 43 FR 33450 (July 31, 1978); 52 FR 7066 (Mar. 6, 1987); 76 FR 42471 (July 19, 2011).

[25] 76 FR 42471 (July 19, 2011).

[26] Proposed Rules, 75 FR 57110, 57118 (Sept. 17, 2010), adopted in 2011, 76 FR 42471 (July 19, 2011).

[27] 43 FR 33450, 33531 (July 31, 1978).

[28] Proposed Rules, 75 FR 57110, 57118 (Sept. 17, 2010), adopted in 2011, 76 FR 42471 (July 19, 2011).

[29] *See, e.g.,* In re Red Ventures Holdco and Bankrate, FTC Dkt. C–4627 (Nov. 3, 2017) (enforcement action involving overlapping limited partnership holdings); *United States* v. *Dairy Farmers of Am.,* 426 F. 3d 850 (6th Cir. 2005) (DFA stakes in competitors Flav-O-Rich and Southern Belle violated Section 7).

[30] 76 FR 42471 (July 19, 2011).

proposed identification of all minority investors of 5% or more in entities related to the transaction would allow the Agencies to more quickly identify potential competitive issues related to these holdings during the initial waiting period.

To reduce the additional burden associated with these proposed changes, the Commission proposes limiting the information about minority holders collected from the acquired person. Currently, the acquired person must list certain minority interest holders of the acquired entity(s), but this requirement does not distinguish between minority holders that will be cashed out as a result of the transaction, and those that will continue investment after the transaction. On balance, the Commission believes that identifying only the minority holders that would continue to have an interest in the acquired entity(s), directly or indirectly, would provide the most relevant information to the Agencies during the initial waiting period. Therefore, the Commission proposes that the acquired person only be required to identify minority holders of the acquired entity(s) that will continue to hold interest in the acquired entity(s) or will acquire interests in any entity within the acquiring person as a result of the transaction. The Commission recognizes that in certain transactions to which § 801.30 applies, the acquired person might not have this information. In such cases, it would be permissible for the acquired person to indicate that the information is unknown.

c. Other Types of Interest Holders That May Exert Influence

The proposed Other Types of Interest Holders that May Exert Influence section would require the identification of entities or individuals that may have material influence on the management or operations of the acquiring person beyond those with the minority interests discussed above. Because these other interest holders retain the ability to influence decision-making by the acquiring person after the transaction, it is important for the Agencies to know about these relationships during the initial waiting period.

The Commission has long recognized the potential influence of minority holders and the possibility that they may seek to change competitive decisions of the target firm.[31] In the 1978 SBP, the Commission explained that competitors, customers, or suppliers holding a significant interest in one of the parties can raise antitrust concerns.[32] As originally conceived, minority holdings reported in Item 6 were designed to alert the Agencies to situations in which the potential antitrust impact of the transaction does not result solely or directly from the transaction itself, but may arise from direct or indirect shareholder relationships between the parties to the transaction.[33]

As entity structures have evolved and become more complex, the Commission now believes that relationships beyond those created by holding voting securities or non-corporate interests can give rise to similar and significant competitive concerns. For instance, some credit arrangements permit the creditor to exercise rights and influence similar to those of equity holders. Additionally, some equity interests that do not provide rights to vote for the board of directors can, nevertheless, provide rights to vote on or influence business practices of the company, including investments in future product or service lines. Further, contractual arrangements allowing individuals or entities to nominate directors or board observers have proliferated. In addition, some entities outsource the management of operations to third parties that do not beneficially own interests in the company. Each of these relationships can be relevant to understanding the transaction and its potential competitive effects. Without information about these relationships, the Agencies cannot easily identify those transactions where these relationships exist and may affect the competitive dynamics before and after the transaction.

As a result, the Commission proposes that the acquiring person identify certain individuals (other than employees of the acquiring person) or entities that, in relation to the acquiring entity or any entity it directly or indirectly controls or is controlled by, (i) provide credit; (ii) hold non-voting securities, options, or warrants; (iii) are board members or board observers, or have nomination rights for board members or board observers; or (iv) have agreements to manage entities related to the transaction. Credit relationships would be limited to creditors that have, or would have, in conjunction with or result of the transaction, provided credit totaling 10% or more of the value of the entity in question. Holders of non-voting securities, warrants, or options would be limited to those the value of which equals or exceeds 10% of the entity or could be converted to 10% or more of the voting securities or non-corporate interests of the company.

The Commission recognizes that the compilation of this information would add to the burden of preparing an HSR Filing for an acquiring person with a complicated investment structure, but it is important that the HSR Filing contain this information because individuals or entities that fall into any of the four categories described above can have a material influence on the operations or strategy of the acquiring person. As with minority investors, these relationships can affect the competition analysis of the transaction, and the proposed identification of these individuals or entities would allow the Agencies to know the identity of those in a position to influence post-merger competition decisions.

d. Officers, Directors, and Board Observers

The proposed Officers, Directors, and Board Observers section would require the identification of the officers, directors, or board observers (or in the case of unincorporated entities, individuals exercising similar functions) of all entities within the acquiring person and acquired entity, as well as the identification of other entities for which these individuals currently serve, or within the two years prior to filing had served, as an officer, director, or board observer (or in the case of unincorporated entities, roles exercising similar functions). This information would allow the Agencies to know of existing, prior, or potential interlocking directorates and to assess the competitive implications of such relationships under both Sections 7 and 8 of the Clayton Act.[34]

Section 8 of the Clayton Act generally prohibits a person from serving as an officer or director of competing corporations, subject to certain categorical and de minimis exceptions. This section of the Clayton Act aims to prevent information sharing and coordination between competitors through a per se ban that prohibits the same individual from serving as an

[31] *See United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 568 (1957) (du Pont's 23% stake in General Motors violated Section 7 by giving it an advantage over other suppliers and thereby resulting in a substantial lessening of competition). In considering the proper remedy, the Supreme Court found that divestiture of only voting rights was insufficient due to the on-going ''special relationship'' could still result in competitive harm. *United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 332 (1961).

[32] 43 FR 33450, 33531–32 (July 31, 1978).

[33] *Id.* at 33531.

[34] Although Section 8 does not technically apply to unincorporated entities, information sharing and coordination can still raise concerns under Section 1 of the Sherman Act.

officer or director of two competing firms.[35]

In the Agencies' experience, many acquiring persons have board members who also serve on the boards of other companies. As a result, the Agencies often investigate existing board relationships as well as potential interlocks that would result from the transaction as part of its initial review. Section 8 bars interlocks that arise through rights to appoint board members to a competitor[36] or officers or directors serving on the boards of competing companies. Investment entities that acquire board seats across a diverse portfolio of companies may be particularly likely to encounter Section 8 compliance issues via a merger or acquisition.[37]

Currently, filers are not required to disclose the identity of the members of their boards of directors, and this makes it difficult for the Agencies to complete their assessment of potential Section 8 issues during the initial waiting period. Having information about potential interlocking directorates in the HSR Filing would allow the Agencies to take steps to prevent the sharing of board-level confidential information much more quickly. This information is also relevant to the competition analysis of the transaction, as well as concerns about potential gun-jumping, which may violate the Act or Section 1 of the Sherman Act.[38] This is particularly important given that post-merger enforcement of Section 8's *per se* ban can be ineffective after the individual has been privy to the confidential business information of two competitors: Section 8 provides a one-year grace period to remedy an illegal interlock that arises after the individual is elected or chosen to be an officer or director.[39] Moreover, Section 8 does not provide for civil penalties or other monetary relief, only injunctions barring the individual from serving on the two boards.

Information about board observers can also be relevant to the Agencies' analysis of the proposed transaction. Board observers are not subject to the Section 8 ban on interlocking directorates, and yet may have access to the same materials that are shared with officers and directors. In December 2020, the Commission issued an advance notice of proposed rulemaking (''ANPRM'') that, among other things, sought to gather information about sources of influence on corporate decision-making outside the scope of voting securities.[40] The Commission noted the possibility that there are ways to gain influence over a company other than through the acquisition of voting rights, for instance through board observers, and pointed to the increasing use of board observers as part of the governance structure. Because the acquisition of rights to be a board observer is not a reportable event under the HSR Act, the Commission sought information about whether having rights as a board observer provides opportunities to influence an issuer's business decisions.[41]

The Commission received two comments in response to the ANPRM that discuss the role of board observers, and each comment indicated that individuals serving as board observers typically receive the same information as the board of directors, although there may be ways to exclude them from reviewing privileged or competitively sensitive information.[42] In the Commission's experience, board observers have become more prevalent and could be privy to the same information as members of the board. For that reason, information about who these individuals are and whether they also serve as officers, directors, or board observers with other companies is important for understanding other sources of influence on the company's competitive decision-making and whether such individuals could share information between competitors. The Commission believes that having this information available during the initial waiting period would permit the Agencies to take steps to minimize the sharing of information prior to consummation.

The Commission thus proposes that filing persons provide information about the officers, directors, and board observers (or in the case of unincorporated entities, individuals exercising similar functions) of the acquired entity(s) and entities within acquiring person(s), as applicable, for the prior two years, and for each individual, identify any other companies for which those individuals would serve or have served during the prior two years as officers, directors, or board observers. The Commission also proposes requiring the same information for the prospective officers, directors, or board observers of the acquired and acquiring entities after the transaction, as well as for any officers, directors, or board observers of new entities created as a result of the transaction (and, in each case, for unincorporated entities, individuals serving those functions). If it would be impossible to identify the specific officers, directors, and board observers, filers should describe who would have the authority to choose them. Information received through these proposals would help the Agencies identify individuals with the ability to participate in or influence competitively relevant decision-making related to the filing persons or with access to confidential business information, allowing the Agencies to engage in more effective enforcement of the antitrust laws. The Commission believes that this information should be known to or readily accessible by the filing parties, and in some cases already

[35] Like Section 7, Section 8 was designed to ''nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates.'' *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

[36] *See, e.g.,* Complaint, *United States* v. *CommScope Inc.,* 1:07–cv–2200 (D.D.C.) (Dec. 6, 2007) *https://www.justice.gov/atr/case-document/complaint-69* (alleging violations of Sections 7 and 8 where buyer also acquired rights to appoint members to the board of its competitor). See also Press Release, U.S. Dep't of Just., Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates, (Jul. 14, 2016). The Department of Justice has announced its intent to reinvigorate Section 8 enforcement, after seven directors resigned from corporate board positions. See Press Release, U.S. Dep't of Just., Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), *https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.*

[37] The Agencies also consider whether the acquiring person would be expanding into the business of the other company that shared a board member such that the two companies would have competing sales in excess of the de minimis amounts permitted by Section 8.

[38] Any sharing of competitive information between or among competitors, including during the pendency of merger review, that results in competitive harm may be a violation of Section 1 of the Sherman Act, or Section 5 of the FTC Act. Complaint, *United States* v. *Gemstar,* cv 1:03–00198 (D.D.C. 2003), *https://www.justice.gov/atr/case-document/complaint-108;* Complaint, In re Insilco Corp., No. C–3783 (F.T.C. 1998), *https://www.ftc.gov/sites/default/files/documents/cases/1998/01/insilcocmp.pdf.*

[39] 15 U.S.C. 19(b).

[40] 85 FR 77042 (Dec. 1, 2020).

[41] ''At the very least, board observers gain insight into an issuer's strategic decision-making, which is not only useful to the investor sponsoring the board observer, but may also be useful to competitors in the market, especially when those board observers also serve as officers or directors of a competitor. Companies likely benefit from interacting with board observers because company management can obtain additional investor insight without having to alter the composition or voting balance on the board.'' *Id.* at 77050.

[42] *See* Am. Bar. Ass'n, Comment on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules ANPRM, 10–11 (Feb. 1, 2021), *https://www.regulations.gov/comment/FTC-2020-0086-0015;* Comput. & Commc'n Indus. Ass'n, Comment on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules ANPRM, 11 (Jan. 26, 2021), *https://www.regulations.gov/comment/FTC-2020-0086-0002.*

collected as part of an incorporated entity's antitrust compliance program.

C. Transaction Information

The Commission proposes the creation of a Transaction Information section within the proposed Instructions. Currently, information about the transaction is required in several sections of the Form: the initial portion of the current Form requires information about the filing fee and whether early termination of the waiting period is requested; Item 2(a) requires identification of the ultimate parent entities of the acquiring and acquired persons; Item 2(b) identifies the type of transaction; Item 2(c) identifies the § 801.1(h) threshold that will be crossed; Item 2(d) seeks information about the percentage and value of the voting securities, non-corporate interests, and/or assets to be required; Item 3(a) asks for identification of the acquiring and acquired persons and entities, as well as a description of the transaction; Item 3(b) requires the listing and attaching of the most recent transaction agreement, or letter of intent; and Item 5(b) requires information about joint ventures and formations. The Commission proposes the reorganization, clarification, and expansion of these items to require information that will aid the Agencies in understanding the totality of the transaction during the initial waiting period. These proposed changes, discussed below, would require information about the transaction to be reported in the following proposed categories: Parties, Filing Fee, Transaction Details, and Transaction Description.

1. Parties

The proposed Parties section within the proposed Instructions would require the identification of the acquiring and acquired persons and the acquiring and acquired entities. This information is currently collected in Item 3(a) of the Form, and the Commission is not proposing any material changes to this requirement.

2. Filing Fee

The proposed Filing Fee section within the proposed Instructions would require identification of the total filing fee required for the transaction and information about the payment, including identification of the paying entity and the Electronic Wire Transfer confirmation number.[43] This information is currently collected in the Fee Information section of the Form, and the Commission is not proposing any material changes to this requirement.

3. Transaction Details

The proposed Transaction Details section within the proposed Instructions would require the same information currently required by Items 2(b)–2(d) of the Form that detail whether the transaction involves the acquisition of voting securities, non-corporate interests or assets, and the approximate value of each, as well as whether a notification threshold is crossed. The Commission is not proposing any material changes to these requirements.

4. Transaction Description

The Commission proposes creating a Transaction Description section within the proposed Instructions to reorganize information currently required in the Transaction Description portion of Item 3(a) of the Form, and to expand the required information, as described below.

a. Business of the Acquiring Person

The Commission proposes requiring the acquiring person to describe its business operations. Currently, Item 3(a) of the Form requires filing persons to briefly describe the transaction, including whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Filers must also describe the business operation being acquired or what the assets being acquired comprise.[44] Although this information helps the Agencies understand what is proposed to be acquired, it does not provide any insight into the full range of business operations or other entities involved in the transaction on the part of the acquiring person. In the Commission's experience, understanding the scope of the acquiring person's business operations is critically important to determining whether the transaction poses any potential competition concern. Although this information is well known to the acquiring person, it is often not easily or quickly collected and confirmed from public sources during the initial waiting period.

As a result, the Commission proposes requiring the acquiring person to briefly describe the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person's pre-transaction business to facilitate the Agencies' antitrust review during the initial waiting period. Many businesses have pre-prepared descriptions of their operations for use in press releases, marketing materials, and investor materials. Unlike the requirement to describe the entities or assets to be acquired, which would apply to both the acquiring and acquired person, the requirement to describe business operations would be limited to the acquiring person.

b. Business of the Acquired Entity

As noted above, Item 3(a) of the Form requires filing parties to briefly describe the transaction, including whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Filing persons must also describe the business operation being acquired or what the assets being acquired comprise. The Commission is not proposing any material changes to this requirement.

c. Non-Reportable UPE(s)

Item 2(a) of the Form currently requires the identification of any UPE that is not required to file, and the Commission is not proposing any material changes to this requirement.

d. Transaction Description

Item 3(a) of the Form currently requires a brief description of the transaction. The Commission is not proposing any material changes to this requirement.

e. Transaction Rationale

The Commission proposes adding a new requirement that filing persons provide a narrative that would identify and explain each strategic rationale for the transaction. As helpful as the documents responsive to current Items 4(c) and 4(d) of the Form can be, they do not always convey each filing person's cumulative views on the rationale(s) for the transaction. Indeed, such documents (when they are submitted and when they discuss rationales) often contain differing, and at times conflicting or mutually exclusive, statements regarding the transaction depending on when they were prepared or by whom. For example, different members of the deal team might have different perspectives on the potential motivations for the transaction at different times, and the submitted documents do not resolve the filing person's ultimate thinking regarding the topic. Since documents responsive to Items 4(c) and 4(d) do not consistently provide an overview of the rationale(s) for the transaction, it would be of immense value for the Agencies to have during the initial waiting period a

[43] If electronic wire transfers are not available to the filing party, the Instructions would continue to provide instructions for paying by check.

[44] 81 FR 60257 (Sept. 1, 2016).

statement that discusses each the strategic rationale(s) from the perspective of each filing person.

The Commission thus proposes that the acquiring and acquired person be required to submit a narrative describing all strategic rationales for the transaction, including, for example, those related to competition for current or known planned products or services that would or could compete with a current or known planned product or service of the other reporting person, expansion into new markets, hiring the sellers' employees (so-called acqui-hires), obtaining certain intellectual property, or integrating certain assets into new or existing products, services or offerings. The Commission also proposes that the filing person identify which documents submitted with the HSR Filing support the rationale(s) described in the narrative. This proposed requirement would help ensure that the provided narrative is grounded in the filers' ordinary-course documents and not mere advocacy designed to portray a favorable view of the transaction. Moreover, any cited documents that support the narrative would also provide additional context for the Agencies as they assess the parties' stated rationale(s) in relation to any potential competitive consequences of the transaction. Understanding the business reason(s) for pursuing the transaction can materially affect the course and direction of the Agencies' antitrust review during the initial waiting period.

f. Transaction Diagram

The Commission proposes a new requirement that the filing persons provide a diagram of the deal structure along with a corresponding chart that would explain the relevant entities and individuals involved in the transaction. The brief narrative currently required in Item 3(a) of the Form does not require filers to explain all the relevant entities or identify steps involved in the transaction and their sequence. As a result, the Agencies frequently request a more detailed account of these steps during the initial waiting period, but these submissions are voluntary, not uniform in their detail, and often lack important aspects of the transaction that may bear on the competitive analysis and the determination of whether the transaction warrants in-depth review. In the Commission's experience, particularly in the case of complex or multi-step transactions, diagrams are generally more helpful than simple narratives in conveying the relationships of the relevant entities and the deal structure.

The Commission's proposal that filing persons submit a diagram of the deal structure along with a corresponding chart explaining the entities involved in the transaction would further assist the Agencies' conceptualization of the transaction and save considerable time in obtaining basic information about the entities involved and how the transaction would affect the operations of those entities. Such diagrams are often prepared by companies in the ordinary course of business for other purposes, such as for transaction diligence requirements.

g. Related Transactions

While Item 3(a) of the current Form asks parties to indicate whether there are additional filings related to the transaction, filers sometimes overlook this requirement. The proposed Instructions would clarify that filing persons must identify related transactions. The proposed Instructions would also provide a list of common circumstances in which multiple filings are required to guide filing parties in their responses. These proposed changes would provide clarity for both filing persons and the Agencies.

h. Early Termination

The proposed Early Termination section would ask whether the filing party requests early termination of the waiting period. This question is currently asked on page one of the Form, and the Commission is not proposing any material changes to this requirement.

5. Joint Ventures

The proposed Joint Ventures section within the proposed Instructions would require information about transactions structured as a joint venture or formation pursuant to §§ 801.40 or 801.50. This information is currently collected in Item 5(b) of the Form and requires information about the contributions each person will make to the entity, what consideration will be received, the business in which the new entity will engage, and an allocation of revenue to industry codes. As discussed in section III.A.1.b. above and III.D.3. below, the Commission is proposing eliminating the use of 10-digit NAPCS codes. Therefore, the Commission proposes also eliminating the requirement to identify the NAPCS codes in which the joint venture will derive revenue. The Commission is not proposing any other material changes to this requirement.

6. Agreements and Timeline

The proposed Agreements and Timeline section within the proposed Instructions would require filing persons to provide a term sheet or draft agreement that reflects sufficient detail about the proposed transaction to demonstrate the transaction is more than hypothetical, if a definitive agreement has not been executed, as described above in the proposed amendments to § 803.5(b) at II.C. In addition, the Commission proposes additional changes regarding which agreements must be submitted. These proposed changes, discussed below, include a requirement to submit the entirety of all agreements related to the transaction and a new requirement to submit other agreements between the filing persons that are not related to the transaction, as well as a timetable for the transaction.

a. Transaction-Specific Agreements

The Commission proposes requiring that all transaction-specific agreements be submitted with HSR Filings. Currently, Item 3(b) of the Form requires the submission of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities, or non-corporate interests are to be acquired, as well as agreements not to compete and other agreements between the parties. The production of schedules to agreements is not currently required, unless the schedules contain agreements.[45] In the Commission's experience, the structure of transactions has become increasingly complex, often comprising not only multiple agreements between the filing persons but agreements with third parties. Understanding the entirety of the transaction, including but not limited to non-competition and non-solicitation agreements and other agreements negotiated with key employees, suppliers, or customers in conjunction with the transaction, is crucial to determining the totality of the transaction and assessing during the initial waiting period the transaction's potential competitive impact. Moreover, schedules increasingly include descriptions of key terms and provisions.

The Commission thus proposes requiring filing persons to produce all agreements, inclusive of schedules, exhibits, and the like, that relate to the transaction, regardless of whether both parties to the transaction are signatories. It is the Commission's understanding

[45] 16 CFR 803 Appendix Notification and Report Form Instructions at page V.

that these documents are collected and are typically included in materials necessary for closing. Having a complete set of transaction-related agreements would provide the Agencies with a more complete understanding of the transaction under review.

b. Other Agreements Between the Parties

The Commission also proposes requiring filing persons to submit all agreements between any entity within the acquiring person and any entity within the acquired person in effect at the time of filing or within the year prior to the date of filing. Understanding the scope of any existing contractual relationships between the filers would materially assist the Agencies' review by revealing any business interactions or relationships that exist prior to the transaction and that may be affecting premerger competition. These might include licensing agreements, supply agreements, non-competition or non-solicitation agreements, purchase agreements, distribution agreements, or franchise agreements, among others. Understanding the full extent of the filing parties' existing contractual relationships would allow the Agencies to identify those relationships that contribute to the premerger competitive dynamics, which is material to assessing how the transaction may affect post-merger competition.

c. Timeline

The Commission also proposes that filing persons provide a narrative timeline of key dates and conditions for closing. Just as it is critical for the Agencies to understand the totality of the transaction during the initial waiting period, it is also critical to understand the timing of key milestones and the conditions to closing, which are often complex and not easily understood from the transaction documents themselves. The Agencies often cannot confirm basic deadlines for the transaction from the transaction documents and in those cases, the Agencies expend a great deal of time and effort to confirm with filers key dates, including the timing of pre-closing conditions, during the initial waiting period. Understanding deal timing is critical to each Agency's decisions regarding how to manage its merger workload on a priority basis, focusing available resources on those deals whose closing dates are imminent. This basic information about the timing of the transaction is not adequately captured in the current Form, and, to the extent the filing person knows at the time of the HSR Filing and can readily provide it, this information would help the Agencies understand key deal milestones and better manage the timing and focus of the investigation during the initial waiting period.

D. Competition and Overlaps

The Commission proposes creating a Competition and Overlaps section within the proposed Instructions. This section would collect, in one place, information that reveals any existing business relationships between the filing persons that requires the Agencies to take a closer look to determine whether the transaction warrants an in-depth investigation, which is the primary purpose of premerger notification and review. Information collected in this section would include information and documents currently collected in several parts of the Form: in Items 4(c) and 4(d), which require the production of certain documents created in conjunction with the evaluation of the transaction; Item 5(a), which requires the allocation of revenue from U.S. operations to industry and product codes; Item 6(c), which identifies certain minority-held entities of the filer; Item 7, which provides information about industries in which the acquiring person and acquired entity both participate; and Item 8, which requires the identification of certain prior acquisitions made by the acquiring person. The Commission proposes expanding and reorganizing the information and requiring additional documents that would bear directly on the premerger competitive relationship between the filing persons. The proposed Competition and Overlaps section would provide a new source of relevant information related to horizontal overlaps, as well as new information about supply relationships and employees, which would enable to Agencies to quickly identify and assess the potential impact of the transaction across many dimensions of competition. These proposed changes, discussed below, would be organized in the following proposed categories: Business Documents, Competition Analysis, NAICS Codes, Controlled-Entity Overlaps, Minority-Held Entity Overlaps, and Prior Acquisitions.

1. Business Documents

The proposed Business Documents section within the proposed Instructions would require the submission of documents currently required by Items 4(c) and 4(d) of the Form and additional categories of documents. The Commission's proposal for requiring additional documents is informed by a comparison of documents submitted by filing persons with the HSR Filing and those submitted during the Agencies' in-depth investigations that are not required by the current Form but would have been highly probative to the initial antitrust assessment of the transaction during the initial waiting period. The specific types of proposed business documents are discussed below.

a. Transaction-Related Documents

The proposed Transaction-Related Documents section would comprise the same types of documents currently required by Item 4(c) of the Form, which the Commission proposes to expand to include documents prepared by or for the supervisory deal team leads, and Item 4(d), which the Commission proposes to clarify without material changes. The Commission also proposes requiring the submission of certain previous draft versions of these documents.

i. Documents Prepared by or for Officers, Directors, or Supervisory Deal Team Lead(s)

In the proposed Documents Prepared by or for Officers, Directors, or the Supervisory Deal Team Lead section, the Commission proposes expanding the scope of requested documents evaluating the transaction by adding a requirement to submit such documents prepared by or for the supervisory deal team lead(s). Currently, Item 4(c) requires filing persons to provide all studies, surveys, reports, plans, and analyses prepared by or for officers or directors to evaluate the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into products or geographic markets. These transaction-specific assessments of competition, past and future, provide the Agencies with invaluable insights into each party's view of how the transaction could change the competitive landscape and, most importantly, narrow the inquiry to particular markets and companies that each party believes to be its competitors. Since the beginning of the premerger notification program, 4(c) documents have been a key screening tool for the Agencies to identify those transactions that require more than a cursory review during the initial waiting period. The proposed section would retain the same definition of transaction-related documents to be submitted but add the supervisory deal team lead(s) to the list of individuals to whom this item would apply.

In some companies, an officer may lead the day-to-day activities of the deal team and would be considered the supervisory deal team lead, resulting in

no change to the documents currently required as part of Item 4(c) of the Form. But someone other than an officer or director often functionally leads the deal team. In the Commission's experience, in those cases, responses to current Item 4(c) often do not contain documents with sufficient information about the filing person's analysis of the competitive implications of the transaction to enable the Agencies to identify potentially problematic transactions. In fact, based on documents submitted in response to Second Requests, it is the Agencies' experience that individuals other than officers and directors are often the authors or recipients of documents that are otherwise responsive to Item 4(c) of the Form but are not required to be submitted with the HSR Filing because they were not prepared by or for an officer or director. These documents, typically in the possession of the supervisory deal team lead(s), often include information that would have been crucial to the Agencies' analysis of the transaction during the initial waiting period.

The Commission thus proposes that in addition to requiring documents prepared by or for officer and directors, filing persons must also submit these transaction-related documents prepared by or for supervisory deal team lead(s). Identification of any supervisory deal team lead would not be based upon title alone. The Commission proposes that the filing person determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue. A supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in communicating with the individuals, such as officers or directors, that have the authority to authorize the transaction. Any such individual(s) might be the leader(s) of an investment committee, tasked with heading the analysis of mergers and acquisitions, or otherwise given supervisory capacity over the flow of information and documents related to transaction.

The Commission believes this proposal strikes a balance between the interests of the Agencies and those of filing persons in requesting additional documents responsive to Item 4(c) of the Form. Requiring filing persons to include materials prepared by and for supervisory deal team lead(s) would allow the Agencies to receive additional key materials relevant to the analysis of the transaction without requiring information from all deal team members, in light of the opportunity to obtain additional documents through the issuance of Second Requests.

ii. Confidential Information Memoranda

The proposed Confidential Information Memoranda section would collect the information currently required by Item 4(d)(i) of the Form. The Commission is not proposing any material changes to this requirement.

iii. Studies, Surveys, Analyses, and Reports

The proposed Studies, Surveys, Analyses, and Reports section would collect the information currently required by Item 4(d)(ii) of the Form. The Commission is not proposing any material changes to this requirement.

iv. Synergies and Efficiencies

The proposed Synergies and Efficiencies section would collect the information currently required by Item 4(d)(iii) of the Form, and the Commission proposes to clarify that forward-looking analyses are responsive. Currently, Item 4(d)(iii) asks for all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. The Commission proposes to specifically include a reference to models and financial projections to make clear that filers should submit forward-looking assessments of synergies or efficiencies. This information is especially important for screening the competitive impact of products or services not yet generating revenue but projected to do so. As before, financial models without stated assumptions would not need to be provided. For many transactions, especially those involving markets in which competition occurs via on-going innovative efforts, these forward-looking assessments will materially benefit the Agencies' identification of transactions that warrant in-depth review.

v. Drafts

Along with expanding the required Transaction-Related Documents as described above, the Commission also proposes requiring the submission of drafts responsive to these requests. It has been a long-standing position of the Commission's PNO that the submission of draft versions of documents responsive to Item 4(c) or 4(d) is not required unless there is no final version, in which case the most recent draft has been required, or unless a draft was sent to the board of directors. Under this guidance, if a draft version of a document is sent to the Board, it ceases to be a ''draft'' and must be submitted, even if a final version is also submitted. As a result, the Commission has not typically received many draft documents as part of HSR filings.

The Agencies routinely ask for and receive draft documents in response to Second Requests and, in the Agencies' experience, these drafts often reveal additional information about the transaction that would have been important to the Agencies' review during the initial waiting period, such as references to specific product markets or competitors that were removed in subsequent versions. In addition, these drafts can contain highly relevant, probative, or candid statements about the competitive impact not reflected in the final version of the document. In some cases, it appears that the draft documents have been edited to remove candid assessments of factors relevant to competition prior to circulation to officers or directors. In others, the dates of the documents suggest that otherwise responsive drafts were not finalized or shared with officers or directors until after making an HSR Filing.

The Commission therefore proposes clarifying in the Instructions that drafts of responsive transaction-related documents must be submitted if that document was provided to an officer, director, or supervisory deal team lead(s). This proposed change would ensure that the Agencies have access to documents that reflect pre-transaction assessments of business realities, as opposed to ''sanitized'' versions, to aid in their analysis during the initial waiting period. The addition of the supervisory deal team leader(s) to this requirement should capture draft materials important to managing the transaction but avoid the burden of having to submit prior versions that were not reviewed by senior managers or decision-makers. As stated elsewhere in this NPRM, the Commission aims to strike a balance between the Agencies' need to obtain material information about the transaction and the burden on filing parties, so the scope of this request is limited so as not to require filing parties to search numerous company personnel beyond officers, directors, and supervisory deal team lead(s).

The Commission recognizes that requiring draft transaction-related documents creates an additional burden for filing parties to collect and submit more documents to the Commission with their HSR filings and that, to some

degree, previous versions of submitted documents may contain repetitive information. Moreover, HSR filings that contain large document submissions could overwhelm the Agencies and undermine the goal of effective and efficient screening for transactions that require an in-depth investigation. For this reason, the Commission seeks comment on a potential alternate approach in which filing parties collect draft Transaction-Related Documents as part of preparing HSR filings but do not submit these documents until and unless agency staff reviewing the transaction requests the draft documents during the initial waiting period. In the event that agency staff requests the draft documents, the filing person would be required to submit them within 48 hours in order to retain the initial waiting period. The Commission invites comment on whether this alternative approach would reduce the burden for the parties and the Agencies compared with submitting all versions with the HSR Filing as described above, whether there are logistical issues with providing the collected draft documents within 48 hours, and the estimated volume of drafts collected.

b. Periodic Plans and Reports

The proposed Periodic Plans and Reports section would require filing persons to submit certain high-level strategic business documents that were not created in contemplation of the transaction but still contain information relevant to the antitrust analysis. As a result of decades of experience, the Agencies are aware that, as part of diligence for a potential transaction, companies often collect a targeted set of ordinary course documents that do not need to be submitted as part of an HSR Filing. Such documents typically include strategic plans and documents that are useful to those negotiating or evaluating the transaction because they discuss general market dynamics, competitors, or other potential mergers and acquisitions. The Commission understands that these documents are collected to provide key transaction decision-makers with the company's internal assessment of commercial realities of the premerger marketplace.

The Commission therefore proposes requiring certain plans and reports created in the ordinary course of business and not prepared solely for the purpose of evaluating the proposed transaction to be submitted as part of the HSR Filing. Periodic plans and reports created in the ordinary course of a company's business often contain detailed assessments of core business segments, markets, competitors, other acquisition targets, and projections about future competitive dynamics—insights that have direct bearing on the Agencies' antitrust assessment of the transaction in the initial waiting period. The Commission proposes requiring the submission of semi-annual and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity, if those documents were shared with a chief executive of an entity involved in the transaction, or with certain individuals who report directly to a chief executive. The Commission also proposes requiring the submission of all plans and reports submitted to the board of directors (or, in the case of unincorporated entities, individuals exercising those functions) that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiring person and acquired entity.

These proposed new document requirements would be limited in certain specific ways to minimize the overall number of documents submitted with the HSR Filing. First, the new Periodic Plans and Reports section would not require documents that analyze ''the potential for sales growth or expansion into product or geographic markets'' as is required by current Item 4(c). Additionally documents responsive to this item would be limited to those prepared or modified within one year of the date of the HSR Filing. The Commission believes that the submission of a limited set of ordinary course business documents that were not prepared specifically to evaluate the transaction but discuss premerger and future competitive dynamics and strategies broadly would provide valuable insight and context for the transaction-related documents submitted with the HSR Filing. These ordinary course business documents are routinely submitted during in-depth investigations in response to Second Requests and routinely contain unique information about the state of premerger competition, which if available during the initial review period would help the Agencies determine if an in-depth review is warranted and if so, its proper scope.

The Commission is aware that this new requirement has the potential to result in the submission of a large number of documents for complex or large transactions. The Commission is also aware of the potential impact on the filing persons and on the Agencies of large document submissions. The Commission seeks to balance these interests and invites comment on how or whether narrowing the set of custodians for periodic reports and plans, or any other proposed limits, would still generate information about the premerger state of competition that is not specific to the transaction while reducing any burden on filers and the Agencies.

Finally, the Commission notes that filing persons should not exchange additional information with respect to planned products or services to provide a response to this proposed requirement but should respond instead on the basis of regular diligence and the knowledge or belief of the filing person. The Commission recognizes that an acquired person would have limited information about the acquiring person's operations, including products under development, and the Commission does not intend these proposed changes to encourage additional information sharing of this type of information.

c. Organizational Chart of Authors

As the final part of its proposed Business Documents section, the Commission proposes requiring filing persons to identify the authors of all responsive documents submitted with the HSR Filing and to provide additional information about each individual. Given the short period of time for review during the initial waiting period, it is crucial for the Agencies to have a clear understanding of how authors of key documents fit into the organization or entities of each filing person to determine the importance and perspective of the responsive documents submitted with the HSR Filing and to identify key employees within the organizations. Thus, the Commission proposes requiring an organizational chart(s) that would reflect the position(s) within the filing person's organization held by identified authors, and for privileged documents, the recipients of each document submitted with the HSR Filing. The Commission also proposes requiring the filer to identify the individuals searched for responsive documents. It would be sufficient to indicate by notation on the organization chart(s) which individuals were searched.

Providing a chart will help contextualize reporting relationships, as well as the relative seniority, of the authors and recipients and allow the Agencies to more quickly assess which documents contain high-level assessments from key employees. The benefit of being able to identify important decision-makers within the filing person and having context for key documents would allow the Agencies to

quickly assess the probative value of the documents

2. Competition Analysis

The Commission proposes creating a new Competition Analysis section within the proposed Instructions. This proposed section would create new requirements for filing persons to provide narratives that would, among other things, describe their basic business lines and provide product or service information for all related entities; identify current and potential future horizontal overlaps and supply relationships between the filing persons; and provide information about their employees and what services these employees provide. These proposed narrative requests would provide the Agencies with crucial information about current and future competitive relationships between the filing parties, including whether they compete to hire employees, which is information that is not required by the current Form.

a. Horizontal Overlap Narrative

The Commission proposes creating a new Horizontal Overlap Narrative section that would require each filing person to provide an overview of its principal categories of products and services (current and planned) as well as information on whether it currently competes with the other filing person. Such information is core to the Agencies' substantive antitrust analysis during the initial waiting period and is not readily accessible from sources other than the filers themselves. In drafting the Horizontal Overlap Narrative, each filing person would describe its current and planned principal categories of products and services in the way that those business lines are referred to in the company's day-to-day operations so that the Agencies could more readily understand the information in the context of current market realities. If any of the submitted documents support the information contained in the narrative, the filing person would also identify such documents.

The products or services offered by the filing persons that currently or potentially compete with each other are often referred to by antitrust professionals as ''horizontal overlaps.'' The identification and assessment of such horizontal overlaps is an essential starting point for the Agencies' substantive review of any transaction to determine whether it has the potential to violate the antitrust laws. As discussed elsewhere, NAICS code reporting can result in underreporting of horizontal overlaps, and not every HSR Filing contains 4(c) documents that could potentially reveal overlaps not identified by NAICS code reporting. In such cases, the HSR Filing does not contain basic screening information that the Agencies need to determine whether the transaction merits closer scrutiny during the initial waiting period. Premerger notification is intended to allow the Agencies to scrutinize any transaction that eliminates competition between existing or potential competitors, and it is important for every HSR Filing to identify any existing or potential horizontal overlap created by the transaction.

As a result, the Commission proposes that within the Horizontal Overlap Narrative, each filing person would be required to list each current or known planned product or service that competes with (or could compete with) a current or known planned product of the other filer. For each such overlapping product or service, the filing person would provide sales, customer information (including contacts), a description of any licensing arrangements, and any non-compete or non-solicitation agreements applicable to employees or business units related to the product or service.

The proposed requirement for this information about each filing person's market presence in overlapping products or services would enable the Agencies to quickly identify and assess the significance of the filers' respective businesses both in relative and absolute terms. Proposed customer information would enable the Agencies to understand the customer base of the overlapping businesses and to promptly conduct, at the beginning of the initial waiting period, further industry research with customers likely to be affected by the transaction or those who are particularly knowledgeable about the parties' business operations, relevant industry dynamics, and other market participants. Contacting customers to confirm basic market dynamics is a key step in the antitrust analysis conducted by Agency staff during the initial waiting period, and the parties are frequently asked to provide this information on a voluntary basis once one Agency has granted clearance to the other to conduct an initial investigation of the transaction. However, since this information is not compulsory, the Agencies do not always receive it in a timely fashion during the initial waiting period, hampering the ability of the Agencies to use that period to effectively screen for transactions that merit the issuance of Second Requests.

The proposed requirement to describe any licensing, non-compete, or non-solicitation agreements involving the overlapping products or services would enable the Agencies to assess specific categories of existing contracts that are likely to affect how the transaction will impact competition for those products or services. These existing relationships bear on premerger market conditions and may reflect that the filers already view themselves as competitors (in the case of non-compete or non-solicitation agreements) or as key trading partners (in the case of licensing agreements).

The Commission acknowledges the burden drafting the proposed Horizontal Overlap Narrative could create for some filers, especially for transactions involving close competitors with multiple overlapping product or service lines. But identifying those transactions that present broad and complex competition issues is a critical first step for the Agencies. Once identified, the Agencies must then properly manage their review, first determining which markets could be impacted by the transaction and then deciding which of those necessitate in-depth review. On balance, this proposed requirement would significantly improve the information available to the Agencies to identify any existing or potential horizontal overlap to assess the competitive implications of a transaction during the initial waiting period. The Commission notes that in the Agencies' experience, companies who are horizontal competitors prior to the transaction frequently assess the antitrust risk associated with the transaction prior to making an HSR Filing, and therefore the information required by this proposal may already be available, in whole or part, to include with the HSR Filing. Although the Agencies have not previously required this type of narrative to be submitted as part of the Form, other jurisdictions have required such narratives for many years.

b. Supply Relationships Narrative

The Commission proposes creating a Supply Relationships Narrative section that would require each filing person to provide information about existing or potential vertical, or supply, relationships between the filing persons. A prior version of the Form required similar information about vertical vendor-vendee relationships, but the requirement was eliminated in 2001 because the type of information collected did not prove useful enough to the Agencies as a screen for potential non-horizontal relationships to justify

the burden of providing it at that time.[46] Based on the Agencies' experience investigating vertical mergers in the intervening decades, the Commission believes that the current proposal would provide sufficiently robust information to allow the Agencies to identify vertical and other non-horizontal issues, including those presented by diagonal mergers. Non-horizontal relationships can be hard to detect in certain sectors where supply chains are not well defined, for instance in the provision of services rather than physical products. The Agencies have an interest in knowing whether a transaction in which the filing persons operate in related markets would result in any change in market structure or incentives that might affect post-merger competition. Early identification of potential non-horizontal competitive issues is critical to determining whether further investigation is needed, as structural changes in these relationships require additional fact development to determine the nature and scope of potential non-horizontal competitive concerns, which can often be complex and unique. These issues are difficult to discern from the information currently required by the Form, and filing parties are in a unique position to identify existing or future non-horizontal business relationships between them.

The Commission thus proposes to collect, in a narrative response, information for related sales and purchases between the filing persons or with other companies that use the filing person's products, services, or assets to compete with the other filing person. Filing persons would report sales to the other filing person and to any other business that, to the best of the filing person's knowledge, uses its product, service, or asset as an input for a product or service that competes or is intended to compete with the other filing person's products or services. Filing persons would also provide information (including contact information and a description of the supply agreement) for other customers that use the product, service, or asset to compete with other filing person. Filing persons would provide similar information for purchases made from the other filing person and from any other business that, to the best of the filing person's knowledge, competes with the other filing party to provide a substantially similar product, service, or asset. This information would allow the Agencies to identify whether the transaction would create opportunities for post-merger foreclosure of rivals arising from vertical or diagonal relationships.

The Commission acknowledges that this will increase the burden on filers whose transaction involves existing supply relationships or who supply or purchase from companies that compete with the other filing party. But the Commission believes that requiring filing parties to provide a narrative that reveals existing and potential supply relationships between the acquiring person and acquired entity is important for the Agencies because it would allow them to quickly identify those transactions that raise concerns about non-horizontal competitive effects.

c. Labor Markets Information

The Commission proposes creating a new Labor Markets section that would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction. The Agencies have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets and have stepped up efforts to identify and investigate potential labor market effects arising from reportable transactions. Transactions have been challenged on the basis that consummation would result in labor market harms,[47] and consent agreements have included provisions that stop the use of certain non-compete clauses that limit the ability of potential market entrants to hire key employees.[48]

In transactions that involve two firms that purchase labor from the same labor market(s), the Agencies consider whether the transaction may substantially lessen competition for buyers of labor services. Every firm competes for labor in at least one labor market and, more commonly, in multiple labor markets. Companies that compete in the same product market may also compete in the same labor market. Employers, however, may compete in the same labor market even when they do not compete in the same product or input market.

Yet the Form does not collect any information about employees that would allow the Agencies to conduct an initial screening for potential labor market effects, which has materially hampered their ability to protect employees from the harmful effects of mergers. To identify whether the filing persons compete to employ the same types of workers in a particular geographic area, the Commission proposes requiring certain information concerning each filing person's workers before the transaction and any plans that would affect workers post-consummation. This proposed section would identify potential labor market overlaps and allow the Agencies to engage with the filers on potential labor market issues during the initial waiting period.

i. Largest Employee Classifications

The Commission proposes creating a Largest Employee Classifications section that would serve as a screening tool based on the SOC system, developed by the Bureau of Labor Statistics, which classifies workers into occupational categories. Labor markets have two dimensions: the type or features of work performed, and the location of the work. Because describing every relevant feature of each job would be burdensome for parties, the Commission proposes requiring filing persons to classify their workers into occupational categories based on the SOC system, a widely used system for reporting worker statistics. While SOC categories do not always provide exact comparisons, SOC codes would nevertheless provide the Agencies with an objective classification standard which can be used as an initial screen for potential labor market overlaps. The use of these codes as a screening tool is not intended to endorse their use for any other purpose, such as defining a relevant labor market. To implement this proposed screening

[46] The Form originally required information about any vendor-vendee relationship between the reporting parties regarding manufactured product during the most recent year; this information was intended to help the Agencies identify supply relationships that could give rise to concerns about foreclosure or other competitive consequences of vertical integration. The Commission eliminated this requirement in 2001 because it was not effective in identifying vertical issues, not because vertical acquisitions present no potential competitive risks. 66 FR 8680, 8686–87 (Feb. 1, 2001). Since 2001, the Form has not collected specific information related to vertical relationships.

[47] Press Release, U.S. Dep't of Just., Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster, (Nov. 2, 2021), *https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon. See also* Concurring Statement of Commissioner Slaughter and Chair Khan regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England,* at 1–2 (Feb. 17, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf* (recommending including a count in the complaint that the proposed merger would have violated Section 7 of the Clayton Act in a relevant labor market).

[48] Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.*

tool, the Commission proposes requiring filers to list their five largest categories of workers by the relevant 6-digit SOC classification and to provide the total number of employees for each 6-digit code identified.

ii. Geographic Market Information for Each Overlapping Employee Classification

The Commission proposes creating a Geographic Market Information for Each Overlapping Employee Classification section that would serve as a screen for the geographic component of labor markets based on the United States Department of Agriculture's ERS system. The ERS commuting zones were designed to delineate local economies based on where people live and work.[49] Filers would be required to identify the top five largest 6-digit SOC codes in which both parties employ workers. This should provide enough information for the Agencies to use SOC classifications as an initial proxy for labor issues while balancing the burden on filers by limiting the request to their five largest categories of workers. Also, for each of the five largest SOC codes in which both parties employ workers, this section would require filing persons to list the overlapping ERS-defined commuting zone(s) from which the employees commute and the total number of employees within each commuting zone. This proposed requirement would be limited to overlapping geographies, expressed as commuting zones, to capture sufficient information to identify potential labor market concerns without requiring filing parties to provide a complete list of all commuting zones in which they have workers.

This information would represent a material improvement in the data available to the Agencies during the initial waiting period. By relying on existing metrics that are familiar to U.S. companies and by limiting the request to the top five SOC classifications, the Commission's intent is to minimize the burden on filers. Nonetheless, the Commission seeks comment on whether this information would be difficult or costly to collect, and any alternative means by which the Commission could screen HSR Filings for potential labor market overlaps, for example by collecting information on the number and types of workers employed at each of the filing person's facilities.

iii. Worker and Workplace Safety Information

The Commission proposes creating a Worker and Workplace Safety Information section that would require filing persons to identify any penalties or findings that were issued against the acquiring person or acquired entity by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration during the five-year period before the filing. If a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job. The proposed five-year period limitation would capture the most relevant information for analysis during the initial waiting period while lessening the burden on filers to search through older files. This information is not always publicly available but is known to the filers and is relevant to identifying potential labor market effects.

3. NAICS Codes

The Commission proposes creating a NAICS section within the proposed Instructions. This section proposes changes to certain information currently required by Item 5(a) of the Form, which now asks filing persons to submit information regarding dollar revenues and lines of commerce with respect to operations conducted within the United States during the most recently completed fiscal year. This includes products manufactured in the United States, regardless of where they are sold, products manufactured outside the United States but sold into the United States or through a U.S. entity, and products or services derived from U.S. operations, whether sold to a U.S. or foreign customer.

The current version of Item 5 of the Form requires the reporting of revenue by industry and product codes developed by Census to track economic activity in the United States. Over the years, the Commission has revised Item 5 as it sought to balance the need to receive filing persons' revenue information with the burden on filers to provide that revenue information.[50] As part of the redesign of the premerger notification process contemplated in this NPRM, the Agencies reviewed the totality of revenue information currently required in Item 5(a) to determine which information is especially valuable, which is due for an update, and which is not sufficiently reliable or needed to conduct a robust initial assessment of reported transactions. As a result, the Commission now believes that it can further revise revenue reporting requirements to make reported revenue information more informative for the Agencies and less burdensome for filing parties. The Commission thus proposes a substantively different approach to revenue information through six proposed changes. The Commission also proposes a ministerial change to adopt the 2022 version of the NAICS codes, which are the most recent released by Census. Through these proposed changes, the Commission would expand and clarify the industry and product codes that filing persons would have to report, as well as limit the requirements on how revenue must be reported.

First, the Commission proposes eliminating the requirement that filing persons provide the precise amount of revenue attributed to each NAICS code. The Commission intends for the proposed change to streamline revenue reporting for filers and result in figures that would be just as useful to the Agencies for identifying important business lines of each person. It is the Commission's understanding that many businesses do not maintain detailed revenue information by NAICS code in the ordinary course of business and generating this information can require great effort. In fact, even obtaining estimates of revenue to the nearest $100,000, as is currently required, can still be burdensome for filers. The Commission therefore proposes that filing persons would only need to estimate revenue at five levels: pre-revenue (for certain products and services, as described below); less than $10 million; between $10 million and $100 million; between $100 million and $1 billion; and more than $1 billion. The Commission anticipates these ranges would provide the Agencies with an important overview of the magnitude of revenue generated by particular products and services, an important factor in the analysis of transactions during the initial waiting period, while at the same time reducing the burden of reporting revenues for filers. The Commission welcomes comments on

[49] *See* U.S. Dep't of Agric., ERS Commuting Zones and Labor Market Areas, *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/*.

[50] *See* 43 FR 33450, 33520 (July 31, 1978) (revenue reporting based upon Standard Industrial Classification codes of the U.S. Bureau of the Census); 66 FR 35541 (July 6, 2001) (amending the Form and Instructions to report revenue by North American Industry Classification System codes of the U.S. Bureau of the Census); 76 FR 42471 (July 19, 2011) (elimination of the requirement to report ''base year'' data); 84 FR 30595 (June 27, 2019) (amending the Form and Instructions to report manufacturing revenue by North American Product Classification System-based codes of the U.S. Bureau of the Census).

the proposed ranges, as well as other potential ways to capture the relative magnitude of the business of the acquiring person or acquired entity attributable to each NAICS code.

Second, the Commission proposes that NAICS codes be reported on a descriptive basis, encompassing all U.S. operations. Revenue reporting in Item 5(a) currently relies on the filing persons' ordinary course financial records. In the Commission's experience, reliance on these financial records often results in under-reporting or reporting in codes that may not actually be descriptive of the products or services provided. To address this issue, the Commission proposes requiring individuals familiar with the business operations of each operating company (or subdivision) to review the available NAICS codes to select the codes that would best describe the full line of products and services related to U.S. operations, regardless of whether the company tracks revenue by such codes in the ordinary course of business or relies on them for other reporting requirements. The Commission intends for this change to shift the collection of NAICS codes from how a company records revenue to align more closely with the full range of products and services offered. Because the Commission proposes to eliminate the requirement to specifically quantify the amount of revenue attributable to the codes, as described above, the Commission does not anticipate that this change will substantially increase the burden of collecting the information. Further, codes related to non-manufacturing activities estimated to have generated less than $1 million in the last fiscal year would not need to be listed, unless they overlap with a code reported by the other filing person.

Additionally, the Commission recognizes that some NAICS codes are imprecise, which can result in two filing persons engaged in similar businesses using different NAICS codes. Therefore, the Commission proposes that if more than one code might be appropriate, the filing persons would be required to list all the codes that describe the products or services offered and use end notes as needed to clarify selections and any potential overlap where the same revenues are reported in more than one NAICS code. This would assist the Agencies in understanding the businesses of the filing persons during the initial waiting period and address some of the shortcomings of NAICS code reporting.

Third, the Commission proposes changing how NAICS codes should be organized. Currently, filing persons must aggregate revenue across all entities within the acquiring person or acquired entity. But often the acquiring person or acquired entity comprises multiple operating companies or units, which may be engaged in multiple lines of business. For example, large companies can contain multiple operating units or subsidiaries that do business under separate brands and offer diverse products or services. Similarly, funds that file as acquiring persons may control many different operating companies. The Commission thus proposes to require acquiring persons and acquired entities with more than one operating company or unit to identify which entity(s) derives revenue in each code. This proposed requirement would facilitate efficient review and quickly identify the operating company(s) that may or may not be relevant to the antitrust analysis. From this information, the Agencies could quickly identify which entity within the filing person has competing or related business activities with the other filing party.

Fourth, the Commission proposes requiring the reporting of certain NAICS codes for certain pipeline or pre-revenue products. Currently, filers are not required to provide information about products or services that did not derive revenue in the last fiscal year. Yet these pre-revenue or early revenue activities are often core to the transaction rationale and essential to understanding the potential competitive impact of the transaction during the initial waiting period. This information is known to the filing person and is not available from other sources, as it is typically highly sensitive. As a result, the Commission proposes adding a requirement for acquiring and acquired persons to report NAICS codes for certain pipeline or pre-revenue products. The acquiring person would be required to identify any NAICS codes for products and services under development if those codes would overlap with the codes for current or known pipeline products or services of the acquired entity(s). The acquired person would identify the NAICS codes that would apply to the products or services of the acquired entity(s) that are under development or pre-revenue and anticipated to have annual revenue totaling more than $1 million within the following two years. The Commission believes the benefit to the Agencies would be substantial and anticipates that the burden associated with the collection of these codes would be minimal, as identification of these products and services would likely be completed during ordinary diligence. The Commission understands that the acquired person may have limited knowledge about the planned or under-development products of the acquiring person and does not intend the filing persons to divulge this information for the purpose of making an HSR Filing.

Fifth, the proposed NAICS code section would clarify that the acquired person must report the NAICS codes relevant to the acquired entity(s) at the time of closing. While most filers currently report in this manner, others have asserted that when an acquired entity is merely a shell at the time of the HSR Filing due to anticipated pre-consummation reorganization, no NAICS codes are required. This is not the intent of the revenue reporting requirements in the current Form, and the Commission proposes clarifying this issue by requiring NAICS reporting that reflects the operations of the acquired entity(s) upon consummation. This would provide clarity and make NAICS code reporting more reliable for both filing persons and the Agencies.

Finally, the Commission proposes eliminating the requirement for filing persons engaged in manufacturing to provide revenue by NAPCS-based codes. The requirement to allocate revenue to product codes dates from the promulgation of the Rules in 1978 and has been updated to reflect various product code formats implemented by Census over the years. The most recent Census industry code format is the 6-digit NAICS format.[51] Initially, Census also created 10-digit NAICS-based codes to provide more detail about the products within the 6-digit NAICS industry codes, and these were adopted by the Commission for use in HSR Filings in 2001.[52] In 2018, Census discontinued the use and updating of 10-digit NAICS-based codes in favor of 10-digit NAPCS-based codes. As a result, in 2019, the Commission amended the Form and Instructions to require use of the NAPCS-based codes for manufactured products.[53]

However, these new NAPCS-based codes have been less useful for the Agencies' analysis than the discontinued 10-digit NAICS-based codes and have created significant confusion for both filers and the Agencies. The NAICS-based system provided 6, 8, and 10-digit codes, with the description of the products becoming more precise as the number of

[51] NAICS Codes were first published in 1997 and first used in the HSR Form in 2001. *See* 66 FR 23561 (May 9, 2001).

[52] 66 FR 35541 (July 6, 2001).

[53] 84 FR 30595 (June 27, 2019).

digits in the code increased. But the 10-digit NAPCS-based codes created by Census correspond to a combination of former 8-digit and 10-digit NAICS-based manufactured product codes. As a result, some parties inadvertently report revenue using a NAPCS code that corresponds to an 8-digit NAICS code. When this happens, the Agencies lack the more granular and descriptive nature of the NAPCS-based codes that correlate to the former 10-digit NAICS-based code that would allow the Agencies to more accurately identify mergers of companies that produce similar types of products. Additionally, when one filing party uses a NAPCS-based code that corresponds to an 8-digit NAICS-based code and the other filing person uses a NAPCS-based code that corresponds to a 10-digit NAICS-based code, the filing may not properly capture codes in which both parties report revenues. This could result in filings that should report revenue overlap code(s) but do not, limiting the Agencies' ability to rely on the codes to conduct an initial screen for competitive overlaps.

Because the proposed Horizontal Overlap section of the proposed Instructions would require the identification of overlapping products or services, as discussed in III.D.2., the Commission believes that additional identification of products by NAPCS code would no longer be necessary. The elimination of NAPCS-based revenue reporting would lessen the burden on filers to collect and report these figures, which have become less useful to the Agencies as a tool for identifying horizontal overlaps.

4. Controlled-Entity Overlaps

The Commission proposes creating a Controlled-Entity Overlaps section within the proposed Instructions. This section would continue to require the submission of information currently required by Item 7 of the Form, such as the identification of certain entities within the filing person that derive revenue in the same NAICS codes as the other filing person and geographic information regarding the operations and sales of such entities, but the Commission proposes certain changes to what information would be collected and reported. As explained below, specific information related to entities controlled by the filing person is critical to the Agencies' initial antitrust review as it serves as the primary tool for identifying horizonal overlaps between the parties to the transaction and their controlled entities, especially for transactions involving a UPE with complex corporate structures and multiple entities under its control. Compared to the current HSR Form, this proposed section would: (i) add a requirement to provide the name(s) by which entities have done business within the last three years, (ii) require the filing person to identify the overlapping entity within its own person, rather than the other filing person, (iii) update the NAICS codes that require geographic reporting at the street address level, (iv) require the identification of locations of franchisees for certain NAICS codes, and (v) add a requirement to provide geolocation data.

a. NAICS Overlaps of Controlled Entities

The Commission proposes that the new Controlled-Entity Overlaps section include the information currently required by Item 7(a), which requires the identification of the overlapping NAICS codes for the acquiring person (or an associate) and acquired entity, and Item 7(b), which requires the identification of the entities that derived revenue in overlapping NAICS codes within the UPE of the other filing person and, for the acquiring person, its associates. The Commission understands that filing persons often do not identify for the other filing person the entities that report in overlapping NAICS codes. Therefore, the Commission believes that it would be less of a burden for each filing person to only report entities within its own person that derive revenue in the overlapping NAICS codes. The Commission thus proposes requiring the acquiring person to identify the entity(s) within its own person that has operations in the same NAICS code as the acquired entity(s), and for the acquired person to identify the entity(s) within the acquired entity(s) that has operations in the same NAICS codes as the acquiring person. This proposed change would refine NAICS code reporting to provide the Agencies with a reliable source for identifying whether any entity within each filing person generates revenues in the same or related codes. As this information, unlike the current information required by Item 7(b), is known to the filing parties, the Commission anticipates that the burden of responding to this request will be diminished.

The Commission proposes two additional changes to the current requirements of Item 7(b). First, the Commission proposes requiring the identification of ''doing business as'' or ''formerly known as'' names used within the last three years by entities with U.S. operations in overlapping NAICS codes. This information would allow the Agencies to more efficiently collect information about the overlapping entities in publicly available resources during the initial waiting period by connecting each entity with any name by which it is known to other market participants. This information is known to filers and limited to a three-year look back period.

In addition, the Commission proposes that filing persons be required to identify the entity(s) that have U.S. operations in the overlapping NAICS code(s). For acquiring persons, this would include entities controlled by associates that have U.S. operations in a NAICS code in which the acquired entity(s) report. Currently some filers voluntarily match the overlapping NAICS codes to the entities within the acquiring person (or its associates) or acquired entity. In the Commission's experience, this information aids the Agencies in quickly identifying the entities within the filing person that may be relevant to the competitive analysis during the initial waiting period.

b. Geographic Market Information

The Commission proposes creating a Geographic Market Information section to collect the information currently required by Items 7(c) and 7(d) of the Form, which require, for each overlapping NAICS code, the identification of geographic markets where the entities controlled by the acquiring person (and its associates) and the acquired entity(s) do business. The Commission proposes to modify these requirements by updating the NAICS industries in which street-level reporting is required, requiring geolocation information for these addresses, and requiring the reporting of franchisees' locations.

The Commission periodically reviews which NAICS codes require more granular street, city, and state address information and which NAICS codes need only be reported at the state level.[54] Recognizing the burden that providing the street-level address for each location of an entity can require, the Commission differentiates between (1) NAICS industry codes that either do not tend to involve small local or regional markets or involve local markets but nonetheless can adequately be reviewed if the parties specify only the state in which revenue is derived, and (2) those which do tend to involve local markets for which knowing the areas served by each filing person is important to identify locations where

[54] *See, e.g.,* 75 FR 57110 (Sept. 17, 2010), adopted by 76 FR 42471 (July 19, 2011).

both parties compete for sales (*i.e.,* geographic overlaps). As part of this proposed rulemaking, the Agencies have reviewed the list of NAICS industries for which such street-level information is required and have adjusted the list of sectors which, based on their experience, require more granular geographic information than state-level information. The Commission thus proposes updating the list of NAICS codes for which locations need only be identified at the state level and NAICS codes for which street-level information would be required.

The Commission proposes removing the Nondepository Credit Intermediation NAICS codes (codes beginning with 5222) from the list of codes for which street-level information is required. In the Agencies' experience, these industries tend not to be locally focused. Therefore, for these codes, the Commission proposes requiring filing persons to list only the states within which they conduct operations, rather than street address as is now required. This proposal should reduce the burden on those filing persons who report sales in these NAICS codes.

The Commission proposes that filers be required to provide street-level reporting for the following additional codes (codes with asterisks indicate that all NAICS codes that begin with the preceding numbers are included).

113*** Forestry and Logging
2211** Electric Power Generation, Transmission and Distribution
2212** Natural Gas Distribution
3115** Dairy Product Manufacturing
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
325110 Petrochemical Manufacturing
325130 Synthetic Dye and Pigment Manufacturing
325180 Other Basic Inorganic Chemical Manufacturing
325193 Ethyl Alcohol Manufacturing
325194 Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing
325199 All Other Basic Organic Chemical Manufacturing
325211 Plastics Material and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
327310 Cement Manufacturing
327390 Other Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drugs and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers
44911* Furniture Retailers
493*** Warehousing and Storage
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
7132** Gambling Industries
71394* Fitness and Recreational Sports Centers

These are codes that represent industries in which the Agencies often determine that competition occurs on a local or regional basis. For those codes that represent regional competition, the Commission believes that there would be few individual addresses that would need to be provided, and therefore the burden would not be significantly higher than reporting the overlaps at the state level. The Commission acknowledges that for those industries where competition occurs on a very localized level, for example where customers travel to the company's location to purchase goods or services, providing street-level revenue information can be challenging. However, because businesses often face different competitors in each of these markets, the Agencies have learned that businesses often track sales at the local level in the ordinary course of business for these sectors. Knowing where within a state the filer's facilities are located is an important screening tool for the Agencies to quickly identify existing and potential geographic overlaps, and that benefit justifies requiring street-level reporting for these NAICS codes. Providing the Agencies with information to screen for geographic overlaps during the initial waiting period also benefits filing persons by reducing need to issue Second Requests to determine if there are such overlaps.

The Commission recognizes that providing the street address of tens, hundreds, or, in certain cases, thousands of locations can impose a burden on filers. Therefore, the Agencies have reviewed the NAICS codes closely to identify only those codes for which the Agencies would most benefit from street-level information. For these transactions that require more than a cursory review, attempts to collect this information from the parties during the initial waiting period slows down the review and delays the decision on whether an in-depth investigation of the transaction is needed. Further, the Commission believes that such information should be available in an accessible manner for most businesses that have a large number of facilities. Nonetheless, the Commission welcomes comments that identify, with rationales, NAICS codes that should either be added to or deleted from the list of codes for which state-level information is required.

The Commission also proposes requiring filers to report latitude and longitude information for street addresses so that the Agencies can easily and quickly use that information to populate mapping software and create maps to better identify possible geographic overlaps between the acquiring person and the acquired entity. Street addresses alone can be inadequate or inaccurate for isolating the exact location of facilities. Converting street addresses to coordinates is difficult due to abbreviations such as BLVD or ST, and street addresses often lack important information, such as South or North, or contain errors, such as mislabeling a Street address for an Avenue. Latitude and longitude information is unique, which reduces the likelihood of errors. Any errors in generating maps displaying the locations of the relevant facilities may affect screening for local markets, resulting in over- or under-identification of geographic overlaps. Since filing persons are familiar with the location of their own establishments, the Commission believes that they would be in best position to validate the accuracy of the locations through more precise latitude and longitude reporting.

The Commission also proposes requiring filers to list locations where franchisees of the acquiring or acquired person (as appropriate) generate revenue

in overlapping NAICS codes that require street-level reporting. Currently, there is no information submitted with the Form that allows the Agencies to begin this analysis for companies that do business through franchisees. Yet all company locations at issue in the transaction that generate revenues, both directly and indirectly through franchisees, must be accounted for when the Agencies analyze the existence and extent of competition between the filing persons. These proposed changes would provide the Agencies with all company locations to begin assessing geographic overlaps during the initial waiting period. Because franchisors must approve the location of franchisee operations and get regular sales reports from those operations, the Commission believes filers with these relationships will have this information about their franchisees.

5. Minority-Held Entity Overlaps

The Commission proposes creating a Minority-Held Entity Overlaps section within the proposed Instructions that would amend certain information that is currently required by Item 6(c) of the Form. Item 6(c) currently requires filing persons to list all of the entities in which the acquiring person and associates of the acquiring person, or the acquired entity (as appropriate), holds a minority interest of 5% or more. As originally proposed by the Commission in 2010, this item was intended to focus on only those minority-held investments that provide products or services that report in the same NAICS code as the other filing person, but in the final version of the rule, in order to limit burden, the Commission permitted filers to list all minority-held companies rather than limiting the list to those that created a NAICS code overlap.[55] However, in the Agencies' experience with information collected in Item 6(c), permitting parties to list all minority-held companies instead of only those that are in the same line of business or NAICS code has hindered the Agencies' ability to determine which entities may be relevant to the competitive analysis of the transaction during the initial waiting period. Unlike the filing persons, which have likely done diligence on the companies in which they invest, the Agencies have no basis to determine from the entire list of minority-held companies which ones have competitively significant relationships with the other filing person as this information is not available from any other source.

The Commission thus proposes eliminating the option to list all the minority-held entities of the acquiring person and its associates or acquired entity (as appropriate) and proposes once again to require identification of those that, to the filing person's knowledge or belief, would derive revenue in the same NAICS codes or have operations in the same industry as the other filing person. The Commission also proposes requiring filers to provide the names by which the listed entities do business. As noted above, the d/b/a or f/k/a names of the businesses are especially helpful to the Agencies in conducting additional research about the entities using public or third-party sources. These proposed changes would significantly assist the Agencies in determining which minority-held entities may be relevant to the competitive analysis of the transaction during the initial waiting period. In the Agencies' experience, there has been an increase in the number and type of companies in which the acquiring person and acquired entity have minority investments, and where they exist, understanding the business lines of these related companies can be important for determining any significant premerger competitive relationship between the filing persons that may be affected by the transaction. This is especially true where the important competitive relationship is not at the UPE level but arises from within the corporate structure or holdings of the filing persons. While the Commission recognizes that investors have more limited information regarding entities in which only a minority interest is held, the proposed Instructions would continue to permit filing persons to rely on their knowledge or belief. The Commission believes that filers have done some level of diligence to determine the business lines prior to investing in these entities, and should have some basis to identify overlaps.

6. Prior Acquisitions

The Commission proposes creating a Prior Acquisitions section within the proposed Instructions that would include the information currently required by Item 8 of the Form, as well as additional information. At present, Item 8 requires the acquiring person to identify all NAICS codes in which the acquiring person derived $1 million or more in revenue and the acquired entity(s) or assets also derived $1 million or more. For such codes, the acquiring person is required to report acquisitions made within the five years prior to filing that (i) resulted in control of entities that had net sales or total assets of greater than $10 million in the year prior to acquisition, or (ii) was an acquisition of assets valued at or above the statutory size-of-transaction threshold. The Commission proposes expanding the scope of prior acquisitions that would be identified and making the requirement applicable to the acquired entity as well.

Information about prior acquisitions has always been important for the Agencies, allowing them to identify strategies to gain market share through acquisitions rather than internal expansion or more vigorous competition. Filers have been required to provide information about prior acquisitions from the beginning of the premerger notification program.[56] This information can be especially important in sectors where acquisitions are typically not HSR-reportable but nonetheless can cause competitive harm and alter the market dynamics for the reported transaction.[57] The Agencies have taken steps to address concerns about acquisition strategies that premerger review does not routinely capture. For instance, when the Commission identifies a company that has violated Section 7 and is engaging in a strategy of rolling up competitors, if it is likely that future acquisitions may not require an HSR Filing, the Commission may order the firm to provide prior notice or obtain prior approval for any future non-reportable acquisition.[58]

As the minimum threshold for making an HSR Filing has been adjusted over time (in accord with changes in gross national product)[59] from $50 million to its current $111 million, many acquisitions do not require premerger

[55] 75 FR 57110 (Sept. 17, 2010), adopted by 76 FR 42471 (July 19, 2011).

[56] 43 FR 33450, 33534 (July 31, 1978).

[57] *See* Press Release, Fed. Trade Comm'n, FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics (June 29, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.*

[58] *See* Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis;* Press Release, Fed. Trade Comm'n, FTC Orders the Divestiture of Hundreds of Retail Stores Following 7-Eleven, Inc.'s Anticompetitive $21 Billion Acquisition of the Speedway Retail Fuel Chain (June 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/06/ftc-orders-divestiture-hundreds-retail-stores-following-7-eleven-incs-anticompetitive-21-billion.*

[59] Section 7A(a)(2) of the Act requires the FTC to revise thresholds annually based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5).

notification, especially in certain sectors.[60] A recent Commission study revealed that five of the largest technology companies in the United States completed 819 acquisitions that were not reported to the Agencies over a ten-year period from 2010–2019.[61] The Commission has thus identified a need to know more during the initial waiting period about prior acquisitions that may raise concerns about the filings parties' acquisition or roll-up strategies.[62]

Acquisitions of small companies can cause harm, including in sectors where competition occurs on a local level. When the Agencies determine that a firm is violating Section 7 through a pattern of serial acquisitions that fuels consolidation by eliminating local competitors, they can seek to prevent future violations but this is often insufficient to prevent widespread harm.[63] A pattern of serial acquisitions may also affect competition among innovative firms by consolidating innovation efforts into the hands of market leaders or other firms attempting to control the pace or direction of innovation.[64] A history of acquisitions in the same or related business lines may be especially important information where market boundaries are fluid and firms engage in a significant number of nonreportable transactions. This is potentially true of both the acquiring person and the acquired entity. The Agencies endeavor to identify such strategies [65] but need more robust tools for identifying firms that are engaging in a strategy of consolidation through transactions that may violate Section 7.

Thus, the Commission proposes several changes to expand the requirements for information related to prior acquisitions beyond what is currently required by Item 8. First, the Commission proposes requiring both the acquiring person and the acquired entity to provide information about prior acquisitions. The purpose of collecting information on all prior acquisitions by both filers is to assist the Agencies in identifying a potential pattern of acquisitions in a particular industry that has contributed to a trend toward concentration or vertical integration that affects the competitive dynamics for the parties to the transaction, as well as the commercial realities of post-merger competition.[66]

Second, the Commission proposes extending the time frame to report on prior acquisitions from five to ten years because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration. In 1987, the Agencies changed the reporting time period from ten years to five years.[67] At the time, it was thought five years reporting of past acquisitions would be sufficient to put the Agencies on notice of possible trends towards consolidation in the affected industries.[68] But based on decades of experience since then, along with changes to the economy and the varied acquisition strategies of filing parties, the Commission believes ten years would once again provide for a better framework to allow the Agencies to engage in a more detailed consideration of how numerous past acquisitions, including those in related sectors, affect the competitive landscape of the current transaction under review.

Third, the Commission proposes eliminating the threshold for listing prior acquisitions, which currently limits reporting to only acquisitions of entities with annual net sales or total assets greater than $10 million in the year prior to the acquisition. Limiting the reporting requirement to acquisitions of entities with annual net sales or total assets over $10 million may not capture acquisitions of new entrants or other nascent competitors that, despite not yet having widespread commercial success, nonetheless are poised to affect competition among existing firms or disrupt market dynamics. In fact, the Commission's technology acquisition study revealed that between 39.3% and 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition.[69] Given the relative nascency of these acquired companies, the Commission believes that excluding prior acquisitions of firms that have not yet had the chance to gain commercial traction to achieve $10 million in net sales or assets does not provide a comprehensive picture of each filer's acquisition strategy. Learning more about the existence and patterns of these additional past acquisitions by both the acquiring person and the acquired entity, including acquisitions of companies that had not yet generated revenue, would help the Agencies better identify during the initial waiting period transactions that may, on their own or as part of a pattern of serial acquisitions, violate the antitrust laws.

Fourth, the Commission proposes treating asset transactions involving the prior acquisition of substantially all of the assets of a business in the same manner as prior acquisitions of voting securities or non-corporate interests. Currently, Item 8 provides separate thresholds for acquisitions of control of entities and acquisitions of assets. This distinction, however, does not recognize that some asset transactions functionally reflect the acquisition of substantially all of the assets of an entity as opposed to the acquisition of a distinct asset such as a manufacturing plant or an exclusive license. Thus, the current rule treats acquisitions of an entity or business differently depending on the form of the agreement. The proposed Instructions would continue to require that the acquisition of a distinct asset be reported only if the then-in-place size-of-transaction threshold was exceeded, but they would also require that a prior acquisition involving substantially all of the assets be reported in the same manner as prior acquisitions involving

[60] *See e.g.,* Thomas Wollmann, *How to Get Away With Merger: Stealth Consolidation and its Real Effects on US Healthcare* (Nat'l Bureau of Econ. Rsch., Working Paper 27274, 2021); Thomas Wollmann, Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, 1 Am, Econ, Rev,: Insights 77, (2019).

[61] Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 10–11 (2021).

[62] *See, e.g.,* Gerry Hansell, Decker Walker, and Jens Kengelbach, ''Lessons from Successful Serial Acquirers: Unlocking Acquisitive Growth,'' Boston Consulting Group (Oct. 1, 2014), *https://www.bcg.com/publications/2014/mergers-acquisitions-unlocking-acquisitive-growth;* Thomas Wollmann, Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act, 1 Am, Econ, Rev,: Insights 77, (2019).

[63] Paul J. Eliason et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry,* 135 Q. J. ECON. 221, 235 (2020). *See* Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita Inc's Future Mergers Follow Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis. See also* Martin Gaynor, Kate Ho, and Robert J Town, *The industrial organization of health-care markets,* J. of Econ. Literature, 53(2):235–284 (2015); Cory Capps, David Dranove, and Christopher Ody, ''Physician Practice Consolidation Driven By Small Acquisitions, So Antitrust Agencies Have Few Tools To Intervene,'' Health Affairs (Sept. 1, 2017), *https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0054.*

[64] Colleen Cunningham, Florian Ederer, and Song Ma, *Killer Acquisitions,* 129 J. of Pol. Econ., 649–702 (2021), *https://ssrn.com/abstract=3241707.*

[65] *See e.g.,* Note by the United States, *Start-ups, killer acquisitions and merger control,* OECD DAF/COMP/WD (2020)23 (June 11, 2020), *https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.*

[66] 43 FR 33534 (July 31, 1978).

[67] 50 FR 38742, 38768 (Sept. 24, 1985).

[68] *Id.*

[69] Fed. Trade Comm'n, Non-HSR Reported Acquisitions by Select Technology Platforms 26 (2021). Note this percentage range could also be different (*i.e.,* lower or higher) as target entities in 13.4% of the transactions did not have founding dates located in the three databases.

voting securities or non-corporate interests.

While the Commission expects that the expanded reporting requirements of past acquisitions would create additional burden for filing parties, the proposed Instructions would continue to limit the reporting to only acquisitions in industries for which the filers have reported horizontal overlaps, as identified by overlapping NAICS codes or in the filer's Horizontal Overlaps Narrative. This limitation still provides the Agencies with sufficient information to identify transactions that may further a trend toward concentration or patterns of acquisitions that may, alone or in combination, substantially lessen competition. Moreover, given the difficulties in determining the value of small or nascent companies, the Commission believes it would be less burdensome for filers to report all acquisitions rather than expend additional time in assessing their value in terms of net sales or assets. The Commission invites comment on ways to limit the burden and exclude de minimis acquisitions of no competitive significance while still capturing acquisitions of entities worth less than $10 million and allowing the Agencies to conduct a robust screening for acquisition strategies that further consolidation trends.

E. Additional Information

1. Subsidies From Foreign Entities or Governments of Concern

As discussed in I.A. above, the 2022 Amendments direct the Commission, with the concurrence of the Assistant Attorney General, and in consultation with the Relevant Agencies, to require persons making an HSR Filing to disclose information about foreign subsidies from countries or entities that threaten U.S. strategic or economic interests. Along with the proposed definitions discussed above, the Commission proposes changes to the Instructions to implement this mandate from Congress.

The Commission proposes creating a Subsidies from Foreign Entities or Governments of Concern section within the proposed Instructions. This proposed section would include three questions. The first proposed question would track the requirements and stated purpose of the 2022 Amendments by requiring the acquiring and acquired person (as appropriate) to identify and describe certain subsidies, as defined by proposed § 801.1(r)(2), received or that are anticipated to be received by any entity within its person from a foreign entity or government of concern, as defined by proposed § 801.1(r)(1). Given the complexity of subsidies, the Commission proposes stating that the question should be answered upon the knowledge or belief of the filing person. This would relieve the filing person of the obligation to conduct a complex legal analysis. The filing person, however, must conduct good faith diligence.

In proposing this question, the Commission believes it is also consistent with Congressional intent to create reasonable limits to the required information on subsidies to benefit both the Agencies and filing parties. The Commission's proposed two-year limitation would identify the subsidies most likely to affect the Agencies' competitive analysis of a proposed transaction because those subsidies are most likely to affect current or future conduct of the parties. The Commission believes that this practical qualifier, coupled with the use of an existing definition of ''subsidy,'' as discussed in I.A.2. above, would provide the Agencies with the most pertinent information for the analysis of proposed transactions, while reasonably limiting the information required from filing parties. The Commission seeks comment on the temporal limitation for subsidies, as well as whether a de minimis value should be set, and if so, what administrable levels might be appropriate.

The Commission believes that requiring information on countervailing duties [70] would be extremely useful in providing a complete picture of the potential impact of subsidies per Congress's mandate and screening for subsidies that bear on whether the transaction may violate the antitrust laws. Thus, the Commission's second proposed question would require the acquiring or acquired person (as appropriate) to identify any of its products produced in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are subject to countervailing duties in any jurisdiction. The Commission would also ask the filing party to list the countervailing duty imposed and the jurisdiction that imposed the duty. Such information about the countervailing duties and relevant products would help the Agencies determine in their initial analysis of a transaction whether subsidies from foreign entities or governments of concern might affect some aspect of competition in the future. The Commission believes that information about countervailing duties imposed by the United States should be readily available to filers because the Department of Commerce issues fact sheets that contain an overview of final subsidy findings and are available on its ''recent case announcements'' web page (*https://www.trade.gov/case-announcements-archives* (case announcements for the prior year)) and on the International Trade Commission's website (*https://legacy.trade.gov/enforcement/operations/scope/index.asp* (older determinations)), and that information about countervailing duties imposed by other jurisdictions should be readily available to filing persons from similar sources as well.

The Commission's third proposed question would require the acquiring or acquired person (as appropriate) to identify, to its knowledge or belief, any of its products produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C) that are the subject of an investigation by any jurisdiction for potential countervailing duties. The Commission would also ask the filing person to list the jurisdiction conducting the investigation. Such information would help the Agencies identify products that may be subject to active subsidies and assist the Agencies in their assessment of the subsidies' impact on competition. It is the Commission's understanding, however, that the investigating agencies do not always inform all producers or market participants of an investigation; thus, the Commission proposes limiting the scope of this third question to the filing person's knowledge or belief. The Commission believes that limiting this reporting requirement to the knowledge or belief of the filing person would provide filers with enough flexibility to respond to the question and certify the HSR Filing without having to confirm with various relevant agencies that no such investigation exists.

The Congressional mandate to collect information about foreign subsidies is consistent with the Agencies' desire to better understand whether there are significant ties to individuals or entities that may affect the Agencies' assessment of the potential competitive risks associated with the transaction. For instance, a foreign government or entity

[70] Countervailing duties are duties intended to offset the price effect of significant foreign government subsidies on a product or good. In the United States, the International Trade Administration of the Department of Commerce investigates whether imported products are subject to significant foreign government subsidies. The amount of the subsidies that the foreign producer receives from its government is the basis for the rate by which the subsidy is offset, or ''countervailed,'' through higher import duties enforced by U.S. Customs and Border Protection. *See, e.g.,* Int'l Trade Admin., *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

could have a financial relationship that gives it the ability to sway the filing person to make different choices in the marketplace than it would without the subsidy. As discussed in III.B., Agencies would benefit from more complete information about individuals and entities, including governments, that have the ability to control or influence competitive decision making. The Commission believes that, taken together, information about minority holdings, individuals with influence, officers, directors, and board observers, as well as information about foreign subsidies may reveal significant constraints on the competitiveness of the affected company that should be taken into account during the Agencies' initial review.

2. Defense or Intelligence Contracts

The Commission proposes creating a Defense or Intelligence Contracts section within the proposed Instructions that would require filing persons to report certain contracts with defense or intelligence agencies. The Agencies regularly review filings from companies that supply the Department of Defense (''DoD'') or the intelligence community (''IC'') with products or services. During the initial waiting period, it is important for the Agency to quickly contact DoD and IC staff to collect key insights and information to prevent mergers that may have an anticompetitive impact on taxpayers through purchases made through DoD and IC programs. Yet without information about specific DoD or IC contracts or knowledge of which unit handles that contract, the Agencies often face difficulty and delay in identifying appropriate relevant personnel or stakeholders with knowledge of the contracts, programs, or products or services at issue. Such delays hinder the identification and evaluation of competition issues that would impact DoD or IC programs or budget during the initial waiting period.

The Commission thus proposes adding a requirement that both the acquiring and acquired person identify whether they have existing or pending defense or intelligence procurement contracts, as defined by 10 U.S.C. 101(a)(6) and 50 U.S.C. 3033(4), valued at $10 million or more, and provide identifying information about the award and relevant DoD or IC personnel. For filings from companies that supply DoD or the IC with products or services, this information would greatly enhance the Agencies' ability to identify and contact appropriate stakeholders within DoD or IC to seek their input as customers that might be impacted by the proposed transaction. This information is well known to the companies that do business with these government entities.

3. Identification of Communications and Messaging Systems

In conjunction with the proposed requirement that filing persons certify they have taken steps to prevent destruction of relevant information, as discussed in III.F. below, the Commission also proposes that filers identify and list all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations. Companies have increasingly been relying on new forms of communication—beyond email and other traditional document formats—to engage in business discussions and make key operational decisions. These systems can encompass internal chat technologies (such as so-called ephemeral messaging) or document management systems, including where content exchanged between the individuals is automatically deleted.

In the Agencies' experience, these communications systems contain highly relevant information on the transaction itself, as well as on topics that are critical for the Agencies' assessment of the transaction such as competition, competitors, markets, customers, and industry characteristics. Company employees' more frequent use of these communications systems and messaging applications, particularly in lieu of other traditional forms of communication such as email, has meant that these systems and applications have become an important part of Agencies' investigations. Moreover, to the extent that these communications systems are being used to evade document retention and preservation requirements that exist for more traditional forms of communication, the Commission believes it is important for the parties to understand that their preservation and retention obligations apply to these systems as well. As yet, many parties do not appear to fully understand and/or comply with document preservation obligations for these new modalities. For these reasons, the Agencies would greatly benefit from having a complete and transparent picture of the filer's applicable communication systems at the filing stage. The Commission further believes that this information is readily available to the filing person and that identifying these systems in use by the company with the HSR Filing would impose minimal burden.

4. Other Jurisdictions

The Commission proposes creating a new Other Jurisdictions section within the proposed Instructions. This section proposes to amend the requirements concerning antitrust filings outside of the United States and add a voluntary waivers section to allow for the sharing of HSR information with other enforcers.

a. Transactions Subject to International Antitrust Notification

The Commission proposes creating a Transactions Subject to International Antitrust Notification section that would require the identification of other jurisdictions that may be conducting a competition review. Currently, page one of the Form asks filing persons to voluntarily identify other jurisdictions where the transaction will trigger premerger notification under the laws of that jurisdiction. The Commission first proposed collecting information about filing in other jurisdictions in 1994, when it proposed a mandatory requirement.[71] In 1999, the Commission noted that it was still considering the proposals included in its 1994 proposed rulemaking.[72] The Commission then proposed a voluntary requirement in 2001[73] and the final rule was adopted in 2003.[74] The Commission now proposes making the disclosure of international filing obligations a mandatory requirement.

Since 2001, and certainly since 1994, merger enforcement by other competition authorities has become more robust as more jurisdictions have adopted competition laws that impose mandatory or voluntary premerger notification requirements. At the same time, a larger percentage of HSR-reportable transactions now involve companies with international reach. As a result, more transactions are likely to be subject to review in multiple jurisdictions around the world. Even though the number of transactions subject to premerger notifications in multiple jurisdictions has increased over the years, most filers do not voluntarily disclose on the Form that their transactions will be subject to non-U.S. notification requirements.

For many years, the Agencies have cooperated with numerous competition authorities on cases of common concern to help identify issues of common interest, gain a better understanding of relevant facts, and achieve, where possible, consistent or, at a minimum,

[71] 59 FR 30545, 30547 (June 14, 1994).
[72] 64 FR 1203 (Jan. 8, 1999).
[73] 66 FR 8680, 8684 (Feb. 1, 2001).
[74] 68 FR 2425, 2429 (Jan. 17, 2003).

non-conflicting outcomes. In order to fully benefit from inter-agency consultations, the Agencies need to know which foreign jurisdictions may also be evaluating the proposed transaction as early as possible. The delay associated with confirming whether there will be reviews or investigations by other competition authorities undermines effective cooperation during the initial waiting period, when sharing expertise and knowledge with other competition enforcers would be especially helpful in identifying which transactions need more in-depth review. Moreover, review by other jurisdictions can often affect the timing, pace, or ability to close the transaction, especially for jurisdictions that also require suspension of the transaction until the competition review is completed.

The Commission thus proposes a mandatory requirement to identify the jurisdictions where each filing person has already filed or is preparing notifications to be filed as well as a list of the jurisdictions where it has a good faith belief it will file. The Commission believes that upon execution of a definitive agreement, filers often know the jurisdictions where competition filings will be made. However, to account for the possibility that, at the time of the HSR Filing, parties may not have yet identified all the other jurisdictions where they will file, the proposed rule provides flexibility by stating that parties should respond based on their ''good faith belief.''

b. Voluntary Waivers for International Competition Authorities and State Attorneys General

The Commission proposes the creation of a voluntary waivers check box within an Other Jurisdictions section to allow filing persons to indicate that they agree to waive the confidentiality provisions of the Act, 15 U.S.C. 18a(h), for any jurisdiction identified by the filing person. As discussed above, transactions are often reviewed by non-U.S. competition authorities, or by one or more State Attorneys General. But the Act's confidentiality provision contains limits on disclosing material collected as part of the Agencies' HSR review of the transaction. As a result, merging parties and third parties waive statutory confidentiality protections so that the investigating Agency can share certain limited information with foreign or state competition authority counterparts, enabling the Agency to make more informed, consistent decisions, and investigate the transaction more effectively, often expediting review.[75]

The Commission proposes amending the Instructions to allow filing persons to waive the confidentiality provision contained in the Act, 15 U.S.C. 18a(h), for any non-U.S. competition authorities or State Attorneys General they identify. Allowing filers to waive the confidentiality protections in the HSR Filing would provide an efficient mechanism for filers to consent to limited waivers of confidentiality at the outset to facilitate early cooperation among competition enforcers. The proposed voluntary waiver would allow the Agencies to disclose the existence of an HSR Filing and the information contained in the HSR filing, but only for those ex-U.S. competition authorities or State Attorneys General selected by the filing person. The Commission also proposes modifying the language that would inform filers about potential disclosures based on the waivers to track the language of the Act more closely. The waivers would be optional for the parties, but the Commission expects that some filers will benefit from providing these limited waivers of confidentiality.

F. Certification

The Commission proposes amending the language of the certification that filing persons must submit with HSR Filings to require affirmation that the filing person has taken the necessary steps to prevent the destruction of documents and information related to the transaction. When parties submit premerger notification filings, this triggers a Congressionally mandated initial phase investigation regarding the potential competitive effects of the proposed transaction. When making an HSR Filing, filers should be aware that the Agencies may, prior to the expiration of the initial waiting period, issue Second Requests to further investigate the proposed transaction.[76] If issued, a Second Request requires the recipient to produce documents and information relevant to the transaction. If, as part of a filing person's ordinary course business operations, relevant information is deleted or destroyed during the initial waiting period, this could lead to a loss of information that may be critical to the investigating Agency and undermine its ability to conduct a full in-depth investigation pursuant to the Act to determine if the transaction is likely to violate Section 7 or any other antitrust law and to seek to prevent its consummation. Therefore, the Commission proposes adding to the certification an acknowledgement that the Agencies may require the submission of additional information or documents in response to a Second Request and a confirmation that the officer, director, or other individual described in § 803.6, as appropriate, has taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period. Such steps could include, for example, the suspension of auto-delete policies in place at any entity within the filing person.

The Commission also proposes the addition of language in the Instructions that would serve to remind filers that there are criminal penalties under other federal statutes that prohibit various deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies. In recent years, the Agencies have observed an increasing number of instances where, in the course of an investigation or later litigation challenging the transaction, the filing parties disclaim or modify statements or information submitted as part of the Form, notwithstanding numerous federal laws that prescribe criminal penalties for submitting false information to the government, including as part of an HSR Filing. While the Commission's proposed language does not intend to change any existing obligation to comply with other laws, it would provide notice to filers that the Commission takes those obligations seriously and may refer filers who do not comply with those obligations for potential criminal proceedings. The Commission does not expect this proposed reminder, which does not require any additional information or obligation, to result in additional burden for filing persons.

G. Affidavit

As discussed in the proposed changes to § 803.5(b) above at II.C., the Commission proposes requiring filings for transactions without definitive agreements to include a term sheet or draft agreement that describes with specificity the scope of the transaction that would be consummated. As a result, the Commission proposes that

[75] The Agencies have developed a model waiver of confidentiality for use in civil matters involving non-U.S. competition agencies that has been in use for 10 years. Similarly, the Agencies have developed a protocol for coordination in merger investigations with State Attorneys General. *See* Fed. Trade Comm'n, *https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust-investigations* and *https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations.*

[76] 15 U.S.C. 18a(e); 16 CFR 803.20.

parties making such filings attest in their affidavit that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

Severability

Section 803.90 provides that, if any provision of the Rules (including the Form) or the application of any such provision to any person or circumstances is held invalid, the other provisions of the Rules and their application to other persons or circumstances shall be unaffected. This severability (or separability) provision would apply to any modifications of the HSR Filing requirements that the Commission adopts as final after issuing this NPRM and considering the public comments received. If a regulatory provision is severable, and one part of the provision is invalidated by a court, the court may allow the other parts of the provision to remain in effect.[77] When analyzing whether a provision is severable, courts consider both (a) the agency's intent and (b) whether severing the invalid parts of the provision would impair the function of the remaining parts.[78] The Commission is not proposing any changes to the separability provision in § 803.90 but is confirming its intent that, if a court were to invalidate any of the HSR requirements, including any modifications that the Commission finalizes at the end of the rulemaking proceeding, the other requirements would remain in effect.

Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner's advisor, will be placed on the public record. *See* 16 CFR 1.26(b)(5).

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3501 *et seq.,* federal Agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. The term ''collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The current rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within OMB regulations implementing the PRA. 44 U.S.C. chapter 35. The existing information collection requirements in the HSR Rules and Form have been reviewed and approved by OMB (OMB Control No. 3084–0005). The current clearance expires on February 28, 2026. Because the rule amendments proposed in this NPRM would change existing reporting requirements, the Commission will submit this notice of proposed rulemaking and the associated Supporting Statement to OMB for review under the PRA.

Increased Time Collecting Data for and Preparing an HSR Filing

The proposed amendments are primarily changes to the information reported on the Notification and Report Form and do not affect the reportability of a transaction. Thus, the same number of filings projected for fiscal year 2023 in the most recent Supporting Statement submitted to OMB and also appearing in the associated **Federal Register** publication [79] will be used for these burden hour calculations.

Some of the proposed changes are intended to reduce the burden of filing. The Commission anticipates that the proposals to report NAICS codes in ranges rather than by specific dollar amount would reduce the burden on almost all filers. Additionally, the proposed change to eliminate the requirement for filers that derive revenue from manufacturing operations to report NAPCS code revenues is also anticipated to reduce the burden for those filers. Finally, the Commission also proposes to limit the reporting of minority investors of the acquired entity.

Some of the proposed changes offer clarifications to the current rules and are unlikely to change the burden on filers. These include the proposed changes to eliminate references to paper and DVD filings (§§ 803.2, 803.5, and 803.10) and to specifically discuss the commencement of the waiting period (§ 803.10).

Certain proposed changes would require the acquiring person to collect and report information that the Commission believes is held in the acquiring person's ordinary course of business records. These include proposed requirements for the acquiring person to describe its own business(es); report minority investors in additional entities related to the transaction; disclose relationships with individuals or entities that provide credit, hold non-voting securities, have the right to appoint board observers, or have management agreements with entities related to the transaction; and to identify members of boards of directors. Once collected, the Commission anticipates that the burden associated with some of these proposals will lessen for subsequent filings by the same acquiring person, as the information would only need to be updated.

Many of the proposed changes would increase the burden on all filers. These include new document collection requirements to produce transaction-related documents from supervisory deal team members; business documents that relate to competition topics but were not produced specifically for the transaction; drafts of responsive documents; other agreements between the acquiring and acquired persons, and to log the request to which documents are responsive. Additionally, the proposed requirements to provide narratives regarding transaction rationale, diagrams of the transaction, and organizational charts for custodians of documents would be applicable to all filers.

Some of the proposed changes would significantly increase the burden on only certain filers. These include those filers whose businesses have existing horizontal, non-horizontal, or labor market overlaps or relationships, with the largest burden falling on filers whose transaction involves many such relationships; transactions that involve a large number of foreign language documents; filing persons or transactions that have a complex structure; transactions that are filed on letters of intent or agreements in principle; and filing persons that receive subsidies from foreign entities of concern.

PNO staff canvassed current Agency staff who had previously prepared HSR filings while in private practice to estimate the projected change in burden due to the proposed amendments to the Instructions. All have considerable experience with the HSR rules and with preparing HSR Filings for the types of transactions that are most likely to be affected by the proposed changes.

These experts were asked to estimate the incremental increase in time to prepare HSR Filings, for both the company and its outside counsel, taking into account that transactions range in complexity—from relatively simple transactions with no overlaps and few

[77] *See, e.g., Davis Cnty. Solid Waste Mgmt.* v. *EPA,* 108 F.3d 1454, 1459 (D.C. Cir. 1997).

[78] *Id.* at 1460.

[79] 88 FR 3413, 3414 (Jan. 19, 2023).

documents (such as ones only involving executive compensation or other stock purchases by an individual), to moderately complex transactions (such as a fund buying or selling a portfolio company with limited overlaps) to very complex (for example, a strategic acquisition by a large company that sells many overlapping products in competition with the seller). The ranges from canvassed officials estimated that the proposed changes would result in approximately 12 to 222 additional hours per filing, depending on the complexity of the filing at issue. In the past five years, approximately 45% of filings had reported overlaps. To estimate an average number of additional hours, the Commission conservatively assumes that 45% of the filings may require an additional 222 hours to prepare and 55% may require an additional 12 hours to prepare. Thus, the Commission estimates an average of 107 additional hours (rounded to the nearest hour) will be allocated to non-index filings.[80] Added to the current estimate 37 hours,[81] the total estimated hours would be 144 per filing.

Net Effect

The proposed Rule and Notification and Report Form changes only affect non-index filings[82] which, for FY 2023, the FTC projects will total 7,096. As described above, the Commission estimates that he amendments to the HSR Rules and Notification and Report Form would increase the time required to prepare responses for non-index filings, with an estimated net increase of 107 hours per filing. Thus, the total estimated additional hours burden is 759,272 (7,096 non-indexed filing × 107 hours/each).

Applying the revised estimated hours, 759,272, to the previous assumed hourly wage of $460 for executive and attorney compensation, yields approximately $350,000,000 in labor costs. The amendments are expected to impose either minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Instructions.

Request for Comments

The Commission invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of these information collections on respondents.

Comments on the proposed reporting requirements subject to PRA review by OMB should additionally be submitted 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. The *reginfo.gov* web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small entities, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR Filing, the premerger notification rules rarely, if ever, affect small entities.[83] The 2000 amendments to the Act exempted all transactions valued at $50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of $111 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Invitation To Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 28, 2023. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov/* website.

Because of the agency's security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through *https://www.regulations.gov/.* To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580. If possible, please submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website, *https://www.regulations.gov/,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or

[80] Clayton Act section 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the FTC and the Assistant Attorney General. Thus, parties must submit copies of these ''index'' filings, but completing the task requires significantly less time than non-exempt transactions that require ''non-index'' filings. The proposed changes would not require any additional information from indexed filings.

[81] 88 FR 3413, 3414 (Jan. 19, 2023).

[82] Id.

[83] *See* 13 CFR part 121 (regulations defining small business size).

any commercial or financial information which . . . is privileged or confidential,''—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

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

Visit the Commission's website, *www.ftc.gov,* to read this publication and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 28, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, *see https://www.ftc.gov/site-information/privacy-policy*.

List of Subjects in 16 CFR Parts 801 and 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes amending 16 CFR parts 801 and 803 as set forth below:

PART 801—COVERAGE RULES

■ 1. The authority citation for part 801 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by adding paragraph (r) to read as follows:

§ 801.1 Definitions

* * * * *

(r)(1) *Foreign entity or government of concern.* The term *foreign entity or government of concern* means: (i) An entity that is a foreign entity of concern as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)); or

(ii) A government, or an agency thereof, of a foreign country that is a covered nation as that term is defined in section 40207 of the Infrastructure Investment and Jobs Act (42 U.S.C. 18741(a)(5)(C)).

(2) *Subsidy.* The term *subsidy* has the meaning given the term in Part IV of Title VII of the Tariff Act of 1930 (19 U.S.C. 1677(5)(B)).

PART 803—TRANSMITTAL RULES

■ 3. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 4. Amend § 803.2 by:
■ a. Redesignating paragraph (a) as (a)(1) and adding paragraph (a)(2);
■ b. Removing paragraph (b)(1)(v); and
■ c. Revising paragraphs (e) and (f). The revisions and additions read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

(a)(1) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative: *Provided however,* That notwithstanding §§ 801.1(c)(2) and 801.2 *of this chapter,* only one notification shall be filed by or on behalf of a natural person, spouse and minor children with respect to an acquisition as a result of which more than one such natural person will hold voting securities of the same issuer.

Example:

Jane Doe, her husband, and minor child collectively hold more than 50 percent of the shares of family corporation F. Therefore, Jane Doe (or her husband or minor child) is the ''ultimate parent entity'' of a ''person'' composed to herself (or her husband or minor child) and F; see paragraphs (a)(3), (b) and (c)(2) of § 801.1 *of this chapter.* If corporation F is to acquire corporation X, under this paragraph only one notification is to be filed by Jane Doe, her husband, and minor child collectively.

(2) Persons that are both acquiring and acquired persons should submit separate forms, one as the acquiring person and one as the acquired person, following the appropriate instructions for each.

* * * * *

(e) For documents required by item 4(b) of the Notification and Report Form, a person filing the notification may, instead of submitting a document, provide a cite to an operative internet address directly linking to the document, if the linked document is complete and payment is not required to access the document. If an internet address becomes inoperative during the waiting period, or the document is otherwise rendered inaccessible or incomplete, upon notification by the Commission or Assistant Attorney General, the parties must make the document available to the agencies by either referencing an operative internet address where the complete document may be accessed or by providing electronic copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. on the next regular business day. Failure to make the document available, by the internet or by providing electronic copies, by 5 p.m. on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

(f) Filings must comply with all format requirements set forth at the Premerger Notification Office pages at *https://www.ftc.gov.* The use of any format not specified as acceptable, or any other failure to comply with the applicable format requirements, shall render the entire filing deficient within the meaning of § 803.10(c)(2).

■ 5. Amend § 803.5 by revising paragraphs (a)(1), (3) and (b) to read as follows:

§ 803.5 Affidavits required.

(a)(1) *Section 801.30 acquisitions.* For acquisitions to which § 801.30 of this chapter applies, the notification required by the act from each acquiring person shall contain an affidavit attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received written notice delivered to an officer (or a person exercising similar functions in the case of an entity without officers) by email, certified or registered mail, wire, or hand delivery, at its principal executive offices, of:

* * * * *

(3) The affidavit required by this paragraph must have attached to it a copy of the written notice received by the acquired person pursuant to paragraph (a)(1) of this section.

(b) *Non-section 801.30 acquisitions.* For acquisitions to which § 801.30 of

this chapter does not apply, the notification required by the act shall contain an affidavit attesting that a contract, agreement in principle, or letter of intent to merge or acquire has been executed, and further attesting to the good faith intention of the person filing notification to complete the transaction. If a definitive agreement is not provided, the affidavit must attest that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle.

■ 6. Revise § 803.8 to read as follows:

§ 803.8 Foreign language documents.

Documentary materials or information in a foreign language required to be submitted at the time of filing a Notification and Report Form and in response to a request for additional information or documentary material must be submitted with verbatim English language translations. All verbatim translations must be understandable, accurate, and complete.

■ 7. Amend § 803.10 by revising paragraphs (c)(1)(i) and (ii) to read as follows:

§ 803.10 Running of time.

* * * * *

(c)(1)(i) The date of receipt shall be the date of electronic submission if such date is not a Saturday, Sunday, a legal public holiday (as defined in 5 U.S.C. 6103(a)), or a legal public holiday's observed date, and the submission is completed by 5:00 p.m. eastern time. In the event electronic submission is unavailable, the FTC and DOJ may designate procedures for the submission of the filing. Notification of the alternate delivery procedures will normally be made through a press release and, if possible, on the *https://www.ftc.gov* website.

(ii) Delivery effected after 5 p.m. eastern time on a business day, or at any time on any day other than a business day, shall be deemed effected on the next following business day. If submission of all required filings is not effected on the same date, the date of receipt shall be the latest of the dates on which submission is effected.

* * * * *

■ 8. Amend § 803.12 by revising paragraph (c)(1)(iii) to read as follows:

§ 803.12 Withdraw and refile notification.

* * * * *

(c) * * *

(1) * * * (iii) The resubmitted notification is recertified, and the submission, as it relates to Transaction-specific Agreements (including the latest drafts, if definitive agreements have not been signed), Transaction-Related Documents (including Documents Prepared by or for Officers, Directors or Supervisory Deal Team Leads; Confidential Information Memorandum; Studies, Surveys, Analyses, and Reports; Synergies and Efficiencies) and Subsidies from Foreign Entities of Concern in the Instructions, is updated to the date of the resubmission;

* * * * *

■ 9. Revise Appendices A and B to part 803 to read as follows:

[INSERT GENERAL INSTRUCTIONS AND INFORMATION]

Antitrust Improvements Act Notification for Certain Mergers and Acquisitions

General Instructions And Information

These instructions specify the information that must be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR parts 801–803 (''the Rules''). Submitted materials must be provided to the Federal Trade Commission (''FTC'') and to the Antitrust Division of the Department of Justice (''DOJ'') (together, ''the Agencies'').

Information

The central office for information and assistance concerning the Rules is: Premerger Notification Office Federal Trade Commission, Room #5301, 400 7th Street SW, Washington, DC 20024, Phone: (202) 326–3100, Email: *HSRhelp@ftc.gov* for rules questions, *Premerger@ftc.gov* for filing information.

Copies of these Instructions, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (''the Act''), the Rules, **Federal Register** publications issuing the Rules and Rule amendments (''Statements of Basis and Purpose''), as well as information to assist in submitting the required information are available at the FTC's Premerger Notification Office (''PNO'') *website.*

Definitions and Explanation of Terms

Unless otherwise indicated, the definitions provided in the Rules apply to these Instructions.

Dollar Values

All financial information should be expressed in millions of dollars rounded to the nearest hundred thousand.

Economic Research Service's Commuting Zones

When submitting information by the Economic Research Service's (''ERS's'') Commuting Zones (''CZ''), refer to the U.S. Department of Agriculture's Economic Research Service Commuting Zones for the year 2000, available at *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

Fee Information

The filing fee is based on the aggregate total value of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition. Filing fee tiers are adjusted annually pursuant to 15 U.S.C. 18a(a)(note) based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5). For each fiscal year commencing after September 30, 2023, filing fees will increase by the percentage increase, if any, in the consumer price index (''CPI'') over the CPI for the fiscal year ending September 30, 2022, pursuant to 15 U.S.C. 18a(a)(note). For current thresholds and fee information, see the *PNO website.*

North American Industry Classification System (NAICS) Data

When reporting information by 6-digit NAICS code, refer to the North American Industry Classification System—United States, 2022, published by the Executive Office of the President, Office of Management and Budget, available at *https://www.census.gov/naics/.* This website also provides guidance in choosing the proper code(s).

Person Filing and Filing Person

The terms ''person filing'' or ''filing person'' mean the ultimate parent entity (''UPE''). See § 801.1(a)(3). The terms are used herein interchangeably.

Standard Occupational Classification

When reporting information by 6-digit Standard Occupational Classification (''SOC'') code, refer to the 2018 SOC System, available at *https://www.bls.gov/soc/2018/#classification.*

Thresholds

Notification thresholds are adjusted annually based on the change in gross national product, in accordance with 15 U.S.C. 19(a)(5). See § 801.1(h). The current threshold values can be found at *Current Filing Thresholds.*

Year

All references to ''year'' refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to ''most recent year'' mean the most recent calendar or fiscal year for which the requested information is available.

Filing

If the UPE is both an acquiring and acquired person, separate filings must be submitted, one as the acquiring person and one as the acquired person, following the appropriate instructions for each. See § 803.2(a)(2).

Filings should be submitted electronically consistent with the instructions on the PNO website. If the electronic submission platform is unavailable, the Agencies may announce sites for delivery through the media and, if possible, at the PNO website.

Responses

Items that require the submission of documents or narrative responses should be produced in (1) searchable PDF format from which text can be copied or (2) Excel formats.

All documents should be logged in an Excel File. The log should list all responsive

documents, regardless of whether the document is redacted or withheld for privilege. For each document, indicate:

1. The document number;
2. Request(s) to which the document is responsive;
3. Title;
4. Date;
5. Authors and job titles; and
6. Whether the document is privileged.

Indented and bolded headings in these Instructions should each be considered a separate request.

If a group of people prepared the document, list all the authors and their titles, identifying the principal authors. Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If the filing person engaged a third party to prepare a document, provide the name of the third party, and the name, title, and company name for the individual within the filing person who supervised the creation of the document, or for whom the document was prepared. For materials received from a third party that was not engaged by the filing person, only the name of the third party is required.

If parties submit documents in addition to what is required, such documents should be identified as ''Voluntary''. See § 803.1(b).

Submit only one copy of identical responsive documents.

For each narrative response, indicate the document number for each document that supports the narrative and the request to which the narrative is responsive.

Privilege

For privileged documents, the filing person must also provide the following in the Responses log:

1. The privilege type (redacted or withheld);
2. The privilege claim;
3. Addressee(s) and all recipients, with company name and title, of the original and any copies;
4. Subject matter;
5. Document's present location; and
6. Who has control over it.

If a privileged document was circulated to a group, such as the board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested.

If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

Translations

Materials or information in a foreign language must be translated into English, with the English translation attached to the foreign language version. See § 803.8.

Non-Compliance

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation ''est.'' to any item where data are estimated.

Limited Response

Information need not be supplied regarding assets, voting securities, or non-corporate interests currently being acquired when their acquisition is exempt under the Act or Rules. See § 803.2(c).

Ultimate Parent Entity Information

UPE Details

Name

Provide the name, headquarters address, and website (if one exists) of the person filing notification. The name of the person filing is the name of the UPE. See § 801.1(a)(3).

Entity Type

Specify whether the UPE is a corporation, unincorporated entity, natural person, or other entity type (specify). See § 801.1.

Acquiring or Acquired Person

Indicate whether the filing is being made as an acquiring or acquired person.

Filing Made on Behalf of the UPE

If the filing is being made on behalf of the UPE by another entity within the same person that is authorized by the UPE to file the notification on its behalf pursuant to § 803.2(a), or filed pursuant to § 803.4 on behalf of a foreign person, provide the name and mailing address of the entity filing the notification on behalf of the UPE.

Contact Information

Provide the name and title, firm name, address, telephone number, and email address of two individuals (primary and secondary) to contact regarding the filing. See § 803.20(b)(2)(ii).

Second Request Contact Information

Provide the name, firm name, address, telephone number, and email address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. See § 803.20(b)(2).

Annual Reports and Financial Information

Central Index Key

Provide the names of all entities within the person filing the notification, including the UPE, that file annual reports (Form 10–K or Form 20–F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

Annual Reports and Audit Reports

Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification.

The acquiring person should also provide the most recent reports of the acquiring entity(s) and any entity controlled by the acquiring person whose revenues contribute to a NAICS overlap or any overlap identified in the Horizontal Overlap Narrative.

The acquired person should also provide the most recent reports of the acquired entity(s).

Natural person UPEs should not provide personal balance sheets or tax returns. Natural person UPEs should instead provide the most recent reports for the highest-level entity(s) they control.

The person filing notification may incorporate a document responsive to this item by reference to an internet address directly linking to the document. See § 803.2(e).

Size of Person

If applicable, indicate whether the UPE stipulates that it meets the size of person test. See 15 U.S.C. 18a(a).

Organization Structure

If the acquisition includes only assets that do not comprise substantially all the assets of an operating unit, the acquired person should not complete the questions in this section. Otherwise, the acquired person must complete these questions for the portion of the transaction related to the voting securities, non-corporate interests, and assets that comprise substantially all the assets of an operating unit.

Entities Within the Acquiring Person and Acquired Entity

List the name, city, state/country, and zip code of all U.S. entities, and all foreign entities that have sales in or into the United States, that are included within the acquiring person, or acquired entity (as appropriate). Entities with total assets of less than $10 million may be omitted. Alternatively, the acquiring person or acquired entity (as appropriate) may report all entities within it. Also list all names under which the entities do business or have done business within the past 3 years (*e.g.,* d/b/a or f/k/a names).

The list of entities should be organized by operating company or operating business/unit (''top-level entity''), if applicable.

Minority Shareholders and Other Non-Controlling Entities

Acquiring Person

Provide a narrative response describing the ownership structure of the acquiring entity.

For transactions where a fund or master limited partnership is the UPE, also provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates. See § 801.1(d).

Additionally, list the name, headquarters mailing address, and approximate percentage of holdings for any individual or entity that currently holds, or will hold as a result of the transaction, 5% or more but less than 50% of the voting securities or non-corporate interests of (1) the acquiring entity, (2) any entity directly or indirectly controlled by the acquiring entity, (3) any entity that directly or indirectly controls the acquiring entity, and (4) any entity within the acquiring person that has been or will be created in contemplation of, or for the purposes of, effectuating the transaction. Entities related

to master limited partnerships, funds, investment groups, or similar entities that do business under a common name should also have the d/b/a or ''street name'' of such group listed.

For limited partnerships, the general partner(s), regardless of percentage held, should also be listed.

If the identity of minority investors or percentage to be held is not finalized at time of filing, provide good faith estimates and explain.

Acquired Person

Provide a narrative response, describing the ownership structure of the acquired entity(s).

Additionally, list the name, headquarters mailing address, and approximate percentage held for any holders of 5% or more but less than 50% of (1) the acquired entity(s), and (2) any entity within the acquired entity(s), but only if such holder will continue to hold an interest (whether voting securities or non-corporate interests) in such entity(s), or will acquire an interest in any entity within the acquiring person as a result of the transaction.

For limited partnerships, the general partner(s), regardless of percentage held, should also be listed.

Other Types of Interest Holders That May Exert Influence

For the Acquiring Person Only: Identify every entity and individual (other than those employed by the acquiring person or an entity it controls) that, upon consummation or as a result of agreements related to consummation:

1. Provides, has provided (and still is a creditor), or will provide credit to the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity. Do not list individuals or entities if the amount of credit they have provided or will provide is less than 10% of the value of that entity;

2. Holds non-voting securities (including options or warrants) of the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity, where such non-voting securities are valued at more than 10% of that entity;

3. Is a board member or board observer or has the right to nominate or appoint a board member or board observer of the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity; or

4. Has an agreement to manage the acquiring entity, an entity the acquiring entity directly or indirectly controls, or an entity that directly or indirectly controls the acquiring entity.

For every individual or entity identified, provide the name, contact information, the percent of voting securities or non-corporate interests owned (if any), and a description of the relevant relationship(s) above.

Officers, Directors, and Board Observers

For each entity within the acquiring person or acquired entity (as applicable), list by entity all current officers, directors, and board observers (or in the case of unincorporated entities, individuals exercising similar functions), as well as those who have served in the position within the past 2 years.

Additionally, list all individuals who will or are likely to serve as an officer, director, or board observer of an entity within the acquiring person as a result of or as contemplated by the transaction. Organize the response by entity and include entities that are not yet created but are expected to be created as a result of or as contemplated by the transaction. If the identities of the prospective officers, directors, and board observers are unknown, briefly describe who will have the authority to select them.

For each officer, director and board observer identified, list all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer.

Transaction Information

Parties

List the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, whether or not required to file a notification. Do not list entities controlled by an acquired entity.

Acquiring UPE

Provide the name, headquarters address, and website (if one exists) of the acquiring person.

Acquiring Entity

If an entity other than the acquiring UPE is making the acquisition, provide the name, mailing address, and website of that entity.

Acquired UPE

Provide the name, headquarters address, and website (if one exists) of the acquired person.

Acquired Entity

If the assets, voting securities, or non-corporate interests of an entity other than the acquired UPE are being acquired, provide the name, mailing address, and website of that entity.

Filing Fee

Total Expected Filing Fee

Indicate the value of the total required fee for the transaction.

Parties Paying the Fee

Indicate which filing party(s) is paying the filing fee and, if applicable, whether the portion of the fee being paid by the filer is being paid by multiple entities associated with the filer. For each entity paying a portion of the fee, provide the name of payer, the amount paid, the payment method, and the Electronic Wire Transfer (EWT) confirmation number or check number.

Note on Paying by EWT: In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the PNO website on the *Filing Fee Information page.*

Note on Paying by Check: The FTC strongly discourages check payments. However, if an EWT cannot be arranged, the FTC will accept a check, sent to Financial Operations. Cashiers' or certified checks are preferred. Make the check payable to the Federal Trade Commission and deliver to: Federal Trade Commission, Financial Operations Division, 600 Pennsylvania Ave., Drop H–790, Washington, DC 20580.

Please note that the waiting period may be delayed until the fee has been confirmed.

Transaction Details

801.30 Transaction:

Indicate whether the transaction is subject to § 801.30.

Transaction Type

Indicate whether the transaction is a(n):

- Acquisition of voting securities;
- Acquisition of non-corporate interests;
- Acquisition of assets;
- Merger (see § 801.2);
- Consolidation (see § 801.2);
- Formation of a joint venture, other corporation, or unincorporated entity (see §§ 801.40 and 801.50);
- Bankruptcy that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. 363);
- Cash Tender Offer;
- Acquisition subject to § 801.31;
- Secondary acquisition subject to § 801.4;
- Acquisition subject to § 801.2(e); and/or
- Acquisition consummated in violation of the HSR Act.

Acquisition Details

Provide the requested information for the value and percentage of assets, voting securities, and non-corporate interests to be acquired. If a combination of assets, voting securities, and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote.

For determining percentage of voting securities, evaluate total voting power per § 801.12.

For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(ii).

- State the value of voting securities already held by the acquiring person. See § 801.10.
- State the percentage of voting securities already held by the acquiring person. See § 801.12.
- State the total value of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total percentage of voting securities to be held by the acquiring person as a result of the acquisition. See § 801.12.
- State the value of non-corporate interests already held by the acquiring person. See § 801.10.
- State the percentage of non-corporate interests already held by the acquiring person. See § 801.1(b)(1)(ii).
- State the total value of non-corporate interests to be held by the acquiring person as a result of the acquisition. See § 801.10.
- State the total percentage of non-corporate interests to be held by the acquiring person as a result of the acquisition. See §§ 801.10 and 801.1(b)(1)(ii).
- State the value of assets to be held by the acquiring person as a result of the acquisition. See § 801.10.

• State the aggregate total value of assets, voting securities, and non-corporate interests of the acquired person to be held by the acquiring person as a result of the acquisition. See §§ 801.10, 801.12, 801.13 and 801.14.

Notification Threshold

This item should only be completed by the acquiring person when voting securities are being acquired. If more than voting securities are being acquired, respond to this item only regarding voting securities. Indicate the highest applicable threshold for which notification is being filed. See § 801.1(h).

• $50 million (as adjusted);
• $100 million (as adjusted);
• $500 million (as adjusted);
• 25% (if the value of voting securities to be held is greater than $1 billion, as adjusted);
• 50%;
• N/A.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

Transaction Description

Business of the Acquiring Person

Acquiring Person Only: Describe the business operation(s) of all entities within the acquiring person.

Business of the Acquired Entity

Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation.

Non-Reportable UPE(s)

Provide the names of any non-reportable UPE(s).

Transaction Description

Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Indicate what consideration will be received by each party and the scheduled consummation date of the transaction. Also identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

If any attached transaction documents use code names to refer to the parties, provide an index identifying the codes.

Transaction Rationale

Identify and explain each strategic rationale for the transaction discussed or contemplated by the filing person, or any of its officers, directors, or employees. If the acquiring entity is different from the UPE, submit an explanation for each entity. Identify each document produced in the filing that confirms or discusses the stated rationale(s).

Transaction Diagram

Submit a diagram of the transaction and provide a chart explaining the relationship between all entities and/or natural persons involved in the transaction.

Related Transactions

Indicate whether the transaction that is the subject of this filing has related filings because the transaction:

• Is a principal transaction that triggers one or more shareholder backside transactions;
• Is a shareholder backside transaction;
• Has more than one acquiring UPE;
• Has more than one acquired UPE;
• Has more than one reportable step;
• Is a joint venture;
• Is a consolidation;
• Is an exchange of assets; or
• Has other circumstance that requires more than one filing.

Provide additional details regarding the related transaction(s), such as party names and transaction numbers.

Early Termination

Indicate whether the filing person requests early termination. Notification of each grant of early termination will be published in the **Federal Register**, as required by 15 U.S.C. 18a(b)(2), and on the PNO website. Note that if either party in any transaction requests early termination, it may be granted and published.

Joint Ventures

See §§ 801.40 and 801.50.

Contributions

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Consideration

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Business Description

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

NAICS Codes

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues.

Agreements and Timeline

Transaction-Specific Agreements

Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction.

Documents that constitute the agreement(s) (*e.g.,* Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version. If there is no definitive executed agreement, provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate. See § 803.5.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. 363(b) do not require an executed agreement. For bankruptcies, provide the order from the bankruptcy court.

Other Agreements Between the Parties

Provide all other agreements between the acquiring and acquired person, including but not limited to, non-compete or non-solicitation agreements, supply agreements, or licensing agreements including current agreements and those that expired, have terminated, or were canceled within one year of the filing.

Timeline

Provide a detailed timetable for the transaction, including when the signatories intend to consummate the transaction, or implement all closing conditions, integration, affiliation, or other purchase agreements, and any other important deadlines for closing or terminating the merger agreement. Identify all provisions in the agreement that govern the extension of these deadlines and explain the conditions for extending deadlines and how long they may be extended. Also, if applicable, provide a description of any fee or other consideration paid or to be paid at key dates of the transaction or upon closing, including but not limited to termination fees, break fees, ticking fees, and any other arrangement intended to serve in lieu of a break fee.

Competition and Overlaps

Business Documents

Transaction-Related Documents

Documents Prepared by or for Officers, Directors, or Supervisory Deal Team Lead(s)

Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead(s).

Confidential Information Memoranda

Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or

director(s) of the buyer meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists.

Documents responsive to this item are limited to those produced within one year before the date of filing.

Studies, Surveys, Analyses, and Reports

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third party advisors (''third party advisors'') for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement.

Documents responsive to this item are limited to those produced within one year before the date of filing.

Synergies and Efficiencies

Provide all studies, surveys, analyses, models, and reports evaluating or analyzing synergies, financial projections, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

Drafts

For each responsive Transaction-Related Document, provide drafts of the document that were sent to an officer, director, or supervisory deal team lead(s).

Periodic Plans and Reports

Provide all semi-annual or quarterly plans and reports that were provided to the Chief Executive Officer (CEO) of the acquiring or acquired entity (as appropriate) and any entity that it controls or is controlled by and individuals who report directly to each such CEO (but excluding individuals responsible solely for environmental, tax, human resources, pensions, benefits, ERISA, or OSHA issues) that analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party (acquiring person or acquired entity as appropriate). Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Provide all plans and reports (including semi-annual or quarterly) that were provided to the Board of Directors of the acquiring or acquired entity (as appropriate) and any entity that it controls or is controlled by that analyze market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party (acquiring person or acquired entity as appropriate). Documents responsive to this item are limited to those prepared or modified within one year of the date of filing.

Organizational Chart of Authors and Recipients

Provide an organizational chart(s) that identifies the position(s) held by authors, and for privileged documents, recipients, of all business documents submitted. Filing persons should indicate on the organizational chart(s) the individuals whose files were searched for documents responsive to these Instructions.

Competition Analysis

Horizontal Overlap Narrative

Describe each of the principal categories of products and services (as defined in the day-to-day operations) of the acquiring person or acquired entity (as applicable).

In addition, list and describe each of the current or known planned products or services of the acquiring person or acquired entity (as appropriate) that competes with (or could compete with) a current or known planned product or service of the other party (acquiring person or acquired entity as appropriate). Current or known planned products or services include those that the acquiring person or acquired entity researches, develops, manufactures, produces, sells, offers, provides, supplies, or distributes. For each such product or service listed, provide:

1. The sales (in units and dollars) for each of the past two fiscal years. For those products or services not generating revenue or whose performance is not measured by revenue in the ordinary course of business, provide projected revenue, estimates of the volume of products to be sold, time spent using the service, or any other metric by which the acquiring person or acquired entity (as appropriate) measures performance (*e.g.,* daily users, new signups).

2. A description of all categories of customers of the acquiring person or acquired entity (as appropriate) that purchase or use the product or service (*e.g.,* retailer, distributor, broker, government, military, educational, national account, local account, commercial, residential, or institutional), and an estimate of how much of the product or service each customer category purchased or used monthly for the last fiscal year. If no customers have yet used the product or service, provide the date that development of the product or service began; a description of the current stage in development, including any testing and regulatory approvals and any planned improvements or modifications; the date that development (including testing and regulatory approvals) was or will be completed; and the date that the product or service is expected to be sold or otherwise commercially launched.

3. Contact information (including individual's name, title, phone, and email) for the acquiring person's or acquired entity's (as appropriate) top 10 customers in the last fiscal year (as measured in both units and dollars), and the top 10 customers for each customer category identified.

4. A description of any licensing arrangements.

5. A description, including duration, of any non-compete or non-solicitation agreement applicable to employees or business units related to the product or service.

Supply Relationships Narrative

Related Sales: List and describe each product, service, or asset (including data) that the acquiring person or acquired entity (as applicable) has sold, licensed, or otherwise supplied in the last two fiscal years (1) to the other party (acquiring person or acquired entity as appropriate), or (2) to any other business that, to the filing person's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services.

For each product, service, or asset listed, provide:

1. The sales (in units and dollars and any other appropriate measure) for each of the past two fiscal years, separately to (1) the other party (acquiring person or acquired entity as appropriate) and (2) any other business that, to the filing person's knowledge or belief, uses its product, service, or asset to compete with the other party's products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services.

2. The top 10 customers (as measured in both units and dollars) of the acquiring person or acquired entity (as appropriate) that use the acquiring person's or acquired entity's (as appropriate) product, service, or asset to compete with the other party's (acquiring person or acquired entity as appropriate) products or services, or as an input for a product or service that competes or is intended to compete with the other party's products or services. For each such customer, provide contact information (including title, phone, and email) and a description of the acquiring person's or acquired entity's (as appropriate) supply or licensing agreement (or other comparable terms of supply).

Related Purchases: List and describe each product, service, or asset (including data) that the acquiring person or acquired entity (as appropriate) incorporates as an input into any product or service and that the acquiring person or acquired entity (as appropriate) has purchased, licensed, or otherwise obtained in the last two years (1) from the other party (acquiring person or acquired entity as appropriate) or (2) from any other business that, to the filing person's knowledge or belief, competes with the other party to provide a substantially similar product, service, or asset.

For each product, service, or asset listed, provide:

1. The purchased amount (in units and dollars and any other appropriate measure) for each of the last two fiscal years, separately for (1) the other party and (2) any other business that, to the filing person's

knowledge or belief, competes with the other party to provide a substantially similar product, service, or asset.

2. The top 10 suppliers (as measured in both units and dollars) for the associated input product, service, or asset, with contact information (including title, phone, and email) and a description of the acquiring person's or acquired entity's (as appropriate) purchase or licensing agreement (or other comparable terms of purchase).

Labor Markets Information

This section requests information about the largest categories of workers employed by the acquiring person or acquired entity (as appropriate) and the geographic area(s) where these employees work.

Largest Employee Classifications

Provide the aggregate number of employees of the acquiring person or acquired entity (as appropriate) for each of the five largest occupational categories (as categorized by the first six digits of the relevant SOC classifications).

Geographic Market Information for Each Overlapping Employee Classification

Indicate the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers. For each overlapping 6-digit SOC code, list each ERS commuting zone in which both parties employ workers with the 6-digit classification and provide the aggregate number of classified employees in each ERS commuting zone.

Worker and Workplace Safety Information

Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters.

For each identified penalty or finding, provide (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding.

NAICS Codes

This item requests information regarding the industry categories of the acquiring person or acquired entity(s) or assets (as appropriate) of products and services that derived revenue in the last fiscal year, as well as for products or services in development that would create overlaps with the other party (acquiring person or acquired entity as appropriate).

NAICS Codes Describing U.S. Operations With Estimates of Revenue

Acquiring Person

Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquiring person, inclusive of all entities included within the acquiring person at the time the filing is made.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating entity(s) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more but less than $1 billion; or $1 billion or more. Identify each 6-digit NAICS code in which both the acquiring person and acquired entity(s) or assets derive revenue.

For products and services that derived revenue in the most recent fiscal year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquired entity(s) or assets derived revenue from U.S. operations.

Acquiring persons should also list all NAICS codes for products or services under development by the acquiring person that would overlap with the products or services of the acquired entity(s) or assets, inclusive of products or services that are known to be under development by the acquired entity(s) or assets. NAICS codes that reflect only these pipeline products or services should be identified as ''pre-revenue.''

If more than one NAICS code describes the same operations of the acquiring person, list each code, and provide an estimate of revenue, as described above. End notes may be used to clarify the selection of codes or potential overlaps.

Acquired Person

Identify all 6-digit NAICS industry codes that describe the U.S. operations of the acquired entity(s) or assets, inclusive of all entities and assets anticipated to be included within the acquired entity(s) or assets at the time the transaction will be consummated.

Responses must be organized by NAICS code in ascending order. For each code, provide the name of the operating entity(s) that derive(s) revenue in that code and the estimated revenue range: less than $10 million; $10 million or more but less than $100 million; $100 million or more, but less than $1 billion; or $1 billion or more. Identify each 6-digit NAICS code in which both the acquiring person and acquired entity(s) or assets derive revenue.

For products and services that derived revenue in the most recent fiscal year in a non-manufacturing NAICS code, if the revenue is estimated at less than one million dollars, that code may be omitted so long as the code does not overlap with a code in which the acquiring person derived revenue from U.S. operations.

Acquired persons should also list all NAICS codes for products or services under development by the acquired entity(s) or assets and expected to have annual revenue greater than $1 million within two years. NAICS codes that reflect only these pipeline products or services should be identified as ''pre-revenue.''

If more than one NAICS code describes the same operations of the acquired entity(s) or assets, list each code, and provide an estimate of revenue, as described above. End notes may be used to clarify the selection of codes or potential overlaps.

No Revenue

If there is no revenue to report, explain why.

Controlled-Entity Overlaps

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see § 801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations:

1. In industries within any 6-digit NAICS industry code in which any acquired entity also derived any amount of dollar revenues in the most recent year; or

2. In which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

If the acquiring person reports an associate overlap only, the acquired person does not need to respond to this section.

NAICS Overlaps of Controlled Entities

Acquiring Person

List the name of each entity within the acquiring person or associate of the acquiring person, that has U.S, operations in the same code as an acquired entity or assets. For each such entity, list the name(s) by which the entity does or has within the last 3 years done business, whether the listed entity is controlled by the filing person or an associate of the filing person, the overlapping NAICS code(s), NAICS description(s), and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code.

Acquired Person

List the name of each entity within the acquired entity that has U.S. operations in the same code as the acquiring person. For each such entity, list the name(s) by which the entity does or has within the last 3 years done business, the overlapping NAICS code(s), NAICS description(s), and provide the appropriate Geographic Market Information, based upon the NAICS code. Organize responses by NAICS code.

Geographic Market Information

For each identified overlapping NAICS code, provide geographic information, as described below. Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Except in the case of those NAICS industries in the sectors, subsectors, and codes that require street-address level reporting, the person filing notification may respond with the word ''national'' if business is conducted in all 50 states.

State-Level Reporting

Manufacturing Industries

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit

NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold).

31**** through 33**** Manufacturing, *except:*
- 3115** Dairy Product Manufacturing
- 311611 Animal (except Poultry) Slaughtering
- 311613 Rendering and Meat Byproduct Processing
- 311615 Poultry Processing
- 31181* Bread and Bakery Product Manufacturing
- 321*** Wood Product Manufacturing
- 32221* Paperboard Container Manufacturing
- 324*** Petroleum and Coal Products Manufacturing
- 3251** Basic Chemical Manufacturing
- 325521 Plastics Materials and Resin Manufacturing
- 3271** Clay Product and Refractory Manufacturing
- 3272** Glass and Glass Product Manufacturing
- 3273** Cement and Concrete Product Manufacturing

Wholesale Trade

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

42**** Wholesale Trade, *except:*
- 42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
- 42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
- 42344* Other Commercial Equipment Merchant Wholesalers
- 42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
- 42346* Ophthalmic Goods Merchant Wholesalers
- 42349* Other Professional Equipment and Supplies Merchant Wholesalers
- 4239** Miscellaneous Durable Goods Merchant Wholesalers
- 4241** Paper and Paper Product Merchant Wholesalers
- 4242** Drug and Druggists' Sundries Merchant Wholesalers
- 42441* General Line Grocery Merchant Wholesalers
- 42442* Packaged Frozen Food Merchant Wholesalers
- 42451* Grain and Field Bean Merchant Wholesalers
- 42452* Livestock Merchant Wholesalers
- 4247** Petroleum and Petroleum Products Merchant Wholesalers
- 4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
- 42491* Farm Supplies Merchant Wholesalers
- 42495* Paint, Varnish, and Supplies Merchant Wholesalers

Insurance Carriers

For the 6-digit NAICS code within the industry subsector listed below, list the state(s) in which the person filing notification is licensed to write insurance.

5241** Insurance Carriers

Other NAICS Sectors

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

11**** Agriculture, Forestry, Fishing, and Hunting, *except:*
- 113*** Forestry and Logging

21**** Mining, Quarrying, and Oil and Gas Extraction, *except:*
- 2123** Nonmetallic Mineral Mining and Quarrying

2213** Water, Sewage, and Other Systems
23**** Construction
44912* Home Furnishing Retailers
4492** Electronics and Appliance Retailers
48**** and 49**** Transportation and Warehousing, *except:*
- 493*** Warehousing and Storage

51**** Information, *except:*
- 512*** Motion Picture and Sound Recording Industries

5222** Nondepository Credit Intermediation
523*** Securities, Commodity Contracts, and Other Financial Investments and Related Activities
5242** Agencies, Brokerages, and Other Insurance Related Activities
525*** Funds, Trusts, and Other Financial Vehicles
531*** Real Estate
533*** Lessors of Nonfinancial Intangible Assets (Except Copyrighted Works)
54**** Professional, Scientific and Technical Services, *except:*
- 54138* Testing Laboratories and Services
- 54194* Veterinary Services

55**** Management of Companies and Enterprises
561*** Administrative and Support Services
61**** Educational Services
71**** Arts, Entertainment, and Recreation, *except:*
- 7132** Gambling Industries
- 71394* Fitness and Recreational Sports Centers

7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps
8114** Personal and Household Goods Repair and Maintenance
813*** Religious, Grantmaking, Civic, Professional, and Similar Organizations
814*** Private Households

Street-Level Reporting

For each 6-digit NAICS code within the industry sector, subsector, or code listed below, provide the street address, arranged by state, county and city or town, and latitude and longitude (each in degrees up to at least five decimal places) of each establishment from which dollar revenues were derived (either directly or by a franchisee) in the most recent year by the person filing notification.

113*** Forestry and Logging
2123** Nonmetallic Mineral Mining and Quarrying
22**** Utilities, *except:*
- 2213** Water, Sewage and Other Systems

3115** Dairy Product Manufacturing
311611 Animal (except Poultry) Slaughtering
311613 Rendering and Meat Byproduct Processing
311615 Poultry Processing
31181* Bread and Bakery Product Manufacturing
321*** Wood Product Manufacturing
32221* Paperboard Container Manufacturing
324*** Petroleum and Coal Products Manufacturing
3251** Basic Chemical Manufacturing
325521 Plastics Materials and Resin Manufacturing
3271** Clay Product and Refractory Manufacturing
3272** Glass and Glass Product Manufacturing
3273** Cement and Concrete Product Manufacturing
42331* Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers
42333* Roofing, Siding, and Insulation Material Merchant Wholesalers
42344* Other Commercial Equipment Merchant Wholesalers
42345* Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers
42346* Ophthalmic Goods Merchant Wholesalers
42349* Other Professional Equipment and Supplies Merchant Wholesalers
4239** Miscellaneous Durable Goods Merchant Wholesalers
4241** Paper and Paper Product Merchant Wholesalers
4242** Drug and Druggists' Sundries Merchant Wholesalers
42441* General Line Grocery Merchant Wholesalers
42442* Packaged Frozen Food Merchant Wholesalers
42451* Grain and Field Bean Merchant Wholesalers
42452* Livestock Merchant Wholesalers
4247** Petroleum and Petroleum Products Merchant Wholesalers
4248** Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers
42491* Farm Supplies Merchant Wholesalers
42495* Paint, Varnish, and Supplies Merchant Wholesalers
44**** and 45**** Retail Trade, *except:*
- 44912* Home Furnishings Retailers
- 4492** Electronics and Appliance Retailers

493*** Warehousing and Storage
512*** Motion Picture and Sound Recording Industries
521*** Monetary Authorities—Central Bank
5221** Depository Credit Intermediation
5223** Activities Related to Credit Intermediation
532*** Rental and Leasing Services
54138* Testing Laboratories and Services
54194* Veterinary Services
562*** Waste Management and Remediation Services
62**** Health Care and Social Assistance

7132** Gambling Industries
71394* Fitness and Recreational Sports Centers
72**** Accommodation and Food Services, *except:*
7212** RV (Recreational Vehicle) Parks and Recreational Camps
7213** Rooming and Boarding Houses, Dormitories, and Workers' Camps
811*** Repair and Maintenance, except
8114** Personal and Household Goods Repair and Maintenance
812*** Personal and Laundry Services

Minority-Held Entity Overlaps

This section requires the disclosure of holdings of 5% or more but less than 50% of certain entities that derive dollar revenues in any 6-digit NAICS code reported by the other person filing notification. Holdings in those entities that have total assets of less than $10 million may be omitted.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the filing person, should be listed. Holdings in those entities that have total assets of less than $10 million may be omitted.

Minority Holdings of Acquiring Person and Its Associates

If the acquiring person holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS code(s) reported by the acquired entity(s) or assets, provide such 6-digit NAICS code(s), the entity within the acquiring person that holds the minority interests, the name and d/b/a names (if known) of the minority held-entity, and percentage of voting securities or non-corporate interests held.

Additionally, based on the knowledge or belief of the acquiring person, for each associate (see § 801.1(d)(2)) of the acquiring person holding:

1. 5% or more but less than 50% of the voting securities or non-corporate interests of an acquired entity; and/or

2. 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year,

list the associate, the name and d/b/a names (if known) of the minority-held entity, and percentage of voting securities or non-corporate interests held.

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

The acquiring person may rely on its regularly prepared financials that list its investments, and those of its associates that list their investments, provided the financials are no more than three months old.

Minority Holdings of the Acquired Entity

If an acquired entity holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code(s) reported by the acquiring person, provide such 6-digit NAICS code(s), the entity within the acquired entity that holds the minority interests, the name and d/b/a names (if known) of the minority-held entity, and percentage of voting securities or non-corporate interests held.

Responses should be organized alphabetically by the name of the entity in which minority interests are held.

Prior Acquisitions

This item should be completed for the acquiring person and the acquired entity, and pertains only to prior acquisitions of U.S. entities or assets and foreign entities or assets with sales in or into the U.S. that (i) derived revenue in an identified 6-digit NAICS industry code overlap *or* (ii) provided or produced a competitive overlap product or service as described in the Horizontal Overlap Narrative.

Identify all such acquisitions of entities or assets made within the ten years prior to filing in which (i) 50% or more of the voting securities of an issuer, (ii) 50% or more of non-corporate interests of an unincorporated entity, or (iii) all or substantially all the assets of an operating unit were acquired. Additionally, identify all such acquisitions of assets that did not constitute all or substantially all of an operating unit but were valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

1. the 6-digit NAICS code(s) (by number and description) identified above in which the acquired entity derived dollar revenues, or the competitive overlap product(s) or service(s) provided;

2. the name of the entity from which the voting securities, non-corporate interests, or assets were acquired;

3. the headquarters address of that entity prior to the acquisition;

4. whether voting securities, non-corporate interests, or assets were acquired;

5. the consummation date of the acquisition; and

6. whether all or substantially all of the acquired voting securities, non-corporate interests, or assets are still held at the time of filing.

Additional Information

Subsidies From Foreign Entities or Governments of Concern

To the knowledge or belief of the filing person, within the two years prior to filing, has the acquiring or acquired person (as appropriate) received any subsidy (or a commitment to provide a subsidy in the future) from any foreign entity or government of concern (see § 801.1(r))? If yes, list each entity or government from which such subsidy was received and provide a brief description of the subsidy.

For products the acquiring or acquired person (as appropriate) produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C), is any product subject to countervailing duties imposed by any jurisdiction? If yes, list each product, the countervailing duty imposed, and the jurisdiction that imposed the duty.

To the knowledge or belief of the filing person, for products the acquiring or acquired person (as appropriate) produced in whole or in part in a country that is a covered nation under 42 U.S.C. 18741(a)(5)(C), is any product the subject of a current investigation for countervailing duties in any jurisdiction? If yes, list each product and the jurisdiction conducting the investigation.

Defense or Intelligence Contracts

Identify pending or active procurement contracts with the U.S. Department of Defense or any member of the U.S. intelligence community, as defined by 10 U.S.C. 101(a)(6) or 50 U.S.C. 3033(4) valued at $10 million or more. The acquiring person should limit its response to the acquiring entity and any entity within the acquiring person that directly or indirectly controls the acquiring entity. The acquired person should limit its response to the acquired entity(s) and/or assets. Include (1) the name of the entity within the filing person (2) the contracting office, as defined by 48 CFR 2.101(b); (3) the Contracting Office ID; (5) the Award ID; (5) and the NAICS code(s), if any, listed in the System for Award Management database.

Identification of Communications and Messaging Systems

List all communications systems or messaging applications on any device used by the acquiring or acquired person (as appropriate) that could be used to store or transmit information or documents related to its business operations.

Other Jurisdictions

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the transaction, list the name of each such authority. Identify, to the knowledge or belief of the filing person at the time of filing, any jurisdiction where (1) a merger notification has been filed, (2) a merger notification is being prepared for filing, or (3) the parties have a good faith belief that a merger notification will be made, along with the dates of the filing or planned filing.

HSR Confidentiality Waiver for International Competition Authorities (VOLUNTARY)

Indicate whether the filing person agrees to waive the disclosure exemption contained in the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h) to permit the DOJ and FTC to disclose to non-U.S. competition authority/authorities listed by the filing person below (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. 18a(e) and does not preclude the filing person from providing a full waiver as provided for under *FTC and DOJ practice as*

reflected in the Model Waiver. The filing person should list the jurisdictions to which the waiver applies. This item is voluntary.

HSR Confidentiality Waiver for State Attorneys General (VOLUNTARY)

Indicate whether the filing person agrees to waive the disclosure exemption contained in the Hart-Scott-Rodino Act, 15 U.S.C. 18a(h) to permit the DOJ and FTC to disclose to State Attorneys General listed by the filing person below (1) the fact that a notification was filed, (2) the waiting period associated with the notification, and (3) information and documents filed with the notification. This waiver will not cover materials provided in response to a request for additional information issued pursuant to 15 U.S.C. 18a(e) and does not preclude the filing person from providing a full waiver as provided for under *FTC and DOJ practice as reflected in the Model Waiver.* The filing person should list the jurisdictions to which the waiver applies. This item is voluntary.

Certification

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. 1746 relating to unsworn declarations under penalty of perjury.

Penalties for False Statements

Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, *e.g.,* Section 1519 of Title 18, United States Code.). It is also a criminal offense to knowingly make a false statement in a federal investigation, obstruct a federal investigation, or conspire to obstruct justice or obstruct or impede the lawful functioning of the government (see, *e.g.,* Sections 371, 1001, and 1505 of Title 18, United States Code).

Certification

This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

I acknowledge that the Commission or the Assistant Attorney General of the Antitrust Division of the Department of Justice may, prior to the expiration of the initial waiting period pursuant to 15 U.S.C. 18a, require the submission of additional information or documentary material relevant to the proposed transaction. I have taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction before the expiration of any waiting period.

Affidavits

Affidavit(s) required by § 803.5 must be notarized or use the language found in 28 U.S.C. 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

In non-§ 801.30 transactions, the affidavit(s) (submitted by both persons filing) must attest that a definitive agreement to merge or acquire has been executed, or if a definitive agreement has not been executed, that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted. The affidavit(s) must further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

In § 801.30 transactions, the affidavit (submitted only by the acquiring person) must attest:

1. That the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;

2. In the case of a tender offer, that the intention to make the tender offer has been publicly announced; and

3. The good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are also required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

1. The identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;

2. The specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;

3. The fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;

4. The anticipated date of receipt of such notification by the Agencies; and

5. The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

Privacy Act Statement

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 CFR 1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

Disclosure Notice

Public reporting burden for this report is estimated to vary from 20 to 382 hours per response, with an average of 144 hours per response, including time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, Federal Trade Commission, Room #5301, 400 7th Street SW, Washington, DC 20024

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the Paperwork Reduction Act, as amended, 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 operative OMB control number, 3084–0005, appears within the Notification and Report Form and these Instructions.

By the direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–13511 Filed 6–28–23; 8:45 am]

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Part IV

Department of Education

Privacy Act of 1974; System of Records; Notice

DEPARTMENT OF EDUCATION

[Docket ID ED–2023–FSA–0113]

Privacy Act of 1974; System of Records

AGENCY: Federal Student Aid, U.S. Department of Education.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), the U.S. Department of Education (Department) publishes this notice of a new system of records titled ''FUTURE Act System (FAS)'' (18–11–23). The Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE Act) amended the Internal Revenue Code (IRC) to authorize the U.S. Department of the Treasury, Internal Revenue Service (IRS), to disclose to the Department certain Federal tax information (FTI) of an individual, upon approval being provided by the individual to the Department, for the purpose of determining eligibility for, or repayment obligations under, Income-Driven Repayment (IDR) plans under title IV of the Higher Education Act of 1965, as amended (HEA), with respect to loans under part D of title IV of the HEA, and determining eligibility for, and amount of Federal student financial aid under, a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA. The Department and the IRS have entered into a computer matching agreement (CMA) pursuant to which the IRS will disclose FTI to the Department, to maintain and secure the FTI obtained in this system.

DATES: Submit your comments on this new system of records notice on or before July 31, 2023.

This new system of records notice will become applicable upon publication in the **Federal Register** on June 29, 2023, unless it needs to be changed as a result of public comment, except for the routine uses. The routine uses, listed in the section titled ''ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES,'' will become effective on July 31, 2023, unless they need to be changed as a result of public comment. The Department will publish any significant changes to the new system of records notice or routine uses resulting from public comment.

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 submitted by fax or by email, or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. In addition, 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 is to make all comments received from members of the public 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.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or aid, please contact the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Pardu Ponnapalli, Technology Directorate, Federal Student Aid, U.S. Department of Education, Union Center Plaza, 830 First Street NE, Washington, DC 20202–5454. Telephone: 202–377–4006. Email: *Pardu.Ponnapalli@ed.gov*.

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

SUPPLEMENTARY INFORMATION:

Introduction

The FAS provides a confined platform consisting of three specific FSA information technology systems (namely, the FTI Module, FTI Datamart, and FTI Student Aid internet Gateway (SAIG), described in greater detail below), within which the Department uses and maintains FTI that the Department receives from the IRS in accordance with the IRC, including sections 6103(l)(13)(A), (C), and(D) therein.

The FAS allows the Department to: (1) enhance the Free Application for Federal Student Aid (FAFSA®)experience by enabling the Department to obtain FTI from the IRS for each applicant, parent, or spouse who provides approval for the purposes set forth in section 6103(l)(13)(C) of the IRC; (2) improve program integrity for Income Driven Repayment (IDR) plans by enabling the Department to obtain FTI faster, and in a secure manner, from the IRS for individuals who provide approval for the purposes set forth in section 6103(l)(13)(A) and (C) of the IRC; and (3) provide an improved experience to applicable aid applicants and aid recipients, along with their spouses and parents, through the establishment of a matching program between the IRS and the Department.

To the extent that the Department determines it to be required by law or essential to the conduct of its matching program with the IRS, the Department may also use the FTI that the IRS discloses to the Department for the foregoing purposes for the following additional purposes permitted by section 6103(l)(13)(D)(i) of the IRC: (a) reducing the net cost of improper payments: (i) under IDR plans, and (ii) relating to awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA; (b) the Department's OIG's oversight activities as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions; and (c) conducting analyses and forecasts for estimating costs related to: (i) IDR plans, and (ii) awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA. This will improve the Department's administration of programs authorized under title IV of the HEA by enhancing the FAFSA verification experience and eliminating multi-year certification for IDR plan applicants and aid recipients, which simplifies both online application experiences and prevents many aid recipients from defaulting on their Federal student loans.

The three FSA information technology systems comprising the FAS are as follows:

(i) FTI Module—The FTI Module is a centralized and secured platform that interfaces with the IRS to collect and maintain FTI via a matching program. It also serves as a database that contains

FTI where authorized Department users can view FTI and perform all FTI-related business functions. The FTI Module also houses the non-FTI information (*e.g.,* last name, SSN/TIN, unique identifier, consent/affirmative approval information, date, and time stamp) needed to engage in the applicable matching program. In particular, the Department uses the FTI Module to perform calculations required for the Department to determine eligibility for, and amount of, Federal student financial aid under subpart 1 of part A, part C, or part D of title IV of the HEA, and eligibility for, and repayment obligations under, IDR plans with respect to loans under part D of title IV of the HEA, as permitted under sections 6103(l)(13)(A) and (C) of the IRC. More specifically, the Department uses the FTI Module to calculate the Student Aid Index (SAI), verify financial information, conduct eligibility determination checks, and calculate the IDR plan monthly payment amount. Further, the. The FTI Module produces outputs to FSA systems outside of the FTI Module's boundary that address those systems' required business needs, as permitted by applicable law and in a manner that complies with IRS Publication 1075, ''Tax Information Security Guidelines for Federal, State, and Local Agencies.'' For example, the SAI calculation that is derived from FTI within the FTI Module boundary is transmitted to the FAFSA Processing System (FPS) covered by the Department's system of records notice entitled ''Aid Awareness and Application Processing'' (18–11–21). In addition, to determine eligibility requirements for loan repayment plans, the FTI Module calculates a monthly loan payment amount derived from FTI which is then transmitted to the Common Origination and Disbursement (COD) System covered by the Department's system of records notice entitled ''Common Origination and Disbursement (COD)System'' (18–11–02);

(ii) FTI Datamart—The FTI Datamart is a secure data warehouse that contains FTI maintained by the Department and utilizes analytics frameworks to support data analytics, budget service, and auditing analysis. A set of analytical tools included in the FTI Datamart provides users the ability to analyze data based on the users' needs and to the extent such analysis is authorized by sections 6103(l)(13)(D)(i)(I) through (III) of the IRC; and

(iii) FTI SAIG—The FTI SAIG is used for title IV, HEA data transmissions that contain FTI, as permitted by section 6103(l)(13)(D)(iii) of the IRC and provided the Department has obtained the written consent of the taxpayer, to certain institutions of higher education (IHE),IHEs) State higher education agencies, and certain scholarship organizations solely for use in the application, award, and administration of financial aid awarded by the Federal government, by an IHE that participates in a program under subpart 1 of part A, part C, or part D of title IV of the HEA, by a State higher education agency, or by a scholarship organization designated by the Secretary of Education prior to December 19, 2019, under section 483(a)(3)(E) of the HEA.

Additionally, the FTI SAIG allows users the ability to send and receive files while maintaining complete compliance with applicable law and the requirements of IRS Publication 1075 regarding the transfer and storage of FTI.

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

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

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

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

For the reasons discussed in the preamble, the U.S. Department of Education (Department or ED) publishes a notice of a new system of records to read as follows:

SYSTEM NAME AND NUMBER:

FUTURE Act System (FAS) (18–11–23).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Amazon Web Services (AWS) GovCloud West-1, 875 Howard Street, San Francisco, CA 94103–3009. (AWS GovCloud hosts the infrastructure that supports the FAS.) Federal Student Aid (FSA), U.S. Department of Education, Union Center Plaza, 830 First Street NE, Washington, DC 20202–5454.

SYSTEM MANAGER(S):

FUTURE Act System Manager, Technology Directorate, Federal Student Aid (FSA), U.S. Department of Education, Union Center Plaza, 830 First Street NE, Washington, DC 20202–5454.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title IV of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1070 *et seq.*); section 141(f) of the HEA (20 U.S.C. 1018(f)), and 6103(1)(13) and p(4) of the IRC and IRS Publication 1075 Tax Security Guidelines for Federal, State, and Local Agencies. The collection of Social Security numbers (SSNs) and Taxpayer Identification numbers (TINs) of individuals (including parents of dependent applicants and spouse(s) of independent applicants), who apply for or receive Federal student financial assistance under programs authorized by title IV of the HEA is also authorized by 31 U.S.C. 7701 and Executive Order 9397, as amended by Executive Order 13478 (November 18, 2008).

PURPOSE(S) OF THE SYSTEM:

The information contained in this system is maintained for the following purposes related to aid applicants and recipients under title IV of the HEA:

(1) To provide an aid applicant's or aid recipient's financial aid history to aid applicants or aid recipients, IHEs, Tribes, and Federal, State higher education agencies, or local agencies, and third-party servicers;

(2) To assess the administration of title IV, HEA program funds;

(3) To identify, recoup, and prevent improper payments in title IV, HEA programs;

(4) To help Federal, State, Tribal and local government agencies exercise their supervisory and administration powers (including, but not limited to licensure, examination, discipline, regulation, or oversight of IHEs, Department contractors, guaranty agencies, lenders and loan holders, and third-party servicers);

(5) To respond to aid applicant or aid recipient complaints submitted

regarding the practices or processes of the Department and/or the Department's contractor;

(6) To update information and correct errors contained in Department records regarding the aid applicant's or aid recipient's title IV, HEA program funds;

(7) To support the investigation of possible fraud and abuse and detect and prevent fraud and abuse in title IV, HEA program funds;

(8) To determine an applicant's eligibility for the award of aid under title IV of the HEA, State postsecondary education assistance, and aid by eligible IHEs or other entities that have been designated by the Secretary, as currently permitted by Section 483(a)(3)(E) of the HEA (20 U.S.C. 1090(a)(3)(E)), and to administer those awards.

Pursuant to sections 6103(l)(13)(A) and (C) of the Internal Revenue Code (IRC) the Department will use the Federal tax information (FTI) disclosed to the Department by the U.S. Department of the Treasury, Internal Revenue Service (IRS), that the Department maintains in this system for the purpose of determining eligibility for, or repayment obligations under, Income-Driven Repayment (IDR) plans under title IV of the HEA, with respect to loans under part D of title IV of the HEA; and determining eligibility for, and amount of Federal student financial aid under, a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA.

To the extent that the Department determines it to be required by law or essential to the conduct of its matching program with the IRS, the Department may also use the FTI that the Department maintains in this system for the foregoing purposes for the following additional purposes permitted by section 6103(l)(13)(D)(i) of the IRC:

(1) reducing the net cost of improper payments:

(a) under IDR plans, and

(b) relating to awards of Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA;

(2) the Department's Office of Inspector General's (OIG's) oversight activities as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions; and (3) conducting analyses and forecasts for estimating costs related to:

(a) IDR plans, and

(b) awards of Federal student financial aid under subpart 1 of part A, part C, or part D of title IV of the HEA.

The Department also uses the FTI that the Department maintains in this system to produce a Student Aid Report (SAR)/FAFSA Submission Summary (FSS), Institutional Student Information Record (ISIR) and, as permitted by section 6103(l)(13)(D)(iii) of the IRC and provided the Department has obtained the applicable individual's written consent, to distribute the ISIR to authorized institutions of higher education (IHEs), State higher education agencies, and certain scholarship organizations solely for the use in the application, award, and administration of financial aid awarded by the Federal Government, by an IHE that participates in a program under subpart 1 of part A, part C, or part D of title IV of the HEA, by a State higher education agency, or by a scholarship organization designated by the Secretary of Education prior to December 19, 2019, under section 483(a)(3)(E) of the HEA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system of records maintains records on aid applicants, aid recipients, and participants (*i.e.,* parent(s) of dependent applicants and spouse(s) of independent applicants) who apply for repayment of their obligations under IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA, or who apply for Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records maintains information provided by aid applicants for and aid recipients, or participants (as defined above) of, title IV, HEA program assistance on the Free Application for Federal Student Aid (FAFSA®) including, but not limited to, the applicant's last name, date of birth, SSN and/or TIN, unique identifier, consent/affirmative approval information, and the date/time stamp of the consent/affirmative approval provided for the purposes set forth in section 6103(l)(13)(C) of the IRC, clauses (iii), (iv), (v), and (vi) of section 6103(l)(13)(D) of the IRC, and under section 494(a) of the HEA (20 U.S.C. 1098h(a)). This system also maintains similar information provided about participants (as defined above) on the FAFSA. For an aid applicant or aid recipient who is married, this system of records also maintains spousal income and asset information. For an aid applicant or aid recipient who is a dependent student, this system of record maintains their income and asset information as well as the income and asset information of their parent(s).

In addition, this system maintains data related to FTI transmission processing, such as when FTI batch data was transmitted and received by the FTI SAIG.

This system also maintains the following data on IDR applicants and their spouses, if applicable, to calculate and produce the output calculation of the monthly repayment amount for IDR-related plans: the applicant's last name, date of birth, SSN and/or TIN, and unique identifier, and the consent/affirmative approval including date/time stamp provided for the purposes set forth in section 6103(l)(13)(A) of the IRC, clauses (iii), (iv), (v), and (vi) of section 6103(l)(13)(D) of the IRC, and under section 494(a) of the HEA (20 U.S.C. 1098h(a)).

Further, this system maintains the following FTI to determine eligibility for, and amount of, Federal student financial aid under a program authorized under subpart 1 of part A, part C, or part D of title IV of the HEA: SSA/TIN; tax year; last name; filing status code; adjusted gross income (AGI) amount; total number of tax exemptions; total number of dependents; income earned from work (sum of wages, farm income, Schedule C income); total amount of income tax paid; total allowable education tax credits; sum of untaxed IRA contributions and other payments to qualified plans; tax-exempt interest received; sum of untaxed pensions and annuities; net profit/loss from Schedule C; and indicator of filing for Schedules A, B, D, E, F, and H. This FTI will be used to generate a Student Aid Index (SAI), which will also be maintained in this system.

This system maintains the following FTI to determine eligibility for, or repayment of obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA: SSN/TIN, tax year; last name; filing status code; AGI amount; total number of exemptions; and total number of dependents. This FTI will be used to calculate monthly payment amounts, which will also be maintained in this system.

Note: With the consent/affirmative approval of the applicants, an ISIR will be provided to the IHEs identified on the applicant's FAFSA indicating the applicant's SAI, application results, whether there is discrepant or insufficient data, or FPS assumptions that affect FAFSA processing. The SAI will be used by IHEs to determine the student's eligibility for Federal and institutional program assistance, by State higher education agencies to determine the student's eligibility for State aid, and, if provided by the aid applicant or aid recipient, the Bureau of Indian Affairs (BIA) for tribal assistance.

RECORD SOURCE CATEGORIES:

Information maintained in this system is obtained from aid applicants or aid recipients, the parent(s) of dependent aid applicants or aid recipients (for FAFSA purposes only), and the spouse(s) of independent aid applicants or aid recipients for title IV, HEA program assistance; the authorized employees or representatives of IHEs, institutional third-party servicers, and State higher education agencies; and other persons or entities from which information is disclosed following a disclosure of records under the routine uses set forth below.

This system maintains information added during FTI processing and receives information from other Department information technology systems or their successor systems, such as the National Student Loan Data System (NSLDS) (covered by the Department's system of records notice entitled ''National Student Loan Data System (NSLDS)'' (18–11–06)); Common Origination and Disbursement (COD) System (covered by the Department's system of records notice entitled ''Common Origination and Disbursement (COD) System'' (18–11–02); Enterprise Data Management and Analytics Platform Services (EDMAPS) (covered by the Department's system of records notice entitled ''Enterprise Data Management and Analytics Platform Services'' (18–11–22)); Person Authentication Service (PAS) (covered by the Department's system of records notice entitled ''Person Authentication Service (PAS)'' (18–11–12)); Postsecondary Education Participants System (PEPS) (covered by the Department's system of records notice entitled ''Postsecondary Education Participants System (PEPS)'' (18–11–09)); and all information technology systems covered by the Department's system of records entitled ''Aid Awareness and Application Processing'' (18–11–21).

Information maintained in this system is also obtained through a matching program with the IRS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The Department may disclose information maintained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. These disclosures may be made on a case-by-case basis or pursuant to a computer matching agreement that meets the requirements of the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a). However, any FTI maintained in a record in this system of records may only be disclosed without the consent of the individual under the routine uses listed in this system of records notice if the disclosure is compatible with the purposes for which the record was collected and if the disclosure is permissible under section 6103(l)(13) of the IRC. Section 483(a)(3)(E) of the HEA, which will be in effect until June 30, 2024, also restricts the use of the information collected by the electronic FAFSA to the application, award, and administration of aid awarded under title IV of the HEA or of aid awarded by States, eligible IHEs, or such entities as the Secretary of Education may designate. Thus, until July 1, 2024, any such FAFSA information may only be disclosed under the routine uses listed in this system of records notice if the disclosure is compatible with the purposes for which the record was collected and if the disclosure is for the application, award, and administration of aid awarded under title IV of the HEA or of aid awarded by States, eligible IHEs, or such entities as the Secretary of Education may designate.

Program Disclosures. The Department may disclose records from this system of records for the following program purposes:

(a) To provide an aid applicant's or aid recipient's financial aid history, the Department may disclose records to IHEs, Tribes, and Federal, State higher education agencies, or local agencies, and third-party servicers;

(b) To facilitate receiving application and recertification information, calculating IDR plans monthly payment amounts, and calculating SAI, the Department may disclose records to IHEs, and Federal, State higher education agencies, or local agencies, Tribes, and third-party servicers;

(c) To assist the Department in assessing the administration of title IV, HEA program funds, the Department may disclose records to IHEs, third-party servicers, and Federal and State agencies;

(d) To support the Department in identifying, preventing, and recouping, improper payments in title IV, HEA programs, the Department may disclose records to IHEs, third-party servicers, Tribes, and Federal, State, or local agencies, State higher education agencies, and fiscal/financial agent designated by the U.S. Department of Treasury include employees, agents, or contractors of such agent;

(e) To help Federal, State, Tribal, and local governmental agencies exercise their supervisory and administrative powers (including, but not limited to licensure, examination, discipline, regulation, or oversight of educational institutions, Department contractors, guaranty agencies, eligible lenders, and third-party servicers) or to investigate, respond to, or resolve complaints submitted regarding the practices or processes of the Department and/or the Department's contractors, the Department may disclose records to governmental entities at the Federal, State, Tribal, and local levels. These records may include all aspects of records relating to loans and grants made under title IV of the HEA, to permit these governmental entities to verify compliance with debt collection, consumer protection, financial, and other applicable statutory, regulatory, or local requirements. Before making a disclosure to these Federal, State, local, or Tribal governmental entities, the Department will require them to maintain safeguards consistent with the Privacy Act to protect the security and confidentiality of the disclosed records;

(f) To support the investigation of possible fraud and abuse and to detect and prevent fraud and abuse in title IV, HEA program funds, the Department may disclose records to IHEs, third-party servicers, Tribal, and Federal, State, or local agencies; and

(g) To determine an aid applicant's eligibility for the award of aid under title IV of the HEA, and to assist with the awarding and administration of aid, State postsecondary education assistance, and aid by eligible IHEs or other entities designated by the Secretary of Education and to administer those awards, the Department may disclose records to State agencies, eligible IHEs, third-party servicers, Tribal, Federal, State, or local agencies, and other entities that award aid to students that have been designated by the Secretary of Education.

(2) *Enforcement Disclosure.* If information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulation, or order of a competent authority, the Department may disclose the relevant records to the appropriate agency, whether Federal, State, Tribal, or local, charged with investigating or prosecuting that violation or charged with enforcing or implementing the statute, regulation, or order issued pursuant thereto.

(3) *Litigation and Alternative Dispute Resolution (ADR) Disclosure.*

(a) *Introduction.* In the event that one of the parties listed in sub-paragraphs (i) through (v) is involved in judicial or administrative litigation or ADR, or has an interest in judicial or administrative litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c), and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department or any of its components;

(ii) Any Department employee in their official capacity;

(iii) Any Department employee in their individual capacity where the U.S. Department of Justice (DOJ) agrees to or has been requested to provide or arrange for representation of the employee;

(iv) Any Department employee in their individual capacity where the Department has agreed to represent the employee; and

(v) The United States, where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosure.* If the Department determines that disclosure of certain records to an adjudicative body before which the Department is authorized to appear or to a person or entity designated by the Department or otherwise empowered to resolve or mediate disputes is relevant and necessary to judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the adjudicative body, person, or entity.

(d) *Disclosure to Parties, Counsel, Representatives, and Witnesses.* If the Department determines that disclosure of certain records is relevant and necessary to judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(4) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records to the DOJ or to the Office of Management and Budget (OMB) if the Department determines that disclosure would help in determining whether records are required to be disclosed under the FOIA or the Privacy Act.

(5) *Contract Disclosure.* If the Department contracts with an entity to perform any function that requires disclosing records to the contractor's employees, the Department may disclose the records to those employees. As part of such a contract, the Department shall require the contractor to agree to establish and maintain safeguards to protect the security and confidentiality of the disclosed records.

(6) *Congressional Member Disclosure.* The Department may disclose records to a Member of Congress in response to an inquiry from the Member made at the written request of and on behalf of the individual whose records are being disclosed. The Member's right to the information is no greater than the right of the individual who requested it.

(7) *Employment, Benefit, and Contracting Disclosure.*

(a) *For Decisions by the Department.* The Department may disclose a record to a Federal, State, Tribal, or local agency or to another public authority or professional organization, maintaining civil, criminal, or other relevant enforcement or other pertinent records, if necessary to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional Organizations.* The Department may disclose a record to a Federal, State, Tribal, local, or other public authority or professional organization, in connection with the hiring or retention of an employee or other personnel action, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit, to the extent that the record is relevant and necessary to the receiving entity's decision on the matter.

(8) *Employee Grievance, Complaint, or Conduct Disclosure.* If a record is relevant and necessary to an employee grievance, complaint, or disciplinary action involving a present or former employee of the Department, the Department may disclose a record from this system of records in the course of investigation, fact-finding, or adjudication to any party to the grievance, complaint, or action; to the party's counsel or representative; to a witness; or to a designated fact-finder, mediator, or other person designated to resolve issues or decide the matter.

(9) *Labor Organization Disclosure.* The Department may disclose records from this system of records to an arbitrator to resolve disputes under a negotiated grievance procedure or to officials of labor organizations recognized under 5 U.S.C. chapter 71 when relevant and necessary to their duties of exclusive representation.

(10) *Disclosure to the DOJ.* The Department may disclose records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(11) *Research Disclosure.* The Department may disclose records to a researcher if the Department determines that the individual or organization to which the disclosure would be made is authorized and qualified to carry out specific research related to functions or purposes of this system of records. The Department may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The researcher shall be required to agree to establish and maintain safeguards to protect the security and confidentiality of the disclosed records.

(12) *Disclosure to the OMB and Congressional Budget Office (CBO) for Federal Credit Reform Act (FCRA) Support.* The Department may disclose records to OMB and CBO as necessary to fulfill FCRA requirements in accordance with 2 U.S.C. 661b.

(13) *Disclosure in the Course of Responding to a Breach of Data.* The Department may disclose records to appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that there has been a breach of the system of records; (b) the Department has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(14) *Disclosure in Assisting another Agency in Responding to a Breach of Data.* The Department may disclose records from this system to another Federal agency or Federal entity, when the Department determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach or (b) 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.

(15) *Disclosure to the National Archives and Records Administration (NARA).* The Department may disclose records from this system of records to NARA for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12): The Department may disclose the following information to a consumer reporting agency regarding a valid, overdue claim of the Department: (1) the name, address, TIN, and other information necessary to establish the identity of the individual responsible for the claim; (2) the amount, status, and history of the claim; and (3) the program under which the claim arose. The Department may disclose the information specified in this paragraph under 5 U.S.C. 552a(b)(12) and the procedures contained in subsection 31 U.S.C. 3711(e). A consumer reporting agency to which these disclosures may be made is defined at 15 U.S.C. 1681a(f) and 31 U.S.C. 3701(a)(3).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic applicant records, which may include optically imaged documents, are stored on Direct Access Storage Device (DASD) disks in a virtual disk library, in the computer facilities controlled by the Federal Student Aid Data Center.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records in this system pertaining to a title IV, HEA loan aid applicant or aid recipient are indexed and retrieved by a single information element or a combination of the following information elements: SSN/TIN, name, date of birth, and/or the academic year in which the aid applicant applied for title IV, HEA program assistance.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records that constitute FTI that are maintained in this system are primarily retained and disposed of in accordance with the following records schedules:

(a) The Department will maintain FTI that the Department receives from the IRS pursuant to section 6103(l)(13)(A) of the IRC for the purpose of determining eligibility for, or repayment obligations under, IDR plans under title IV of the HEA with respect to loans under part D of title IV of the HEA, in accordance with ED Records Schedule 072, ''FSA Application, Origination, and Disbursement Records'' (DAA–0441–2013–0002)(ED 072); ED Records Schedule 075, ''FSA Loan Servicing, Consolidation, and Collections Records'' (DAA–N1–441–09–016) (ED 075); and ED Records Schedule 051, ''FSA National Student Loan Data System(NSLDS)'' (DAA–0441–2017–0004) (ED 051). The Department has proposed amendments to ED 072, ED 051, and ED 075 for NARA's consideration and will not destroy records covered by these records schedules until such amendments are in effect, as applicable;

(b) The Department will maintain FTI that the Department receives from the IRS pursuant to sections 6103(l)(13)(A) and/or (C) of the IRC that the Department uses for the purpose of reducing the net cost of improper payments under such IDR plans and relating to such awards, and pursuant to section 6103(l)(13)(C) of the IRC for the purpose of determining eligibility for, and amount of, Federal student financial aid under the programs authorized under subpart 1 of part A, part C, or part D of title IV of the HEA in accordance with ED Records Schedule 052, ''Ombudsman Case Files'' (N1–441–09–21) (ED 052). The Department has proposed amendments to ED 052 for NARA's consideration and will not destroy records covered by this records schedules until such amendments are in effect, as applicable;

(c) The Department will maintain FTI that the Department receives from the IRS pursuant to sections 6103(l)(13)(A) and/or (C) of the IRC that the Department uses for the purpose of oversight by the Department's OIG as authorized by chapter 4 of title 5 of the United States Code, except for the purpose of conducting criminal investigations or prosecutions, in accordance with OIG ''Office of Inspector General Simplified Records Schedule'' (DAA–0441–2021–0001); and

(d) The Department will maintain FTI that the Department receives from the IRS pursuant to IRC sections 6103(l)(13)(A) and/or (C) of the IRC that the Department uses for the purpose of conducting analyses and forecasts for estimating costs related to IDR plans and/or awards of Federal student financial aid under the Pell Grant, FWS or Direct Loan, programs authorized under subpart 1 of part A, part C, or part D of title IV of the HEA in accordance with ED Records Schedule 057, ''Office of the Secretary, Deputy Secretary and Under Secretary,'' (DAA–441–97–1) (ED 057), item 16a; and General Records Schedule 1.3, ''Budgeting Records,'' items 040 and 041. The Department proposed amendments to ED 057 for NARA's consideration and will not destroy records covered by this records schedule until such amendments are in effect, as applicable.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

All users of the system will have a unique user ID with a password. All physical access to the data housed at system locations is controlled and monitored by security personnel who check each individual entering the building for their employee or visitor badge. The computer system employed by the Department offers a high degree of resistance to tampering and circumvention with firewalls, encryption, and password protection. This security system limits data access to Department and contract staff on a ''need-to-know'' basis, and controls individual users' ability to access and alter records within the system. All interactions by users of the system are recorded.

In accordance with the Federal Information Security Management Act of 2002 (FISMA), as amended by the Federal Information Security Modernization Act of 2014, every Department system must receive a signed Authorization to Operate (ATO) from a designated Department official. The ATO process includes a rigorous assessment of security and privacy controls, a plan of actions and milestones to remediate any identified deficiencies, and a continuous monitoring program.

FISMA controls implemented are comprised of a combination of management, operational, and technical controls, and include the following control families: access control, awareness and training, audit and accountability, security assessment and authorization, configuration management, contingency planning, identification and authentication, incident response, maintenance, media protection, physical and environmental protection, planning, personnel security, privacy, risk assessment, system and services acquisition, system and communications protection, system and information integrity, and program management. The Department will maintain all FTI obtained from the matching program in accordance with section6103(p)(4) of the IRC and comply with the safeguards requirements set forth in IRS Publication 1075, Tax Information Security Guidelines for Federal, State, and Local Agencies, which is the IRS published guidance for security guidelines and other safeguards

for protecting FTI pursuant to section6103(p)(4) of the IRC and 26 CFR 301.6103(p)(4)–1.

RECORD ACCESS PROCEDURES:

If you wish to gain access to a record in this system, FAFSA applicants and contributors are encouraged to contact their IHE financial aid administrators to access their record most efficiently. IDR applicants, and those recertifying their IDR benefits, may access their non-FTI information by contacting their Federal student loan servicer. Either set of individuals may gain access to their complete records from this system, including FTI, by contacting the system manager at the address listed above. You must provide necessary particulars such as your name, SSN/TIN, date of birth, and any other identifying information requested by the Department while processing the request to distinguish between individuals with the same name. Alternatively, to gain access to a record in the system, you can make a Privacy Act request through the Department's FOIA Service Center at *https://www2.ed.gov/policy/gen/leg/foia/request_privacy.html* by completing the applicable request forms.

Requests by an individual for access to a record must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURES:

If you wish to contest or change the content of a record about you in the system of records, provide the System Manager with your name, date of birth, SSN/TIN, and any other identifying information requested by the Department, while processing the request, to distinguish between individuals with the same name. Identify the specific items to be changed and provide a justification for the change.

Requests to amend a record must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.7.

NOTIFICATION PROCEDURES:

If you wish to determine whether a record exists about you in the system of records, contact the system manager at the address listed above. You must provide necessary particulars such as your name, SSN/TIN, date of birth, and any other identifying information requested by the Department while processing the request to distinguish between individuals with the same name. Alternatively, you can make a Privacy Act request through the Department's FOIA Service Center at *https://www2.ed.gov/policy/gen/leg/foia/request_privacy.html* by completing the applicable request forms.

Requests for notification about whether the system of records contains information about an individual must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.5, including proof of identity.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2023–13980 Filed 6–28–23; 8:45 am]

BILLING CODE 4000–01–P

Reader Aids

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FEDERAL REGISTER PAGES AND DATE, JUNE

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

Rules and Regulations

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1650; Project Identifier AD–2023–00795–T; Amendment 39–22517; AD 2023–15–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 737 airplanes equipped with CFM International, S.A. (CFM) Model LEAP–1B series turbofan engines. This AD was prompted by a report indicating that use of engine anti-ice (EAI) in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. This AD requires revising the existing airplane flight manual (AFM) to limit the use of EAI in certain conditions and revising the operator's existing minimum equipment list to prohibit dispatch under a certain item. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 25, 2023.

The FAA must receive comments on this AD by September 25, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov.* 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* by searching for and locating Docket No. FAA–2023–1650; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include Docket No. FAA–2023–1650 and Project Identifier AD–2023–00795–T at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report in June 2023 indicating that flight testing and analysis revealed that the use of EAI in dry air for more than five minutes during certain combinations of altitude, total air temperature, and N1 settings can result in engine inlet cowl temperatures exceeding design limits when not in visible moisture. Excessive heat buildup can cause overheat of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. There have been no reports of in-service failures of the engine inlet inner barrel to date.

This condition as previously described, if not addressed, could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Inlet loss also causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires revising the existing AFM to limit the use of engine anti-ice in certain conditions. This AD also requires revising the operator's existing minimum equipment list (MEL) to prohibit dispatch under Master Minimum Equipment List (MMEL) Item 30–21–01B (EAI valve locked open). Further analysis of this item is necessary to determine whether continued use will cause failure of the engine inlet inner barrel.

Compliance With AFM Revision

Section 91.9 prohibits any person from operating a civil aircraft without complying with the operating limitations specified in the AFM. FAA regulations also require operators to furnish pilots with any changes to the AFM (14 CFR 121.137) and pilots in command to be familiar with the AFM (14 CFR 91.505).

MMEL Revision

This AD refers to Item 30–21–01B (Engine (Cowl) Anti-Ice Valves), Boeing 737 MAX (B–737–7/-8/-8200/-9) MMEL, Revision 5, dated June 3, 2022; this item is also included in an operator's FAA-approved minimum equipment list (MEL). This AD prohibits dispatch or release of the airplane under conditions currently allowed by that item in the MMEL. The FAA plans to revise the MMEL to remove that item in a future revision; operators would then be required to also remove that item from their existing FAA-approved MEL.

Interim Action

The FAA considers this AD to be an interim action. The manufacturer is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, the FAA might consider additional rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies forgoing notice and comment prior to adoption of this rule because operating EAI in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. If not addressed, this could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Further, inlet loss causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 402 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM/MEL revision	1 work-hour × $85 per hour = $85	$0	$85	$34,170

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–15–05 The Boeing Company: Amendment 39–22517; Docket No. FAA–2023–1650; Project Identifier AD–2023–00795–T.

(a) Effective Date

This airworthiness directive (AD) is effective August 25, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737 airplanes equipped with CFM International, S.A. (CFM) Model LEAP–1B series turbofan engines, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and Rain Protection; 71, Powerplant.

(e) Unsafe Condition

This AD was prompted by a report indicating that use of engine anti-ice (EAI) in dry air for more than five minutes during certain environmental and operational conditions can cause overheating of the engine inlet inner barrel beyond the material design limit, resulting in failure of the engine inlet inner barrel and severe engine inlet cowl damage. The FAA is issuing this AD to address use of EAI in certain environmental and operational conditions. The unsafe condition, if not addressed, could result in departure of the inlet and potential fan cowl failure and departure from the airplane. The departure of the inlet may cause fuselage and/or window damage, potentially resulting in decompression and hazard to window-seated passengers aft of the wing and/or impact damage to the wing, flight control surfaces, and/or empennage, which could result in loss of control of the airplane. Inlet loss also causes significantly increased aerodynamic drag and asymmetric lift due to wing blanking, which risks fuel exhaustion on certain flights, resulting in a forced off-airport landing and injury to passengers.

(f) Compliance

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

(g) Airplane Flight Manual (AFM) Revision

Within 15 days after the effective date of this AD: Revise the Limitations Section of the existing AFM to include the information specified in figure 1 to paragraph (g) of this AD. This may be done by inserting a copy of figure 1 to paragraph (g) of this AD into the existing AFM.

Figure 1 to paragraph (g) - *Engine anti-ice AFM revision*

(Required by AD 2023-15-05)

Engines – Anti-Ice System

Do not operate Engine Anti-Ice (EAI) in-flight when not in actual or anticipated icing conditions.

CAUTION: Operation of EAI when not in actual or anticipated icing conditions may result in severe engine inlet damage or failure.

(h) Minimum Equipment List (MEL) Revision

Within 15 days after the effective date of this AD or upon completion of the AFM revision required by paragraph (g) of this AD, whichever occurs first: Revise the operator's existing FAA-approved MEL to prohibit dispatch under the MEL item corresponding with Master Minimum Equipment List (MMEL) Item 30–21–01B (Engine (Cowl) Anti-Ice Valves).

(i) Alternative Methods of Compliance (AMOCs)

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

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

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

(j) Related Information

For more information about this AD, contact James Laubaugh, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3622; email: *james.laubaugh@faa.gov.*

(k) Material Incorporated by Reference

None.

Issued on July 31, 2023.

Victor Wicklund,

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

[FR Doc. 2023–17197 Filed 8–7–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1010; Airspace Docket No. 23–AGL–15]

RIN 2120–AA66

Amendment of Class E Airspace; Yankton, SD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Yankton, SD. This action is the result of an airspace review caused by the decommissioning of the Yankton very high frequency omnidirectional range (VOR) as part of the VOR Minimum Operating Network (MON) Program.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E surface airspace and the Class E airspace extending upward from 700 feet above the surface at Chan Gurney Municipal Airport, Yankton, SD, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–1010 in the **Federal Register** (88 FR 29568; May 8, 2023) proposing to amend the Class E airspace at Yankton, SD. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This amendment to 14 CFR part 71:

Modifies the Class E surface area to within a 5.1-mile (increased from a 4.1-mile) radius of Chan Gurney Municipal Airport, Yankton, SD; removes the Yankton VOR/DME and all associated extensions from the airspace legal description; and removes the city associated with the airport in the header of the airspace legal description to comply with changes to FAA Order JO 7400.2P, Procedures for Handling Airspace Matters;

And modifies the Class E airspace extending upward from 700 feet above the surface to within a 7.6-mile (decreased from a 7.8-mile) radius of Chan Gurney Municipal Airport; and removes the city associated with the airport in the header of the airspace legal description to comply with changes to FAA Order JO 7400.2P.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL SD E2 Yankton, SD [Amended]

Chan Gurney Municipal Airport, SD
(Lat 42°55′00″ N, long 97°23′09″ W)

Within a 5.1-mile radius of the Chan Gurney Municipal Airport.

* * * * *

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

* * * * *

AGL SD E5 Yankton, SD [Amended]

Chan Gurney Municipal Airport, SD
(Lat 42°55′00″ N, long 97°23′09″ W)

That airspace extending upward from 700 feet above the surface within a 7.6-mile radius of Chan Gurney Municipal Airport.

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16952 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1352; Airspace Docket No. 23–ASO–24]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Columbus, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: A final rule was published in the **Federal Register** on June 30, 2023, amending Class D airspace, Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface for Golden Triangle Regional Airport, Columbus, MS, by updating the airport's description header and geographic coordinates, as well as the geographic coordinates of Columbus AFB, Columbus-Lowndes County Airport, Oktibbeha Airport, and McCharen Field. This action corrects the Class E airspace extending upward from 700 feet above the surface description by correcting the geographic coordinates of Oktibbeha Airport.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

History

The FAA published a final rule in the **Federal Register** (88 FR 42227, June 30, 2023) for Doc. No. FAA–2023–1352, updating the geographic coordinates of Golden Triangle Regional Airport, Columbus AFB, Columbus-Lowndes County Airport, Oktibbeha Airport, and McCharen Field. After publication, the FAA found the geographic coordinates for Oktibbeha Airport were inadvertently transposed. This action corrects this error.

Correction to the Final Rule

Pursuant to the authority delegated to me, the amendment of Class E airspace extending upward from 700 feet above the surface for Columbus, MS, in Docket No. FAA–2023–1352, as published in the **Federal Register** on June 30, 2023 (88 FR 42227), is corrected as follows:

§ 71.1 [Corrected]

■ 1. On page 42228, in the second column, correct the geographic coordinates for Oktibbeha Airport to read:

(Lat 33°29′52″ N, long 88°40′53″ W)

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–16761 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1004; Airspace Docket No. 23–ASO–18]

RIN 2120–AA66

Amendment of Class E Airspace; Greenville, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E surface airspace and Class E airspace extending upward from 700 feet above the surface for the Greenville, NC area, as a new instrument approach procedure has been designed for ECU Health Medical Center Heliport. This action also makes an editorial change.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1004 in the **Federal Register** (88 FR 29557; May 8, 2023), proposing to amend Class E airspace for Greenville, NC. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES**

section of this document. These amendments will be published in the next FAA Order JO 7400.11 update.

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

The Rule

This action amends 14 CFR part 71 by:

We are amending the Class E surface airspace for Pitt-Greenville Airport, Greenville, NC, by increasing the radius to 4.6 miles (previously 4.4 miles) and replacing the outdated term Notice to Airmen with the term Notice to Air Missions.

Amending the Class E airspace extending upward from 700 feet above the surface by increasing the radius of the Pitt-Greenville Airport to 7.1 miles (previously 6.4 miles) and establishing an extension of 1.1 miles on each side of the Pitt-Greenville Airport's 008° bearing extending from the airport's 7.1-mile radius to 13.4 miles northeast of the airport. In addition, this action establishes Class E airspace extending upward from 700 feet above the surface within a 6.2-mile radius of ECU Health Medical Center.

Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as Paragraph 6002. Class E Surface Airspace.

Paragraph 6002 Class E Surface Airspace.

* * * * *

ASO NC E2 Greenville, NC [Amended]

Pitt-Greenville Airport, NC
(Lat 35°38′09″ N, long 77°23′03″ W)

That airspace extending upward from the surface within a 4.6-mile radius of Pitt-Greenville Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASO NC E5 Greenville, NC [Amended]

Pitt-Greenville Airport, NC
(Lat 35°38′09″ N, long 77°23′03″ W)
ECU Health Medical Center Heliport
(Lat 35°36′32″ N, long 77°24′19″ W)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Pitt-Greenville Airport and 1.1 miles on each side of the Pitt-Greenville Airport's 008° bearing extending from the airport's 7.1-mile radius to 13.4 miles northeast of the airport, and that airspace extending upward from 700 feet above the surface within a 6.2-mile radius of ECU Health Medical Center Heliport.

* * * * *

Issued in College Park, Georgia, on August 1, 2023.

Lisa E. Burrows,

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

[FR Doc. 2023–16678 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0919; Airspace Docket No. 23–AGL–11]

RIN 2120–AA66

Amendment of Class E Airspace; Rush City, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Rush City, MN. This action is the result of an airspace review caused by the decommissioning of the Rush City non-directional beacon (NDB). The geographic coordinates of the airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

FOR FURTHER INFORMATION CONTACT: Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5857.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace, extending upward from 700 feet above the surface, at Rush City Regional Airport, Rush City, MN, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–0919 in the **Federal Register** (88 FR 34459; May 30, 2023) amending the Class E airspace at Rush City Regional Airport, Rush City, MN. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraphs 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This amendment to 14 CFR part 71modifies the Class E airspace extending upward from 700 feet above the surface within a 6.4-mile (decreased from a 6.5-mile radius) of Rush City Regional Airport, Rush City, MN; removes the Rush City NDB from the airspace legal descriptions; and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL MN E5 Rush City, MN [Amended]

Rush City Regional Airport,WI
(Lat 45°41′50″ N, long 92°57′08″ W)

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

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16969 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1082; Airspace Docket No. 23–ASO–21]

RIN 2120–AA66

Amendment of Class E Airspace; Covington, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace extending upward from 700 feet above the surface for Covington Municipal Airport, Covington, TN, as a new instrument approach procedure has been designed for this airport.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in

Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it amends Class E airspace in Covington, TN, to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1082 in the **Federal Register** (88 FR 29579; May 08, 2023), proposing to amend Class E airspace for Covington Municipal Airport, Covington, TN. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next FAA Order JO 7400.11 update.

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

The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface for Covington Municipal Airport, Covington, TN, to accommodate area navigation (RNAV) global positioning system (GPS) standard instrument approach procedures (SIAPs) serving this airport. This amendment supports a new instrument approach at this airport. The existing radius would be increased to 10.2 miles (previously 7 miles). Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

ASO TN E5—Covington, TN [Amended]

Covington Municipal Airport, TN
(Lat 35°35′00″ N, long 89°35′14″ W)

That airspace extends upward from 700 feet above the surface within a 10.2-mile radius of Covington Municipal Airport.

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–16908 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1533; Airspace Docket No. 23–AWA–4]

RIN 2120–AA66

Amendment of Class C Airspace; Palm Beach International Airport, West Palm Beach, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, correction.

SUMMARY: This action corrects a final rule published by the FAA in the **Federal Register** on July 18, 2023, that amends the Palm Beach International Airport, FL Class C airspace description as published in FAA Order JO 7400.11G, dated August 19, 2022. In the rule, the text describing Area C of the Class C airspace area was inadvertently omitted from the Palm Beach, FL Class C airspace description. This action restores the text for Area C to the Class C description.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. You may also contact the Rules and Regulations Group, Office of

Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2023–1533 (88 FR 45812; July 18, 2023) that amended the text header in the Palm Beach International Airport, FL Class C airspace description as published in FAA Order JO 7400.11G. The change removed the words ''Palm Beach International Airport'' from the first line in the Class C description and replaced them with the words ''West Palm Beach''. This change aligned with the current formatting standard which requires that the city location of the airport be stated on the first line of the description and the airport name be stated on the second line. In the regulatory text of the rule, the text describing Area C of the Class C airspace area was inadvertently omitted. This action reinserts Area C in the Class C description.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, in Docket No. FAA–2023–1533, as published in the **Federal Register** of July 18, 2023 (88 FR 45812), FR Doc. 2023–15147, is corrected as follows:

Amend the West Palm Beach, FL Airspace Class C description by adding Area C to the description, to read as follows:

§ 71.1 [Corrected]

* * * * *

ASO FL C West Palm Beach, FL [Corrected]

Palm Beach International Airport, FL
(Lat. 26°40′59″ N, long. 80°05′44″ W)
Palm Beach County Park Airport
(Lat. 26°35′35″ N, long. 80°05′06″ W)

Boundaries.

Area A. That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the Palm Beach International Airport, excluding that airspace within a 2-mile radius of the Palm Beach County Park Airport.

Area B. That airspace extending upward from 1,600 feet MSL to and including 4,000 feet MSL within an area bounded on the north by a line direct from the intersection of the Florida Turnpike (highway 91) and Lantana Road to the intersection of a 5-mile radius of the Palm Beach International Airport and a 2-mile radius west of the Palm Beach County Park Airport and a 2-mile radius north of the Palm Beach County Park Airport, on the east by a line direct from the intersection of a 5-mile radius of the Palm Beach International Airport and a 2-mile radius east of the Palm Beach County Park Airport to the intersection of a 10-mile radius of the Palm Beach International Airport and U.S. 1, on the south by a 10-mile radius of the Palm Beach International Airport, and on the west by the Florida Turnpike.

Area C. That airspace extending upward from1,200 feet MSL to and including 4,000 feet MSL within a 10-mile radius of the Palm Beach International Airport, excluding area B.

* * * * *

Issued in Washington, DC, on August 1, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16689 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0265; Airspace Docket No. 19–AAL–55]

RIN 2120–AA66

Establishment of United States Area Navigation (RNAV) Route T–386 in the Vicinity of Fairbanks, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a final rule published by the FAA in the **Federal Register** on July 25, 2023, that establishes United States Area Navigation (RNAV) T-route T–386 in the vicinity of Fairbanks, AK, in support of a large and comprehensive T-route modernization project for the state of Alaska. The geographical coordinates listed in the route description are incorrect.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule for Docket No. FAA–2022–0265 in the **Federal Register** (88 FR 47757; July 25, 2023), that establishes RNAV T-route T–386 in the vicinity of Fairbanks, AK. The geographical coordinates listed in the route description are incorrect.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the geographical coordinates in Docket No. FAA–2022–0265, as published in the **Federal Register** of July 25, 2023 (88 FR 47757), FR Doc. 2023–15674, on page 47758, the geographical coordinates for RNAV T-route T–386 in the vicinity of Fairbanks, AK are corrected to read as follows:

* * * * *

T–386 Fairbanks, AK (FAI) to WEXIK, AK [New]

Fairbanks, AK (FAI)	VORTAC	(Lat. 64°48′00.25″ N, long. 148°00′43.11″ W)
DEYEP, AK	FIX	(Lat. 65°12′15.59″ N, long. 145°31′19.80″ W)
WUTGA, AK	WP	(Lat. 65°21′19.16″ N, long. 145°29′46.87″ W)
FIXEG, AK	WP	(Lat. 65°34′22.46″ N, long. 144°47′14.83″ W)
JEGPA, AK	WP	(Lat. 65°36′37.54″ N, long. 144°25′23.87″ W)
WEXIK, AK	WP	(Lat. 65°49′39.86″ N, long. 144°04′50.79″ W)

* * * * *

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

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16316 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–0215; Airspace Docket No. 19–AAL–61]

RIN 2120–AA66

Amendment of United States Area Navigation (RNAV) Route T–228 in the Vicinity of Cape Newenham, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a final rule published by the FAA in the **Federal Register** on July 24, 2023, that amends United States Area Navigation (RNAV) route T–228 in the vicinity of Cape Newenham, AK, in support of a large and comprehensive T-route modernization project for the state of Alaska. The geographical coordinates listed for ZIKNI, AK, Waypoint (WP) and RUFVY, AK, WP in the route description are incorrect.

DATES: Effective date 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

SUPPLEMENTARY INFORMATION:

History

The FAA published a final rule for Docket No. FAA–2022–0215 in the **Federal Register** (88 FR 47366; July 24, 2023), that amended RNAV route T–228 in the vicinity of Cape Newenham, AK. The geographical coordinates listed for the ZIKNI, AK, WP and RUFVY, AK, WP in the route descriptions are incorrect.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the longitude degrees for ZIKNI, AK, WP and RUFVY, AK, WP reflected in Docket No. FAA–2022–0215, as published in the **Federal Register** of July 24, 2023 (88 FR 47366), FR Doc. 2023–15584, on page 47367, the geographical coordinates for RNAV route T–228 in the vicinity of Cape Newenham, AK are corrected to read as follows:

* * * * *

T–228 ZIKNI, AK TO ROCES, AK [AMENDED]

ZIKNI, AK	WP	(Lat. 58°39′21.68″ N, long. 162°04′13.87″ W)
RUFVY, AK	WP	(Lat. 59°56′34.16″ N, long. 164°02′03.72″ W)
Hooper Bay, AK (HPB)	VOR/DME	(Lat. 61°30′51.65″ N, long. 166°08′04.13″ W)
Nome, AK (OME)	VOR/DME	(Lat. 64°29′06.39″ N, long. 165°15′11.43″ W)
HIPIV, AK	WP	(Lat. 66°15′29.11″ N, long. 166°03′23.59″ W)
ECIPI, AK	WP	(Lat. 67°55′48.11″ N, long. 165°29′58.07″ W)
Barrow, AK (BRW)	VOR/DME	(Lat. 71°16′24.33″ N, long. 156°47′17.22″ W)
Deadhorse, AK (SCC)	VOR/DME	(Lat. 70°11′57.11″ N, long. 148°24′58.17″ W)
ROCES, AK	WP	(Lat. 70°08′34.29″ N, long. 144°08′15.59″ W)

* * * * *

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

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16318 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0995; Airspace Docket No. 23–ASO–17]

RIN 2120–AA66

Amendment of Class E Airspace; Nashville, TN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: A final rule was published in the **Federal Register** on July 24, 2023, amending Class E airspace designated as an extension to a Class C surface area and Class E airspace extending upward from 700 feet above the surface in Nashville, TN. This action corrects the geographic coordinates of Nashville International Airport and Nashville VORTAC under the Class E airspace designated as an extension to a Class C surface area.

DATES: Effective 0901 UTC, October 5, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

History

The FAA published a final rule in the **Federal Register** (88 FR 47362, July 24, 2023) for Doc. No. FAA–2023–0995, amending Class E airspace designated as an extension to the Class C surface area of Nashville International Airport. After publication, the FAA found the geographic coordinates for Nashville International Airport and Nashville VORTAC were displayed incorrectly. This action corrects this error.

Correction to the Final Rule

Accordingly, pursuant to the authority delegated to me, the amendment of Class E airspace designated as an extension to the Class C surface area for Nashville International Airport, TN, in Docket No. FAA–2023–0995, as published in the **Federal Register** on July 24, 2023 (88 FR 47362), is corrected as follows:

§ 71.1 [Corrected]

■ 1. On page 47363, in the second column, under ASO TN E3 Nashville, TN [Amended], correct the geographic coordinates for Nashville International Airport to read:

* * * * *

(Lat 36°07′28″ N, long 86°40′41″ W)

* * * * *

■ 2. On page 47363, in the second column, under ASO TN E3 Nashville, TN [Amended], correct the geographic coordinates for Nashville VORTAC to read:

* * * * *

(Lat 36°08′13″ N, long 86°41′05″ W)

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–16762 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–0735; Airspace Docket No. 23–ASW–11]

RIN 2120–AA66

Amendment of Class E Airspace; Ruston, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Ruston, LA. This action is the result of an airspace review caused by the decommissioning of the Ruston non-directional beacon (NDB). The geographic coordinates of the airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

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

FOR FURTHER INFORMATION CONTACT: Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5857.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Ruston Regional Airport, Ruston, LA, to support instrument flight rule operations at this airport.

History

The FAA published an NPRM for Docket No. FAA–2023–0735 in the **Federal Register** (88 FR 36979; June 6, 2023) amending the Class E airspace at Ruston, LA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document amends the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. FAA Order Jo 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next update to FAA Order JO 7400.11.

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

The Rule

This amendment to 14 CFR part 71 modifies the Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile radius of Ruston Regional Airport, Ruston, LA, and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

ASW LA E5 Ruston, LA [Amended]

Ruston Regional Airport, LA
(Lat 32°30′48″ N, long 92°35′18″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Ruston Regional Airport.

* * * * *

Issued in Fort Worth, Texas, on August 3, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–16968 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Census Bureau

15 CFR Part 30

[Docket No. 230802–0181]

RIN 0607–AA61

Foreign Trade Regulations (FTR): State Department Directorate of Defense Trade Controls Filing Requirement and Clarifications to Current Requirements

AGENCY: Census Bureau, Commerce Department.

ACTION: Final rule.

SUMMARY: The Census Bureau issues this final rule amending its regulations to reflect new export reporting requirements related to the State Department, Directorate of Defense Trade Controls (DDTC) Category XXI Determination Number. Specifically, the Census Bureau is adding a conditional data element, DDTC Category XXI Determination Number, when ''21'' is selected in the DDTC USML Category Code field in the Automated Export System (AES) to represent United States Munitions List (USML) Category XXI. In addition, this rule makes remedial changes to the Foreign Trade Regulations (FTR) to update International Traffic in Arms Regulations (ITAR) references in existing data elements: DDTC Significant Military Equipment Indicator and DDTC Eligible Party Certification Indicator. This rule also makes other remedial changes to the FTR.

DATES: This final rule is effective November 8, 2023.

FOR FURTHER INFORMATION CONTACT: Omari S. Wooden, Assistant Division Chief, Data User and Respondent Outreach, Economic Management Division, Census Bureau by phone (301) 763–3829 or by email *omari.s.wooden@census.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is amending the Foreign Trade Regulations (FTR) to add a conditional data element, Directorate of Defense Trade Controls (DDTC) Category XXI Determination Number, when ''21'' (see Appendix L of the Automated Export System Trade Interface Requirements (AESTIR)) is selected in the DDTC United States Munitions List (USML) Category Code field in the Electronic Export Information (EEI). The FTR defines the DDTC USML Category Code as the USML category of the article being exported (22 CFR) part 121).

Public Law 106–113 amended 13 U.S.C. 301, to add subsection ''(h)'' directing the Secretary of Commerce to require, by regulation, the mandatory electronic filing of export information through the Automated Export System (AES) for items identified in the Commerce Control List (CCL) and the USML. Under the authorities in chapter 9 of title 13, U.S.C., the Secretary of Commerce will collect additional data on the export of items under DDTC USML Category Code ''21'' to identify and validate commodities for which DDTC USML Category Code ''21'' is cited.

The DDTC Category XXI Determination Number is a unique number issued by DDTC in conjunction with a notification that a specific commodity is described in USML Category XXI. Information on valid USML Category XXI determinations and the prospective AES error code may be found in the Frequently Asked Questions section of DDTC's website (*www.pmddtc.state.gov*).

The Census Bureau published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on May 3, 2023 (88 FR 27815) to add the conditional data element, DDTC Category XXI Determination Number, when ''21'' is selected in the DDTC USML Category Code field in the Automated Export System (AES) as well as to make the remedial changes originally proposed in the NPRM published December 15, 2021 in the **Federal Register** (86 FR 71187). Comments to these remedial changes were favorable.

Finally, the U.S. Department of Homeland Security and the U.S. Department of State concur with the revisions to the FTR as required by 13 U.S.C. 302 and Public Law 107–228, division B, title XIV, section 1404.

Response to Comments

The Census Bureau received three comments on the NPRMs published in the **Federal Register** on December 15, 2021 (86 FR 71187) and May 3, 2023 (88 FR 27815). A summary of the comments and the Census Bureau's response are provided below.

Comment. The commenter stated that it is unclear if the Census Bureau proposed to update the published penalty amount in § 30.71 as it still states $10,000 and has not been $10,000 for years. The commentor suggested to update the correct current amount, in conjunction with the footnote update proposed.

Response. The Census Bureau has reviewed this comment and disagrees that the amount shown in § 30.71 should reflect the current amount with the footnote to address the adjustment for inflation. The $10,000 referenced in § 30.71 is consistent with 13 U.S.C. 305. The current penalty amounts are published in 15 CFR 6.3(d).

Comment. The commenter recommends that the Census Bureau eliminate the Dun and Bradstreet Number (DUNS) for reporting the U.S. Principal Party in Interest Identification Number (USPPI ID) because reporting the DUNS requires the company to also report their Employer Identification Number (EIN) and adds to reporting burden and filing mistakes thus increasing risks of incurring a fine and/or penalty. The commenter also recommended that the Census Bureau review and publish the percentage of shipments where the DUNS is used as the filer ID. The commenter also stated that if the Census Bureau decides to keep the DUNS as a USPPI ID, then § 30.3(e)(1)(ii) needs to reflect that when the USPPI uses the DUNS as their filer ID, they must also provide the FPPI's authorized agent their EIN. As currently proposed in the NPRM, the USPPI either provides the EIN or DUNS.

Response. The Census Bureau has reviewed this comment and disagrees with removing the DUNS as an option for reporting the USPPI ID. USPPIs who have postdeparture filing privileges support the use of the DUNS as the USPPI ID because USPPIs prefer to have the less sensitive DUNS rather than the EIN shown on the front page of bills of

lading/air waybills and other commercial documents as part of the postdeparture filing citation. However, as a result of this comment, FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) will be changed from USPPI EIN to USPPI Identification Number to allow either the EIN or DUNS. In regard to the comment of the USPPI using the DUNS as the filer ID, the Census Bureau agrees and has changed § 30.3(e)(1)(ii) to reflect the requirement to provide the USPPI Identification Number as defined under § 30.6(a)(1)(iii).

Comment. The commenter expressed appreciation for the clarification of § 30.6(a)(1)(iii); specifically, clarifying that, when the DUNS is reported as the USPPI ID type, the EIN is also required. The commenter stated that the use of the DUNS and EIN as the USPPI ID has been a mystery to most EEI filers and many EEI transmission software systems are not programmed to accommodate this requirement. According to the commenter, the users of many transmission software systems select USPPI ID type as either DUNS or EIN and then enter a number. Selecting the DUNS option alone fails. As a result, users typically select the ''EIN'' option and then enter a DUNS number. Alternatively, filers will obtain an EIN and only report that number. Therefore, the commenter stated that the practice is that many, if not most, filers do not report both the DUNS and EIN. The commenter believes that it is unlikely, even with this clarification, that EEI filers will begin to transmit both DUNS and EIN or that software providers will change their systems. The commenter stated that it would be helpful if Census could provide further information on the reason and value of receiving the DUNS number.

Response. The Census Bureau historically has given USPPIs the option of providing the DUNS or EIN as the USPPI ID. The option of reporting the less sensitive DUNS instead of the EIN became more favorable to USPPIs who were approved for the postdeparture filing program because the postdeparture filing exemption contains the USPPI ID which is visible on the front of commercial documents. However, when the DUNS is reported as the USPPI ID in the AES, the Census Bureau also requires an EIN. The Census Bureau must have the EIN to link to the Business Register to collect information for the Profile of U.S. Exporting Companies statistical release.

Changes to the Proposed Rule Made by This Final Rule

As discussed above, after consideration of the comments received on the proposed rule, the Census Bureau includes in this final rule an additional change to § 30.3(e)(1)(ii) to reference the USPPI Identification Number instead of USPPI EIN or DUNS. This change will provide consistency with § 30.6(a)(1)(iii), which states that, if the USPPI Identification Number is reported as a DUNS, the submission of the EIN of the USPPI also is required. Additionally, FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) will be changed from USPPI EIN to USPPI Identification Number to allow further consistency with § 30.6(a)(1)(iii).

Program Requirements

Pursuant to the Foreign Relations Act, Public Law 107–228 and 13 U.S.C. 302, the Census Bureau is amending relevant sections of the FTR to revise or clarify export reporting requirements. Therefore, the Census Bureau is amending 15 CFR part 30 by making the following revisions:

- Revise § 30.2(d)(3) to remove the language, ''(See subpart B of this part for export control requirements for these types of transactions.),'' as the exclusion overrides the export control requirements.
- Revise § 30.3(e)(1)(ii) to remove USPPI EIN or DUNS and replace with USPPI Identification Number.
- Revise § 30.6(a)(1)(iii) to clarify that, when the Dun and Bradstreet Number (DUNS) is reported as the U.S. Principal Party in Interest (USPPI) Identification Number, the Employer Identification Number (EIN) of the USPPI also is required to be reported in the Automated Export System.
- Revise § 30.6(b)(3) to amend the Foreign Trade Zone (FTZ) identifier to allow for nine digits. The increased number of digits is required because of the increase in the number of subzones.
- Revise § 30.6(b)(16)(ii) to amend the DDTC Significant Military Equipment (SME) indicator by updating the ITAR references as a result of DDTC relocating certain ITAR provisions to improve the overall structure of the ITAR.
- Revise § 30.6(b)(16)(iii) to amend the DDTC eligible party certification indicator by updating the ITAR references as a result of DDTC relocating certain ITAR provisions to improve the overall structure of the ITAR.
- Revise § 30.6(b)(16)(ix) to add the conditional data element ''DDTC Category XXI Determination Number.'' The ''DDTC Category XXI Determination Number'' will be the unique number issued by DDTC to a member of the regulated community (usually the original equipment manufacturer) in conjunction with a notification that a specific commodity is described in USML Category XXI. This number is required only when citing Category XXI as an export classification and is used to confirm that an authoritative DDTC USML Category XXI determination is being referenced to do so.
- Revise § 30.37(u) to remove and reserve the exemption for technical data. This exemption is covered under § 30.2(d)(3), making the exemption redundant.
- Revise § 30.55 to remove the citation ''19 CFR 103.5'' and add in its place ''19 CFR part 103.''
- Revise § 30.71 to amend the Note to paragraph (b) to address the yearly adjustments for civil penalties as a result of inflation.
- Revise § 30.74 to amend paragraph (c)(5) to remove information that may become outdated and referencing the Census Bureau website to obtain the most current method for submitting a Voluntary Self-Disclosure.
- Revise FTR Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legends (II and III) to remove USPPI EIN and add in its place USPPI Identification Number.

Rulemaking Requirements

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. There were no comments on this certification in the proposed rule.

In the current Foreign Trade Regulations, the Electronic Export Information (EEI) shall be filed through the Automated Export System (AES) for all exports of physical goods. The AES is the electronic system for collecting Shipper's Export Declaration (SED) (or any successor document) information from persons exporting goods from the United States, Puerto Rico, Foreign Trade Zones located in the United States and Puerto Rico, the U.S. Virgin Islands, between the U.S. and Puerto Rico, and to the U.S. Virgin Islands from the United States or Puerto Rico. Under this final rule, export shipments with ''21'' in the DDTC USML Category Code field will be required to report the DDTC Category XXI Determination Number.

In calendar year 2022, authorized agents and U.S. Principal Parties in

Interest reported the DDTC USML Category Code of ''21'' on 0.6% of EEI records. A large majority of the EEI records involved export shipments of defense articles from branches of the Department of Defense. Based on these statistics, the Census Bureau believes this rule will not create any economic impact on companies including a substantial number of small entities. As a result, a final regulatory flexibility analysis is not required, and none has been prepared.

Executive Orders

This rule has been determined to not be significant for purposes of Executive Order 12866. This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

Paperwork Reduction Act

Notwithstanding any other provisions of law, no person is required to respond to, nor shall a person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a valid Office of Management and Budget (OMB) control number.

The information collection requirements included in this rule will be submitted to OMB for review under OMB Control Number 0607–0152. The information collection associated with that control number was approved after 60-day and 30-day public comment periods (87 FR 70777; 88 FR 7680). This rule changes existing requirements for the information collection but will not impact the current reporting-hour burden approved under that control number. Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Submit comments on these or any other aspects of the collection of information to *www.reginfo.gov/public/do/PRAMain.* Find this collection under OMB Control Number 0607–0152—AES Program.

Robert L. Santos, Director, Census Bureau, approved the publication of this notification in the **Federal Register**.

List of Subjects in 15 CFR Part 30

Economic statistics, Exports, Foreign trade, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Census Bureau is amending 15 CFR part 30 as follows:

PART 30—FOREIGN TRADE REGULATIONS

■ 1. The authority citation for 15 CFR part 30 continues to read as follows:

Authority: 5 U.S.C. 301; 13 U.S.C. 301–307; Reorganization plan No. 5 of 1990 (3 CFR 1949–1953 Comp., p. 1004); Department of Commerce Organization Order No. 35–2A, July 22, 1987, as amended, and No. 35–2B, December 20, 1996, as amended; Public Law 107–228, 116 Stat. 1350.

■ 2. Amend § 30.2 by revising paragraph (d)(3) to read as follows:

§ 30.2 General requirements for filing Electronic Export Information (EEI).

* * * * *

(d) * * *

(3) Electronic transmissions and intangible transfers.

* * * * *

■ 3. Amend § 30.3 by revising paragraphs (e)(1)(ii) to read as follows:

§ 30.3 Electronic Export Information filer requirements, parties to export transactions, and responsibilities of parties to export transactions.

* * * * *

(e) * * *

(1) * * *

(ii) USPPI Identification Number.

* * * * *

■ 4. Amend § 30.6 by revising paragraphs (a)(1)(iii), (b)(3), (b)(16)(ii) and (iii), and adding paragraph (b)(16)(ix) to read as follows:

§ 30.6 Electronic Export Information data elements.

* * * * *

(a) * * *

(1) * * *

(iii) *USPPI identification number.* Report the Employer Identification Number (EIN) of the USPPI. If the USPPI has only one EIN, report that EIN. If the USPPI has more than one EIN, report the EIN that the USPPI uses to report employee wages and withholdings, and not the EIN used to report only company earnings or receipts. Use of another company's EIN is prohibited. If a USPPI reports a DUNS, the EIN is also required to be reported. If a foreign entity is in the United States at the time goods are purchased or obtained for export, the foreign entity is the USPPI. In such situations, when the foreign entity does not have an EIN, the authorized agent shall report a border crossing number, passport number, or any number assigned by CBP on behalf of the foreign entity.

* * * * *

(b) * * *

(3) *FTZ identifier.* If goods are removed from a FTZ and not entered for consumption, report the FTZ identifier. This is the unique 9-digit alphanumeric identifier assigned by the Foreign Trade Zone Board that identifies the FTZ, subzone or site from which goods are withdrawn for export.

* * * * *

(16) * * *

(ii) *DDTC Significant Military Equipment (SME) indicator.* A term used to designate articles on the USML (22 CFR part 121) for which special export controls are warranted because of their capacity for substantial military utility or capability. See sections 120.36 and 120.10(c) of the ITAR (22 CFR parts 120 through 130) for a definition of SME and for items designated as SME articles, respectively.

(iii) *DDTC eligible party certification indicator.* Certification by the U.S. exporter that the exporter is an eligible party to participate in defense trade. See 22 CFR 120.16(c). This certification is required only when an exemption is claimed.

* * * * *

(ix) *DDTC Category XXI Determination Number.* The unique number issued by DDTC to a member of the regulated community (usually the original equipment manufacturer) in conjunction with a notification that a specific commodity is described in USML Category XXI. This number is required only when citing USML Category XXI as an export classification and is used to confirm that an authoritative USML Category XXI determination is being referenced to do so.

* * * * *

§ 30.37 [Amended]

■ 5. Amend § 30.37 by removing and reserving paragraph (u).

■ 6. Amend § 30.55 by revising the introductory text to read as follows:

§ 30.55 Confidential information, import entries, and withdrawals.

The contents of the statistical copies of import entries and withdrawals on file with the Census Bureau are treated as confidential and will not be released without authorization by CBP, in accordance with 19 CFR part 103 relating to the copies on file in CBP offices. The importer or import broker must provide the Census Bureau with

information or documentation necessary to verify the accuracy or resolve problems regarding the reported import transaction.

* * * * *

■ 7. Amend § 30.71 by revising the note to paragraph (b) to read as follows:

§ 30.71 False or fraudulent reporting on or misuse of the Automated Export System.

* * * * *

Note 1 to paragraph (b): The civil monetary penalties are adjusted for inflation annually based on The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74). In accordance with this Act, as amended, the penalties in title 13, chapter 9, sections 304 and 305(b), United States Code are adjusted and published each year in the **Federal Register** no later than January 15th.

■ 8. Amend § 30.74 by revising paragraph (c)(5) to read as follows:

§ 30.74 Voluntary self-disclosure.

* * * * *

(c) * * *

(5) *Where to make voluntary self-disclosures.* The information constituting a Voluntary Self-Disclosure or any other correspondence pertaining to a Voluntary Self-Disclosure may be submitted to the U.S. Census Bureau, Branch Chief, Trade Regulations Branch by methods permitted by the Census Bureau. See *www.census.gov/trade* for more details.

* * * * *

■ 9. Amend appendix B by revising the entries for ''II. Postdeparture Citation—USPPI'' and ''III. Postdeparture Citation–Agent'' to read as follows

Appendix B to Part 30—AES Filing Citation, Exemption and Exclusion Legend

* * * * *

II. Postdeparture Citation—USPPI, USPPI is filing the EEI	AESPOST USPPI Identification Number Date of Export (mm/dd/yyyy). Example: AESPOST 12345678912 01/01/2017.
III. Postdeparture Citation—Agent, Agent is filing the EEI	AESPOST USPPI Identification Number—Filer ID Date of Export (mm/dd/yyyy). Example: AESPOST 12345678912—987654321 01/01/2017.

* * * * *

Dated: August 3, 2023.

Shannon Wink,

Program Analyst, Policy Coordination Office, U.S. Census Bureau.

[FR Doc. 2023–16970 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0634]

Safety Zones; Annual Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulations.

SUMMARY: The Coast Guard will enforce a safety zone that encompasses certain navigable waters on Lake Erie, for D-Day Conneaut, in Conneaut, OH. This action is necessary and intended for the safety of life and property on navigable waters during this event. During the enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo or a designated representative.

DATES: The regulations in 33 CFR 165.939, entry (c)(2) of Table to § 165.939, will be enforced from 1:45 p.m. through 5:45 p.m. each day from August 17, 2023, through August 19, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice of enforcement, call or email Lieutenant Jared Stevens, Waterways Management Division, U.S. Coast Guard Marine Safety Unit Cleveland; telephone 216–937–0124, email *D09-SMB-MSUCLEVELAND-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zones; Annual Events in the Captain of the Port Buffalo Zone, as listed in 33 CFR 165.939, Table 165.939(c)(2) in Conneaut, OH on all U.S. waters of Conneaut Township Park, Lake Erie, within an area starting at 41°57.71′ N, 080°34.18′ W, to 41°58.36′ N, 080°34.17′ W, to 41°58.53′ N, 080°33.55′ W, to 41°58.03′ N, 080°33.72′ W (NAD 83), and returning to the point of origin.

Pursuant to 33 CFR 165.23, entry into, transiting, or anchoring within the safety zone during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or a designated representative. Those seeking permission to enter the safety zone may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter the safety zone shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice of enforcement is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice of enforcement in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that the safety zone need not be enforced for the full duration stated in this notice, they may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone. This notification is being issued by the Coast Guard Sector Buffalo Prevention Department Head at the direction of the Captain of the Port.

Dated: August 2, 2023.

Jeff B. Bybee,

Commander, U.S. Coast Guard, Sector Buffalo Prevention Department Head.

[FR Doc. 2023–17167 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0607]

RIN 1625–AA87

Safety Zone; HBPW James DeYoung Powerplant Explosive Demolition; Macatawa

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

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone for the James DeYoung Powerplant Explosive Demolition on August 10, 2023. This safety zone is located on all waters of

the Macatawa River within a circle with a 1000-foot radius from the demolition site located at the James DeYoung Powerplant in position 42°47.726′ N 086°6.81′ W. During the enforcement period, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

DATES: This rule is effective from 8:30 a.m. through 9:45 a.m. August 10, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0607 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Petty Officer Brianna Southard, USCG SECTOR Lake Michigan—Waterways Management Division, U. S. Coast Guard; telephone 414–747–7188, email *D09-SMB-SECLakeMichigan-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event sponsor changed the date of the demolition and did not provide the Captain of the Port enough notice to accommodate the comment period. It is impracticable to conduct a notice-and-comment rulemaking and have this temporary rule in place by August 10, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to ensure the safety vessels during the James DeYoung Powerplant Explosive Demolition on August 10, 2023.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Lake Michigan (COTP) has determined that potential hazards associated with the explosive demolition, will be a safety concern for anyone within a 1000-foot radius of the demolition site. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the demolition.

IV. Discussion of the Rule

This rule establishes a safety zone from 8:30 a.m. until 9:45 a.m. on August 10, 2023. The safety zone will cover all navigable waters within a 1000-foot radius of position 42°47.726′ N 086°6.81′ W in the vicinity of the James DeYoung Powerplant on the Macatawa River, Holland, MI. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the demolition. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location and duration of the safety zone. The safety zone will impact a small part of the waterway and is designed to minimize impact on navigable waters. This rule will prohibit entry into certain navigable waters of Macatawa River in Holland, MI, and is not anticipated to exceed 1 hour in duration. Moreover, under certain conditions vessels may still transit through the safety zone when permitted by the COTP Lake Michigan.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves safety zone with a 1000-foot radius on the Macatawa River around position 42°47.726′ N 086°6.81′ W on August 10, 2023, from 8:30 a.m. until 9:45 a.m. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0607 to read as follows:

§ 165.T09–0607 Safety Zone; Macatawa River, Holland, MI.

(a) *Location.* Holland, MI. In the vicinity of the James DeYoung Power Plant near the Macatawa River within 1000-feet of the demolition site in position 42°47.726′ N 086°6.8′ W.

(b) *Regulations.* The following regulations apply to this safety zone.

(1) The general regulations in § 165.23.

(2) All vessels must obtain permission from the Captain of the Port (COTP) Lake Michigan or his or her designated representative to enter, move within, or exit a safety zone established in this section when the safety zone is enforced. Vessels and persons granted permission to enter one of the safety zones listed in this section must obey all lawful orders or directions of the COTP Lake Michigan or his or her designated representative. Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel must proceed as directed.

(c) *Enforcement period.* The regulation in this section will be enforced from 8:30 a.m. through 9:45 a.m. on August 10, 2023. The Captain of the Port Sector Lake Michigan, or a designated representative may suspend enforcement of the safety zone at any time.

Dated: August 4, 2023.

Joseph B. Parker,

Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.

[FR Doc. 2023–17168 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 111

Intelligent Mail Package Barcode Compliance Quality

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) to add an additional Intelligent Mail® package barcode (IMpb®) validation under the ''Barcode Quality'' compliance category.

DATES: *Effective* October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Steven Jarboe at (202) 268–7690, Devin Qualls at (202) 268–3287, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: On June 28, 2023, the Postal Service published a notice of proposed rulemaking (88 FR 41871–41872) to add an additional IMpb validation. In response to the proposed rule, the Postal Service did not receive any formal comments.

The Postal Service is adding a third validation under the ''Barcode Quality'' compliance category that will require that an IMpb must include a valid, unique 3-digit STC that accurately represents the mail class, product, and service combination on the physical label affixed to the package. Additionally, the IMpb on the package must also correspond with electronic package level details and Extra Services Code(s) contained within the Shipping Services File (SSF). Any variance in the data presented in the electronic submission of a parcel or a variance with the physical aspect of the label affixed to a parcel presented for mailing will be subject to the IMpb noncompliance fee if a mailer falls below the 98 percent threshold.

We believe this revision will ensure IMpb quality enabling the Postal Service to provide customers with a more efficient mailing experience.

The Postal Service adopts the described changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.*

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

200 Commercial Letters, Flats, and Parcels

* * * * *

204 Barcode Standards

* * * * *

2.0 Standards for Package and Extra Service Barcodes

2.1 Intelligent Mail Package Barcode

* * * * *

2.1.8 Compliance Quality Thresholds

* * * * *

EXHIBIT 2.1.8—IMpb COMPLIANCE QUALITY THRESHOLDS

Compliance categories	Compliance codes	Validations				Compliance thresholds
*	*	*	*	*	*	*
Barcode Quality * * *.						
*	*	*	*	*	*	*

[Revise the text in the ''Barcode Quality'' compliance category under the ''Validation'' column by adding a third validation to read as follows:]

• The IMpb must include a valid, unique 3-digit Service Type Code that accurately represents the mail class, product, and service combination on the physical label affixed to the package and the electronic package level details and Extra Services Code(s) in the Shipping Services File.

* * * * *

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–16981 Filed 8–9–23; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2022–0731, FRL–10545–02–R10]

Air Plan Approval; WA; Smoke Management Plan Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving Washington State Implementation Plan (SIP) revisions submitted on August 10, 2022. The submitted revisions incorporate the most recent updates to Washington's Smoke Management Plan and reflect state legislative and regulatory changes. The EPA is approving the revisions based on our determination that the revisions are consistent with Clean Air Act requirements.

DATES: This final rule is effective September 11, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2022–0731. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Randall Ruddick, EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle, WA 98101, (206) 553–1999, *ruddick.randall@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'' or ''our'' is used, it means the EPA.

Table of Contents

I. Background

On March 23, 2023, the EPA proposed to approve Washington's August 10, 2022, SIP submission revising the Washington Smoke Management Plan (88 FR 17481). The reasons for our proposed approval are included in the proposal and will not be restated here. The public comment period closed on April 24, 2023. We received one anonymous comment in support of our proposed action; therefore, we are finalizing our action as proposed.

II. Final Action

The EPA is approving and incorporating by reference, where appropriate, Washington's 2022 submitted revisions into the Washington SIP 40 CFR part 52, subpart WW as discussed in our March 23, 2023, proposed approval (88 FR 17481). Once this approval becomes effective, the Washington SIP will include the following statutes and regulations:

• RCW 52.12.103, Burning Permits—Issuance—Contents (state effective March 27, 1984);

• RCW 52.12.104, Burning Permits—Duties of permittee (state effective March 27, 1984);

• RCW 76.04.005, Definitions. (1) ''Additional fire hazard'' (5) ''Department protected lands'' (9) ''Forest debris'' (11) ''Forestland'' (12) ''Forestland owner,'' ''owner of forestland,'' ''landowner,'' or ''owner'' (13) ''Forest material'' (15) ''Landowner operation'' (18) ''Participating landowner'' (20) ''Slash'' (21) ''Slash burning'' (23) ''Unimproved lands'' (state effective July 24, 2015);

• RCW 76.04.205, Burning Permits—Civil Penalty (state effective July 25, 2021);
• RCW 70A.15.1030, Definitions. (21) ''Silvicultural burning'' (state effective June 11, 2020);
• RCW 70A.15.5000, Definition of ''outdoor burning'' (state effective July 26, 2020);
• RCW 70A.15.5010, (2) Outdoor burning—Fires prohibited—Exceptions (state effective June 11, 2020);
• RCW 70A.15.5020, Outdoor burning—Areas where prohibited—Exceptions—Use for management of storm or flood-related debris—Silvicultural burning, except (3) (state effective June 11, 2020);
• RCW 70A.15.5120, Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction on silvicultural operations—Issuance—Fees (state effective June 11, 2020);
• RCW 70A.15.5130, Silvicultural forest burning—Reduce statewide emissions—Exemption—Monitoring program (state effective July 28, 2019);
• RCW 70A.15.5140, Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction on silvicultural operations—Conditions for issuance and use of permits—Air quality standards to be met—Alternate methods to lessen forest debris (state effective June 11, 2020);
• RCW 70A.15.5150, Cooperation between department of natural resources and state, local, or regional air pollution authorities—Withholding of permits (state effective June 11, 2020);
• RCW 70A.15.5190, Outdoor burning allowed for managing storm or flood related debris (state effective June 11, 2020);
• WAC 332–24–201, Burning Permit Program—Requirements and Exceptions (state effective June 30, 1992);
• WAC 332–24–205, General rules—minimum requirements for all burning, except (13) (state effective November 22, 2019);
• WAC 332–24–211, Specific rules for small fires not requiring a written burning permit (solely for the purpose of establishing the size threshold for burns covered by the Smoke Management Plan) (state effective June 30, 1992);
• WAC 332–24–217, Burning permit—penalty (state effective June 30, 1992);
• WAC 332–24–221, Specific rules for burning that requires a written burning permit (state effective February 1, 2012).

In addition, the EPA is proposing to approve, but not incorporate by reference, into the Washington SIP at 40 CFR part 52, subpart WW the Department of Natural Resources Smoke Management Plan, state effective May 10, 2022 (including all Appendices to such plan), as such plan applies to silvicultural burning regulated by DNR.

We note that, as provided in 40 CFR 52.2476 of the Washington SIP, any variance or exception to the 2022 SMP granted by DNR or Ecology must be submitted by Washington for approval to EPA in accordance with the requirements for revising SIPs in 40 CFR 51.104 and any such variance or exception does not modify the requirements of the federally approved Washington SIP until approved by EPA as a SIP revision.

III. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of regulatory provisions described in section II of this preamble and set forth in the amendments to 40 CFR part 52 in this document. The EPA has made, and will continue to make, these materials reasonably available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the Clean Air Act as of the effective date of the final rule of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

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

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
• 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
• 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.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. 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 air agency did not evaluate environmental justice considerations as part of its SIP submittal; the Clean Air Act 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

[1] 62 FR 27968 (May 22, 1997).

nature of this action, it 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 Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, the SIP is not approved to apply on any Indian reservation land in Washington except as specifically noted below and is also not approved to apply 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 as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law. Washington's SIP is approved to apply on non-trust land within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Consistent with EPA policy, the EPA provided a consultation opportunity to potentially affected tribes in a letter dated May 24, 2022.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 10, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: July 12, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart WW—Washington

■ 2. Amend § 52.2470 as follows:

■ a. In paragraph (c), table 1, by adding:

■ i. The heading ''Washington Administrative Code, Chapter 332–24—Forest Protection'' and the entries ''332–24–201'', ''332–24–205'', ''332–24–211'', ''332–24–217'', and ''332–24–221'' immediately after the entry ''173–492–100'';

■ ii. The heading ''Revised Code of Washington, Chapter 52.12—Fire Protection Districts, Powers—Burning Permits'' and the entries ''52.12.103'' and ''52.12.104'' immediately after newly added entry ''332–24–221'';

■ iii. The heading ''Revised Code of Washington, Chapter 70A.15—Washington Clean Air Act'' and the entries ''70A.15.1030(21)'', ''70A.15.5000'', ''70A.15.5010(2)'', ''70A.15.5020'', ''70A.15.5120'', ''70A.15.5130'', ''70A.15.5140'', ''70A.15.5150'', ''70A.15.5190'' immediately after newly added entry ''52.12.104''; and

■ iv. The heading ''Revised Code of Washington, Chapter 76.04—Washington Clean Air Act'' and the entries ''76.04.005'' and ''76.04.205'' immediately after newly added entry ''70A.15.5190''; and

■ b. In paragraph (e), table 2, by adding the heading ''Smoke Management Planning'' and the entry ''Department of Natural Resources 2022 Smoke Management Plan'' immediately after the entry for ''Regional Haze Progress Report''.

The additions read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

TABLE 1—REGULATIONS APPROVED STATEWIDE

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
*	*	*	*	*
Washington Administrative Code, Chapter 332–24—Forest Protection				
332–24–201	Burning Permit Program—Requirements and Exceptions.	6/30/92	8/10/2023, [INSERT **Federal Register** CITATION].	
332–24–205	General rules—Minimum Requirements for All Burning.	11/22/19	8/10/2023, [INSERT **Federal Register** CITATION].	Except section (13).
332–24–211	Specific rules for small fires not requiring a written burning permit.	7/31/92	8/10/2023, [INSERT **Federal Register** CITATION].	Included for the purpose of setting the size limit for burns covered by the Department of Natural Resources 2022 Smoke Management Plan in paragraph (e), Table 2.
332–24–217	Burning permit requirements—Penalty.	7/31/92	8/10/2023, [INSERT **Federal Register** CITATION].	

TABLE 1—REGULATIONS APPROVED STATEWIDE—Continued

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
332–24–221	Specific Rules for Burning That Requires a Written Burning Permit.	2/1/12	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 52.12—Fire Protection Districts, Powers—Burning Permits				
52.12.103	Burning permits—Issuance—Contents..	3/27/84	8/10/2023, [INSERT **Federal Register** CITATION].	
52.12.104	Burning permits—Duties of permittee	3/27/84	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 70A.15—Washington Clean Air Act				
70A.15.1030(21)	Definitions. ''Silvicultural burning''	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5000	Definition of ''outdoor burning''	7/26/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5010 (2)	Outdoor burning—Fires prohibited—Exceptions.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	Except (1).
70A.15.5020	Outdoor burning—Areas where prohibited—Exceptions—Use for management of storm or flood-related debris—Silvicultural burning.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	Except (3).
70A.15.5120	Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction or silvicultural operations—issuance—Fees.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5130	Silvicultural forest burning—Reduce statewide emissions Exemption—Monitoring program.	7/28/19	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5140	Burning permits for abating or prevention of forest fire hazards, management of ecosystems, instruction or silvicultural operations—Conditions for issuance and use of permits—Air quality standards to be met—Alternate methods to lessen forest debris.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5150	Cooperation between department of natural resources and state, local, or regional air pollution authorities—Withholding of permits.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
70A.15.5190	Outdoor burning allowed for managing storm or flood-related debris.	6/11/20	8/10/2023, [INSERT **Federal Register** CITATION].	
Revised Code of Washington, Chapter 76.04—Washington Clean Air Act				
76.04.005	Definitions	7/24/15	8/10/2023, [INSERT **Federal Register** CITATION].	Except (2), (3), (4), (6), (7), (8), (10), (14), (16), (17), (19), (22)
76.04.205	Burning Permits—Civil Penalty	7/25/21	8/10/2023, [INSERT **Federal Register** CITATION].	

* * * * * (e) * * *

TABLE 2—ATTAINMENT, MAINTENANCE, AND OTHER PLANS

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanations
* *	*	*	* *	*
Smoke Management Planning				
Department of Natural Resources 2022 Smoke Management Plan.	Statewide	8/10/22	8/10/2023, [INSERT **Federal Register** CITATION]..	
* *	*	*	* *	*

[FR Doc. 2023–16409 Filed 8–9–23; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2018–0158; FRL–11022–01–OCSPP]

(2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA); Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices. Exponent, on behalf of Verdesian Life Sciences U.S., LLC, submitted a petition, pursuant to the Federal Food, Drug, and Cosmetic Act (FFDCA), asking the EPA to amend its regulations to establish an exemption from the requirement of a tolerance for residues of the pesticide, when used as a plant growth regulator on agricultural crops, turf and ornamental plants. Instead, EPA is establishing an exemption from the requirement of a tolerance for residues L–PCA in or on all food commodities when applied in buffered end-use products and used in accordance with label directions and good agricultural practices. This regulation eliminates the need to establish a maximum permissible level for residues of L–PCA when used in accordance with this exemption.

DATES: This regulation is effective August 10, 2023. Objections and requests for hearings must be received on or before October 10, 2023 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–2018–0158, 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. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Madison Le, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@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, greenhouse owner, 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–2018–0158 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 October 10, 2023. 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–2018–0158, 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/dockets/where-send-comments-epa-dockets.*

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

II. Background and Statutory Findings

In the **Federal Register** of May 18, 2018 (83 FR 23247) (FRL–9976–87), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 8F8663) by Exponent, on behalf of Verdesian Life Sciences U.S., LLC, 1001 Winstead Dr., Suite 480, Cary, NC 27513. The petition requested that 40 CFR part 180 be amended to establish an exemption from the requirement of a tolerance for residues of L–PCA, when used as a plant growth regulator on agricultural crops, turf, and ornamental plants, in accordance with label directions and good agricultural practices. That document referenced a summary of the petition prepared by the petitioner, Verdesian Life Sciences U.S., LLC, which is available in docket EPA–HQ–OPP–2018–0158 at *https://www.regulations.gov.* No substantive comments were received in response to this Notice of Filing.

III. 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 exemption 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. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require 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. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that 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.''

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. If EPA is able to determine that a tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, 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 L–PCA including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with L–PCA follows.

A. Toxicological Profile

L–PCA is derived from L-glutamic acid via an intramolecular condensation reaction. L–PCA is naturally found in mammalian tissues. L–PCA has a non-toxic mode of action and can effectively enhance upregulation of the glutamine synthesis pathway. When applied to plants, it has demonstrated effects, such as increased growth, increased nodulation, and greater fresh weight. It also has seed priming properties. L–PCA has a long history of use in consumer products, including dietary supplements and cosmetic products.

L–PCA can be applied in various forms (free acids or salts), but it releases a common moiety that is the pesticidally-active component and serves as the basis for risk assessment and tolerance regulation. Since L–PCA is a strong acid, buffered solutions will contain some salt form, but not enough at any moment in time to be toxicologically relevant.

In the field, the above rationale continues to apply when active ingredient is in solution. If the products dry out on plants and then someone touches them, there would likely be some exposure from the salt form, however, it will not change the toxicology since it would not stay in the salt form once it was solubilized upon ingestion/contact with water.

With regard to the overall toxicological profile, L–PCA is of low toxicity. Acute toxicity data indicate that L–PCA is of low acute oral, dermal, and inhalation toxicity. However, with its low pH (2), it is likely corrosive. The available data suggest it is not a skin sensitizer.

Studies from the open scientific literature on the sodium salt analog, Na–PCA, were submitted to satisfy the 90-day oral for L–PCA. The Na–PCA toxicity database is considered appropriate for use in L–PCA risk assessment when EP formulations are buffered. There is an expectation that EP formulations for use as plant growth regulators will be buffered because unbuffered solutions will not be effective as a plant growth regulator, *i.e.,* unbuffered solutions would likely destroy the plant due to the acidity of L–PCA. This is because buffered L–PCA behaves similarly to Na–PCA. There is comparable acute toxicity between the proposed EP formulations and Na–PCA. Further, both L–PCA and Na–PCA are naturally occurring and are products of human metabolism. Using a weight of the evidence (WOE) approach, these studies allowed EPA to establish a no-observed-adverse-effect-level (NOAEL) of 849 mg/kg/day for subchronic oral toxicity for L–PCA in buffered end-use products.

For developmental toxicity, a non-guideline 1-generation reproduction toxicity screening study was submitted on Na–PCA in lieu of a developmental toxicity study. The study showed no treatment-related effects on offspring body weights, body weight gains or on post-implantation losses, mean litter size, numbers of live and dead pups born, sex ratio, or the birth or survival indices. No gross or microscopic pathology of the reproductive tract was seen, and reproductive performance was not affected by treatment. While this study is not a guideline developmental toxicity study, EPA has determined that the screening study is acceptable to satisfy the prenatal developmental toxicity data at this time for the specified products. This decision is based on the fact that no observable toxicity was produced at the limit dose

level in this study and an effect would not be expected from structurally related compounds.

EPA determined that 90-day inhalation toxicity and 90-day dermal studies were not required to assess the risks from L–PCA for the following reasons: (1) physical and chemical properties of the buffered formulations of L–PCA are similar to those of Na–PCA; (2) estimated margins of error (MOEs) are more than 10X the level of concern (LOC); and (3) no irritation was observed in studies conducted using the buffered end-use products.

The available data indicates that the active ingredient is non-mutagenic.

B. Toxicological Points of Departure/ Levels of Concern

Based on the toxicological profile, EPA did not identify any toxicological endpoints of concern for *L–PCA.*

C. Exposure Assessment

1. *Dietary exposure from food, feed uses, and drinking water.* No toxicological endpoint of concern was identified for L–PCA, and therefore, a quantitative assessment of dietary exposure is not necessary. As part of its qualitative risk assessment for L–PCA, the Agency considered the potential for dietary exposure to residues of the chemical. EPA concludes that dietary (food and drinking water) exposures are possible. However, due to the lack of a toxicological endpoint, dietary risk is not of concern.

2. *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). There are currently no proposed residential uses for this active ingredient, therefore a residential exposure assessment is not necessary.

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.'' EPA has not found that L–PCA shares a common mechanism of toxicity with any other substances, and it does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed L–PCA 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. Safety Factor for Infants and Children

FFDCA Section 408(b)(2)(C) provides that EPA shall retain 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. An FQPA safety factor is not required at this time for L–PCA because there are no threshold effects; no dietary endpoints have been selected based on the lack of human-relevant adverse effects at limit doses in the 90-day oral toxicity study and prenatal developmental toxicity study.

E. Aggregate Risk

Based on the available data and information, EPA has concluded that a qualitative aggregate risk assessment is appropriate to support the pesticidal use of L–PCA in buffered end-use products, and that risks of concern are not anticipated from aggregate exposure to the substance in this manner. This conclusion is based on the low toxicity of the active ingredient and its salts, which release a common moiety that is the basis for the risk assessment. Due to the lack of toxicity, EPA concludes that there is no aggregate risk from exposure to L–PCA.

A full explanation of the data upon which EPA relied and its risk assessment based on those data can be found within the September 20, 2022, document entitled ''Product Chemistry Review and Human Health Risk Assessment for FIFRA Section 3 Registrations of (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) Technical, containing 99.1% L–PCA, VLS 2002–03, Containing 25.0% L–PCA and VLS 2002–03–0.10, Containing 10.0% L–PCA.'' This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

IV. Determination of Safety for U.S. Population, Infants and Children

Based on the Agency's assessment, EPA concludes that there is reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of L–PCA.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, EPA is establishing an exemption for residues of L–PCA in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices.

VII. Statutory and Executive Order Reviews

This action establishes an exemption 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 tolerance exemption 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: August 4, 2023.

Edward Messina,

Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR part 180 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. Add § 180.1404 to subpart D to read as follows:

§ 180.1404 (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA); exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the pesticide, (2S)-5-Oxopyrrolidine-2-carboxylic Acid (L–PCA) in or on all food commodities when used as a plant growth regulator in accordance with label directions and good agricultural practices.

[FR Doc. 2023–17135 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 73

Select Agent Determination Concerning Coxiella burnetii Phase II, Nine Mile Strain, Plaque Purified Clone 4 With Reversion to Wildtype cbu0533

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Determination.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS), has determined that an excluded attenuated strain, *Coxiella burnetii* Phase II, Nine Mile Strain, plaque purified clone 4, has, in one instance, been shown to spontaneously mutate when passaged *in vivo.* The resulting mutant, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533,* has enhanced pathogenicity and virulence. Therefore, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* is not an excluded strain but is a select agent and subject to the HHS select agent and toxin regulations.

DATES: This determination is effective August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Samuel S. Edwin Ph.D., Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H21–4, Atlanta, Georgia 30329, Telephone: (404) 718–2000.

SUPPLEMENTARY INFORMATION: *Coxiella burnetti* is a select agent that is regulated pursuant to the HHS select agent and toxin regulations (42 CFR part 73). *C. burnetii* is a gram-negative intracellular bacterium that causes Q Fever. Q Fever is a zoonotic disease that causes flu-like symptoms in humans, including fever, chills, fatigue, and muscle pain. Humans become infected when they are in close contact with infected animal fluids and products.

The HHS select agent regulations (42 CFR part 73) established a process by which an attenuated strain of a select biological agent that does not have the potential to pose a severe threat to public health and safety may be excluded from the requirements of the regulations. On October 15, 2003, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 was excluded from HHS select agent regulations as it does not pose a significant threat to public health and safety (*https://selectagents.gov/sat/exclusions/hhs.htm*).

As set forth under 42 CFR 73.4(e)(2), if an excluded attenuated strain is subjected to any manipulation that restores or enhances its virulence, the resulting select agent will be subject to the requirements of the regulations. On March 20, 2023, an entity informed CDC of a reversion whereby *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 spontaneously mutated. The *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* displayed increased pathogenicity and virulence. The entity stated that after the excluded strain was injected into guinea pigs, a spontaneous reversion occurred that resulted in a mutant strain of the agent and the guinea pigs subsequently exhibited elevated fever and weight loss. The genetic mutation that led to the mutant strain was the reversion and restoration of a deletion in the *cbu0533 gene.* CDC subject matter experts have determined that this reversion in *cbu0533* restored virulence and pathogenicity. Therefore, *C. burnetii* Phase II, Nine Mile Strain, plaque purified clone 4 with reversion to wildtype *cbu0533* is determined to be a select agent and subject to 42 CFR part 73.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–16929 Filed 8–9–23; 8:45 am]

BILLING CODE 4163–18–P

Proposed Rules

Federal Register
Vol. 88, No. 153
Thursday, August 10, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1692; Airspace Docket No. 23–AEA–13]

RIN 2120–AA66

Establishment of Class E Airspace; Warrenton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes establishing Class E airspace extending upward from 700 feet above the surface in Warrenton, VA, as new instrument approach procedures have been designed for Fauquier Hospital Emergency Transport Heliport, Warrenton, VA.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1692 and Airspace Docket No. 23–AEA–13 using any of the following methods:

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

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

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

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

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. 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 for Federal holidays.

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

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the proposal's overall regulatory, aeronautical, economic, environmental, and energy-related aspects. 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 once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and 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 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 editing, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except for Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except on federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Class E airspace designations are published in Paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and

effective September 15, 2022. These updates will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA proposes an amendment to 14 CFR part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Fauquier Hospital Emergency Transport Heliport, Warrenton, VA, as new instrument approach procedures have been designed for the heliport.

Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations. This action is necessary to support IFR operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AEA VA E5 Warrenton, VA [Established]

Fauquier Hospital Emergency Transport Heliport, VA
(Lat. 38°42′47″ N, long. 77°48′35″ W)

That airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Fauquier Hospital Emergency Transport Heliport.

* * * * *

Issued in College Park, Georgia, on August 3, 2023.

Lisa E. Burrows,

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

[FR Doc. 2023–16959 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1674; Airspace Docket No. 23–ASO–33]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Eastman, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace and Class E airspace extending upward from 700 feet above the surface for Heart of Georgia Regional Airport, Eastman, GA. This action would increase the radius of the Class D airspace and the Class E airspace extending upward from 700 feet above the surface, as well as amend verbiage in the Class D description. This action would also update the airport's name and geographic coordinates for the Class E airspace extending upward from 700 feet above the surface.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1674 and Airspace Docket No. 23–ASO–33 using any of the following methods:

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

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

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

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

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. 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 for Federal holidays.

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class D and Class E airspace in Eastman, GA. An airspace evaluation determined that this update is necessary to support IFR operations in the area.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the proposal's overall regulatory, aeronautical, economic, environmental, and energy-related aspects. 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 once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and 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 without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

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

Availability of Rulemaking Documents

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

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

Incorporation by Reference

Class D and Class E airspace designations are published in Paragraphs 5000 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. These updates will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D airspace and Class E airspace extending upward from 700 feet above the surface for Heart of Georgia Regional Airport, Eastman, GA, by increasing the Class D radius to 4.6-miles (previously 4.4 miles) and the Class E airspace extending upward from 700 feet above the surface to 7.1-miles (previously 7.0 miles), and update the geographic coordinates to coincide with the FAA's database. This action would also replace Notice to Airmen with Notice to Air Missions and Airport/Facility Directory with Chart Supplement in the Class D description. Finally, this action would update the airport name to Heart of Georgia Regional Airport (formerly Eastman-Dodge County Airport) in the Class E airspace extending upward from 700 feet above the surface. Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat. 32°12′59″ N, long. 83°07′43″ W)

That airspace extends upward from the surface to and including 2,500 feet MSL within a 4.6-mile radius of the Heart of Georgia Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

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

* * * * *

ASO GA E5 Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat. 32°12′59″ N, long. 83°07′43″ W)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Heart of Georgia Regional Airport.

* * * * *

Issued in College Park, Georgia, on August 2, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–16763 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1147; Airspace Docket No. 22–AAL–55]

RIN 2120–AA66

Amendment of Alaskan Very High Frequency (VHF) Omnidirectional Range (VOR) Federal Airway V–333 in the Vicinity of Shishmaref, AK, and Revocation of Alaskan VOR Federal Airway V–401 in the Vicinity of Ambler, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Alaskan VOR Federal Airway V–333 and to revoke Alaskan VOR Federal Airway V–401. The FAA is taking this action due to the pending decommissioning of the Shishmaref, AK, and Ambler, AK, Nondirectional Radio Beacons (NDB). The identifier V–333 is also used as an identifier for Domestic VOR Federal Airway V–333 in the vicinity of Rome, GA. The identifier V–401 is also used as an identifier for Domestic VOR Federal Airway V–401 in the vicinity of Worland, WY. This proposed airspace action only pertains to the Alaskan V–333 and V–401. The V–333 near Rome, GA and V–401 near Worland, WY, would not be affected by this proposed airspace action.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1147 and Airspace Docket No. 22–AAL–55 using any of the following methods:

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

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it proposes to amend Alaskan VOR Federal Airway V–333 and revoke Alaskan VOR Federal Airway V–401.

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Western Service Center, Federal Aviation 2200 South 216th St., Des Moines, WA 98198.

Incorporation by Reference

Alaskan VOR Federal airways are published in paragraph 6010(b) of FAA Order JO 7400.11, Airspace Designations and Reporting Points,

which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

Background

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: ''To modernize Alaska's Air Traffic Service route structure using satellite-based navigation development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground-based airway navigation.''

As part of this initiative, the Shishmaref, AK, and Ambler, AK, NDBs are scheduled to be decommissioned. As a result, portions of Alaskan V–333 and V–401 in its entirety will become unusable. This airspace action proposes to amend the Alaskan V–333 by removing the portion of the airways that rely on the Shishmaref NDB and revoke Alaskan V–401 airway it its entirety. The mitigations to these amendments are already in place. United States Area Navigation (RNAV) route T–228 overlays Alaskan VOR Federal Airway V–333. Alaskan VOR Federal Airway V–401 extends between Ambler, AK, NDB, Kotzebue, AK, VOR distance measuring equipment (VOR/DME) and Shishmaref, AK, NDB. T–233 is near V–401 to the south between the Ambler, AK, NDB and the Kotzebue, AK, VOR/DME. RNAV route T–364 overlies the V–401 between Kotzebue, AK, VOR/DME and Shishmaref, AK, NDB.

The VOR Federal airway identifier V–333 is used in Alaska and in the Rome, GA, area. The VOR Federal airway identifier V–401 is used in Alaska and in the Worland, WY, area. This proposed airspace action only pertains to the Alaskan V–333 and V–401. It would not affect the V–333 near Rome, GA or the V–401 near Worland, WY.

The Proposal

The FAA proposes to amend 14 CFR part 71 by amending Alaskan VOR Federal airway V–333 and revoking Alaskan VOR Federal airway V–401 in its entirety. The Domestic VOR Federal airways V–333 and V–401 would remain unchanged. The proposed airspace actions are described below.

V–333: The Alaskan V–333 currently extends between the Hooper Bay, AK, VOR/DME, Nome, AK, VOR/DME, and the Shishmaref, AK, NDB. The FAA proposes to revoke the portion of the Alaskan V–333 that extends between the Nome, AK, VOR/DME and the Shishmaref, AK, NDB. As amended, Alaskan V–333 would extend between the Hooper Bay, AK, VOR/DME and the Nome, AK, VOR/DME. The Domestic route V–333 would remain unchanged.

V–401: The Alaskan V–401 extends between the Ambler, AK, NDB, Kotzebue, AK, VOR/DME, and the Shishmaref, AK, NDB. The FAA proposes to revoke the Alaskan V–401 in its entirety. The domestic V–401 would remain unchanged.

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6010(b) Alaskan VOR Federal Airways.

* * * * *

V–333 [Amended]

From Hooper Bay, AK; to Nome, AK.

* * * * *

V–401 [Remove]

* * * * *

Issued in Washington, DC, on August 3, 2023.

Karen L. Chiodini,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2023–16978 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1006; Airspace Docket No. 22–AWP–65]

RIN 2120–AA66

Modification of Class E Airspace; Minden-Tahoe Airport, Minden, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Class E airspace extending upward from 700 feet above the surface at Minden-Tahoe Airport, Minden, NV.

Additionally, this action proposes administrative amendments to update the airport's existing Class E airspace legal description. These actions would support the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1006 and Airspace Docket No. 22–AWP–65 using any of the following methods:

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

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

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

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

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

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

Availability of Rulemaking Documents

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

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

Incorporation by Reference

Class E5 airspace designations are published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to modify the Class E airspace extending upward from 700 feet above the surface at Minden-Tahoe Airport, Minden, NV.

The southern portion should have an extension .5 miles past the radius on a 180 bearing with a width of 1.2 miles on each side to better contain arriving IFR operations below 1,500 feet above the surface. Additionally, the northern portion of the existing Class E airspace should have an extension .2 miles past the 6.5-mile radius on a 359 bearing with a width of 1.8 nautical miles on each side to better contain departing IFR operations until they reach 1,200 feet above the surface.

Finally, the FAA proposes administrative modifications to the airport's associated legal descriptions. The geographic coordinates located on line three of the text header should be updated to match the FAA's database.

Regulatory Notices and Analyses

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

Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AWP NV E5 Minden, NV [Amended]

Minden-Tahoe Airport, NV
(Lat. 39°00′02″ N, long. 119°45′04″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Minden-Tahoe Airport and 1.8 miles on each side of a 359° bearing from the airport extending from the 6.5-mile radius to 6.57 miles north of the airport and 1.2 miles on each side of a 180 bearing from the airport extending from the 6.5-mile radius to 7 miles south of the airport.

* * * * *

Issued in Des Moines, Washington, on August 2, 2023.

B.G. Chew,

Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2023–17016 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1736; Airspace Docket No. 23–AEA–14]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Lynchburg, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace, Class E surface airspace, and Class E airspace designated as an extension to a Class D surface area for Lynchburg Regional Airport/Preston Glenn Field, Lynchburg, VA. This action would increase the radius for this airport, as well as amending verbiage in the descriptions.

DATES: Comments must be received on or before September 25, 2023.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–1736 and Airspace Docket No. [23–AEA–14) using any of the following methods:

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

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

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

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

Docket: Background documents or comments received may be read at *www.regulations.gov* anytime. 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 for Federal holidays.

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class D and Class E airspace in Lynchburg, VA. An airspace evaluation determined that this update is necessary to support IFR operations in the area.

Comments Invited

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

The FAA will file in the docket all comments it receives and 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 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 edits, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Availability of Rulemaking Documents

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

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

Incorporation by Reference

Class D and Class E airspace designations are published in Paragraphs 5000, 6002, and 6004 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. These updates would subsequently be published in the next update to FAA Order JO 7400.11. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D airspace and Class E surface airspace by:

- Updating the airport name to Lynchburg Regional Airport/Preston Glenn Field (previously Lynchburg Regional-Preston Glenn Field Airport).
- Increasing the radius to 4.6 miles (previously 4.5 miles).
- Removing the city name from the airport header.
- Removing the state name from the Falwell Airport header.
- Replacing the terms Notice to Airmen with Notice to Air Missions and Airport/Facility Directory with Chart Supplement.
- Removing the Lynchburg VORTAC from the description, as it is unnecessary in describing the airspace.

The FAA proposes an amendment to 14 CFR part 71 to amend Class E airspace designated as an extension to a Class D surface area by:

- Updating the airport name to Lynchburg Regional Airport/Preston Glenn Field
- Removing the Lynchburg VORTAC from the description is unnecessary in describing the airspace.

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AEA VA D Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)
Falwell Airport
(Lat. 37°22′41″ N, long. 79°07′20″ W)

That airspace extending upward from the surface to and including 3,400 feet MSL within a 4.6-mile radius of Lynchburg Regional Airport/Preston Glenn Field, excluding the portion within a .5-mile radius of Falwell Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be published continuously in the Chart Supplement.

* * * * *

Paragraph 6002 Class E Surface Airspace.

* * * * *

AEA VA E2 Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)
Falwell Airport
(Lat. 37°22′41″ N, long. 79°07′20″ W)

That airspace extending upward from the surface within a 4.6-mile radius of Lynchburg Regional Airport/Preston Glenn Field, excluding the portion within a .5-mile radius of Falwell Airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be published continuously in the Chart Supplement.

* * * * *

Paragraph 6004 Class E Airspace Designated as an Extension to Class D or Class E Surface Area.

* * * * *

AEA VA E4 Lynchburg, VA [Amended]

Lynchburg Regional Airport/Preston Glenn Field, VA
(Lat. 37°19′31″ N, long. 79°12′04″ W)

That airspace extending upward from the surface within 1.6-miles each side of the 028° bearing of Lynchburg Regional Airport/

Preston Glenn Field, extending from the 4.6-mile radius to 7.1 miles northeast of the airport, and within 1.2-miles each side of the 208° bearing of the airport, extending from the 4.6-mile radius to 6.5-miles southwest of the airport.

* * * * *

Issued in College Park, Georgia, on August 3, 2023.

Lisa E. Burrows,

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

[FR Doc. 2023–16947 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 803

RIN 3084–AB46

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

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

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is extending the deadline for filing comments on its notice of proposed rulemaking (''NPRM'') regarding the Premerger Notification; Reporting and Waiting Period Requirements.

DATES: For the NPRM published in the **Federal Register** on June 27, 2023 (88 FR 42178), the comment deadline is extended from August 28, 2023, to September 27, 2023.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300''' on your comment, and file your comment online at *https://www.regulations.gov,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Robert L. Jones, Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024.

SUPPLEMENTARY INFORMATION:

I. Comment Period Extension

On June 27, 2023, the Commission announced and made public its notice of proposed rulemaking regarding the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules (''HSR Form Change''), including its request for public comment on all aspects of the proposed rule. The NPRM was subsequently published in the **Federal Register**, with August 28, 2023, established as the deadline for the submission of comments. *See* 88 FR 42178 (June 29, 2023).

Interested parties have requested an extension of the public comment period to give them additional time to respond to the NPRM's request for comment. While the Commission believes that the current 60-day period—which is 62 days after public release of the notice of proposed rulemaking—is sufficient for meaningful comment and public participation, the Commission agrees to allow the public additional time to prepare and file comments. The Commission therefore extends the comment period to September 27, 2023, to provide commenters a total of 92 days from the public release of the NPRM on June 27, 2023. This is a 30-day extension of the 60-day comment period from publication in the **Federal Register** on June 29, 2023.

II. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before September 27, 2023. Write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of the agency's security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through *https://www.regulations.gov.* To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610, (Annex H), Washington, DC 20580. If possible, please submit your paper comment to the Commission by overnight service.

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

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

Visit the Commission's website, *www.ftc.gov,* to read this publication and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or

before September 27, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–17143 Filed 8–9–23; 8:45 am]

BILLING CODE 6750–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0604; FRL–10574–01–R9]

Air Plan Approval; CA; San Joaquin Valley Air Pollution Control District; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions to the San Joaquin Valley Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). The revisions were submitted by the California Air Resources Board (CARB), on behalf of SJVAPCD, in response to EPA's May 22, 2015, finding of substantial inadequacy and SIP call for certain provisions in the SIP related to exemptions and affirmative defenses applicable to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing approval of the SIP revisions because the Agency has determined that they are in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or the Act).

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0604 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: Christine Vineyard, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4125 or by email at *vineyard.christine@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'' or ''our'' is used, it refers to EPA.

Table of Contents

I. Background

On February 22, 2013, the EPA issued a Federal Register notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' (80 FR 33839, June 12, 2015), hereafter referred to as the ''2015 SSM SIP Action.'' The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[2] Importantly, the 2020 Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to SJVAPCD in 2015. The 2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (Feb. 22, 2013).

[2] October 9, 2020 memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[3] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income, and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.[4] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

With regard to the SJVAPCD SIP, in the 2015 SSM SIP Action, the EPA determined that the rules in the following table were substantially inadequate to meet CAA requirements (80 FR 33840, 33973):

District	Rule number	Adopted	Submitted	Rule title
San Joaquin Valley APCD (Fresno County APCD)	110	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Stanislaus County APCD)	110	2/17/2022	4/14/2022	Equipment Breakdown.
San Joquin Valley APCD (Kern County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Kings County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Tulare County APCD)	111	2/17/2022	4/14/2022	Equipment Breakdown.
San Joaquin Valley APCD (Madera County APCD)	113	2/17/2022	4/14/2022	Equipment Breakdown.

Each of these SIP provisions provide an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction). The rationale underlying EPA's determination that the provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to SJVAPCD to remedy the provisions, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

CARB, on behalf of SJVAPCD, submitted the SIP revisions on April 14, 2022, in response to the SIP call issued in the 2015 SSM SIP Action. In its submission, California is requesting that EPA revise the SJVAPCD SIP by removing the rules in the table above from the California SIP.

II. Analysis of SIP Submission

EPA is proposing to approve SJVAPCD's April 14, 2022 SIP submission. Affirmative defense provisions like these are inconsistent with CAA requirements and removal of these provisions would strengthen the SIP. This action, if finalized, would remove the affirmative defense provisions from the SJVAPCD portion of the EPA-approved SIP for California. EPA is proposing to find that these revisions are consistent with CAA requirements and that they adequately address the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the SJVAPCD portion of the California SIP.

III. Proposed Action

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). EPA is proposing to approve California's April 14, 2022 SIP submission requesting removal of (i) Fresno County ''Rule 110 Equipment Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown'' from the California SIP. We are proposing approval of the SIP revisions because we have determined that they are consistent with the requirements for SIP provisions under the CAA. EPA is further proposing to determine that such SIP revisions correct the deficiencies identified in the May 22, 2015 SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether these SIP revisions are consistent with CAA requirements and whether they address the ''substantial inadequacy'' of the specific SJVAPCD SIP provisions identified in the 2015 SSM SIP Action.

IV. Incorporation by Reference

In this document, EPA is proposing to amend regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, and as described in section I of the preamble, EPA is proposing to remove provisions from Fresno County, Kern County, Kings County, Madera County, Stanislaus County, and Tulare County portions of the California SIP. EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 9 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves removal of State law not meeting Federal requirements and does not impose additional requirements beyond those already 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 13563 (76 FR 3821, January 21, 2011).
- 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

[3] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[4] 80 FR 33985.

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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997).
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001).

Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where 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. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

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. EPA did not perform an EJ analysis and did not consider EJ in this action. 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, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: July 25, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–16975 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2023–0341, FRL–11175–01–R10]

Air Plan Approval; Washington; Southwest Clean Air Agency; Emission Standards and Controls for Sources Emitting Gasoline Vapors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve a revision to the Washington State Implementation Plan (SIP) for the Southwest Clean Air Agency (SWCAA) jurisdiction as it relates to the ozone National Ambient Air Quality Standard. This proposed revision updates SWCAA's requirements in the SIP for Stage I and Stage II vapor recovery systems at gasoline dispensing facilities including: decommissioning existing Stage II systems incompatible with onboard refueling vapor recovery systems on or before January 1, 2023; allowing removal from service of Stage II vapor recovery equipment compatible with onboard refueling vapor recovery on or after January 1, 2023; and removing the requirement for Stage II vapor recovery at new installations. The proposed revisions to the SIP also include, among other changes, revised requirements for installation of enhanced conventional nozzles, installation of low permeation hoses, and annual testing based on facility throughput. SWCAA's submittal, in coordination with the Washington Department of Ecology, incudes a demonstration that such removal of Stage II requirements is consistent with the Clean Air Act and EPA guidance.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2023–0341 at *https://www.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, 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.*

FOR FURTHER INFORMATION CONTACT: Jeff Hunt, EPA Region 10, 1200 Sixth Avenue—Suite 155, Seattle, WA 98101, at (206) 553–0256, or *hunt.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, it is intended to refer to the EPA.

I. Background

Ozone is a gas composed of three oxygen atoms. Ground-level ozone is generally not emitted directly from a vehicle's exhaust or an industrial smokestack but is created by a chemical reaction between nitrogen oxides (NO_X) and volatile organic compounds (VOC) in the presence of sunlight and high ambient temperatures. VOC and NO_X emissions often are referred to as ''precursors'' to ozone formation. Thus, ozone is known primarily as a summertime air pollutant. Motor vehicle exhaust and industrial emissions, gasoline vapors, chemical solvents and natural sources can emit or contain NO_X and/or VOC. Urban areas tend to have high concentrations of ground-level ozone, but areas without

significant industrial activity and with relatively low vehicular traffic are also subject to increased ozone levels because wind carries ozone and its precursors hundreds of miles from their sources. In 1979, under section 109 of the Clean Air Act (CAA or the Act), the EPA established the primary and secondary National Ambient Air Quality Standards (NAAQS) for ozone at 0.12 parts per million (ppm) averaged over a 1-hour period (44 FR 8202, February 8, 1979). In 1997, we revised the primary and secondary NAAQS for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period (62 FR 38856, July 18, 1997). In 2008, we further revised the primary and secondary ozone NAAQS to 0.075 ppm, averaged over an 8-hour period (73 FR 16436, March 27, 2008). In 2015, we again revised the primary and secondary ozone NAAQS to 0.070 ppm, averaged over an 8-hour period (73 FR 16436, March 27, 2008). For additional information on ozone, visit *https://www.epa.gov/ozone-pollution.*

Stage II vapor recovery is an air pollution control technology for automobiles and other on-road mobile sources. When an automobile or other vehicle is brought into a gas station to be refueled, the empty portion of the gas tank on the vehicle contains gasoline vapors, which are VOCs. When liquid gasoline is pumped into the partially empty gas tank in the vehicle the vapors are displaced out of the tank as the tank fills with liquid gasoline. Where air pollution control technology is not used, these vapors are emitted into the air. In the atmosphere, these VOCs can, in the presence of sunlight, react with NO_X and VOCs from other sources to form ozone. The Stage II system consists of special nozzles and coaxial hoses at each gas pump that capture vapor from the vehicle's fuel tank and route them to underground or above ground storage tanks during the refueling process. Stage II vapor recovery systems are specifically installed at gasoline dispensing facilities and capture the refueling fuel vapors at the gasoline pump nozzle. The system directs the displaced vapors back to the underground storage tank at the gasoline dispensing facility to prevent the vapors from escaping to the atmosphere.

Onboard refueling vapor recovery (ORVR) is another emission control system that can capture fuel vapors from vehicle gas tanks during refueling. ORVR systems are carbon canisters installed directly on automobiles to capture the fuel vapors displaced from the gasoline tank before they are released to the atmosphere. The fuel vapors captured in the carbon canisters are then combusted in the engine when the automobile is started and operated after refueling.

Stage II vapor recovery systems and vehicle ORVR systems were initially both required by the 1990 Amendments to the CAA, with Stage II requirements applying to certain nonattainment areas. Under CAA section 182(b)(3) ozone nonattainment areas classified as moderate and above were required to adopt Stage II requirements. CAA section 202(a)(6), requires an onboard system of capturing vehicle refueling emissions, commonly referred to as an ORVR system. In 1994, the EPA promulgated ORVR standards (59 FR 16262, April 6, 1994). Section 202(a)(6) of the CAA required that the EPA's ORVR standards apply to light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards were promulgated, and that ORVR systems provide a minimum evaporative emission capture efficiency of 95 percent.[1] ORVR equipment has been phased in for new light duty vehicles (passenger vehicles) beginning with model year 1998 and starting with model year 2001 for light-duty trucks and most heavy-duty gasoline powered vehicles. Since 2006, ORVR has been a required emissions control on nearly all new gasoline-powered highway vehicles having less than 14,000 pounds gross vehicle weight rating. CAA section 202(a)(6) provides discretionary authority to the Administrator, by rule, to revise or waive the application of the Stage II requirements for areas classified as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems are in widespread use throughout the motor vehicle fleet.

On May 16, 2012, the EPA issued a national rulemaking making the finding that ORVR systems are in ''widespread use'' and determined that emission reductions from ORVR alone are essentially equal to and will soon surpass the emission reductions achieved by Stage II alone (see 77 FR 28772 at 28772). In the May 16, 2012 action, we noted that each year, non-ORVR-equipped vehicles continue to be replaced with ORVR-equipped vehicles and Stage II and ORVR systems capture the same VOC emissions and thus, are redundant. *Id.* The EPA also determined that ORVR systems are in widespread use and waived the Stage II requirement for gasoline dispensing facilities if doing so did not interfere with attaining or maintaining the ozone standards. *Id.* at 28776–28779. The EPA also noted that any state currently implementing Stage II vapor recovery programs may submit SIP revisions that would allow for the phase-out of Stage II vapor recovery systems including a CAA section 110(l) analysis showing that its removal did not interfere with attaining or maintaining the ozone standards. *Id.*

The Portland/Vancouver area was designated an interstate ozone nonattainment area in 1978. On November 15, 1990, the CAA Amendments of 1990 were enacted. (Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q). Under section 181(a)(1) of the 1990 CAA, the area was further classified as a ''Marginal'' ozone nonattainment area. This interstate nonattainment area consisted of the southern portion of Clark County, Washington, and portions of Multnomah, Clackamas, and Washington Counties in Oregon. In 1997, the EPA redesignated the Portland/Vancouver area to attainment (62 FR 27204, May 19, 1997). The Portland/Vancouver area was designated as ''unclassifiable/attainment'' due to the data showing the area was below the new NAAQS for subsequent updates, including the 1997 8-hour ozone NAAQS (69 FR 23857, April 30, 2004), the 2008 8-hour ozone NAAQS (77 FR 30088, May 21, 2012), and the 2015 8-hour ozone NAAQS (82 FR 54232, November 16, 2017).

The Portland/Vancouver area was not subject to Stage II requirements under the 1990 Clean Air Act Amendments as it was classified as Marginal nonattainment for the 1-hour NAAQS for ozone, rather than Moderate or above. However, SWCAA in coordination with the Washington Department of Ecology submitted SWAPCA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' (state effective November 21, 1996, subsequently renamed to SWCAA 491) which contained Stage II requirements as a SIP-strengthening measure approved concurrently with redesignation of the Portland/Vancouver area to attainment (see proposed rulemaking, 62 FR 10501, March 7, 1997, at page 10507). On August 11, 2015 (80 FR 48033), the EPA approved SWCAA's maintenance plan update for the Vancouver portion of the Portland/Vancouver area that specifically anticipated and modeled widespread use of ORVR and the full decommissioning of Stage II in the modeling demonstration of continued attainment through 2015. The SWCAA maintenance plan update and the

[1] Unlike Stage II, which is a requirement only in certain ozone nonattainment areas, ORVR requirements apply to vehicles everywhere.

modeling demonstration are included in the docket for this action.

II. SWCAA's SIP Revision

On June 22, 2023, SWCAA, in coordination with the Washington Department of Ecology as the Governor's designee for revisions to the SIP, submitted the current version of SWCAA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' (state effective February 7, 2020) for EPA approval. Since the EPA's last approval of SWCAA 491, SWCAA revised the regulations four times. Effective June 24, 2000, SWCAA updated the regulations to revise applicability of the Stage II vapor recovery program, which is now replaced by the applicability provisions of the current SWCAA 491. Other changes to SWCAA 491, effective June 24, 2000, are generally SIP-strengthening in nature including the addition of gasoline marine vessel loading and unloading vapor control requirements, which are now contained in the current version of SWCAA 491. The exact revisions in 2000 are in redline/strikeout format included in the docket for this action under WSR 00–11–149. Effective March 18, 2001 (WSR 01–05–067), SWCAA made minor changes to SWCAA 491 to reflect the name change from ''Southwest Pollution Control Authority'' to ''Southwest Clean Air Agency.'' Effective June 18, 2017 (WSR 17–11–080), SWCAA consolidated all agency fees into a single location and updated the cross reference in SWCAA 491–030 accordingly. We note that the 2000, 2001, and 2017 revisions to SWCAA 491 were not previously submitted as updates to the SIP. However, to the extent these revisions are retained in the current version of SWCAA 491 submitted for approval, we are proposing to determine that these relatively minor changes since our last update to the SIP in 1997 are approvable.

The most substantive changes to SWCAA 491 since the EPA's last approval are detailed in WSR 20–03–031, state effective February 7, 2020. Among other changes, this revision to SWCAA 491 included the following: added a requirement to install enhanced conventional (ECO) nozzles; added a requirement that low permeation hoses be installed on higher volume gasoline dispensing facilities without balance type Stage II vapor recovery equipment by no later than January 1, 2023; added a requirement for annual testing of Stage I vapor recovery systems; [2] added a requirement that new or upgraded gasoline storage tanks be equipped with Stage I enhanced vapor recovery equipment; removed a requirement that gasoline dispensing facilities install Stage II vapor recovery equipment; allowed removal from service of Stage II vapor recovery equipment compatible with ORVR on or after January 1, 2023; allowed removal from service of Stage II vapor recovery equipment incompatible with ORVR on or after January 3, 2020; required removal from service of Stage II vapor recovery equipment incompatible with ORVR no later than January 1, 2023; and revised the applicability threshold for low flow nozzles to align SWCAA rules with Federal rules. In the SIP submittal, SWCAA provided a demonstration that VOC emission reductions from enhanced conventional nozzles and low permeation hoses will outweigh the annual emissions impact of removing Stage II requirements. Therefore, SWCAA requested removal of Stage II vapor recovery system requirements in the SIP for SWCAA's jurisdiction.

III. The EPA's Evaluation of the Revision

The EPA's primary consideration for determining the approvability of SWCAA's revisions to remove Stage II vapor control requirements and provide for decommissioning of Stage II equipment within SWCAA's jurisdiction is whether these revisions comply with section 110(l) of the Act. Section 110(l) requires that a revision to the SIP not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the Act. The EPA can approve a SIP revision that removes or modifies control measures in the SIP once the state or local agency makes a ''noninterference'' demonstration that such removal or modification will not interfere with attainment of the NAAQS, RFP, or any other CAA requirement.

The EPA reviewed SWCAA's submittal with the revised SWCAA 491 regulatory text as well as the accompanying analysis of emissions impacts. We propose to determine that SWCAA's June 22, 2023, SIP revision addresses the EPA's Widespread Use for Onboard Refueling Vapor Recovery and Stage II Waiver (77 FR 28772) and is consistent with the EPA's ''Guidance on Removing Stage II Gasoline Vapor Control Programs from State Implementation Plans and Assessing Comparable Measures'' (EPA–457/B–12–001, August 7, 2012).[3] In accordance with the EPA 2012 Guidance on Removing Stage II, SWCAA submitted a demonstration that the Stage II decommissioning will not interfere with attainment or maintenance of the ozone NAAQS. This demonstration was based on an analysis of precursor VOC emissions from removal of Stage II controls at GDFs, as well as emission reduction benefits from other changes to the regulations such as requirements for enhanced conventional nozzles and low permeation hoses. SWCAA estimated emissions impacts using the guidance methodologies from the EPA 2012 Guidance showing an overall benefit to air quality and a reduction of VOC emissions upon full implementation of the rule requirements in 2023. SWCAA estimated the impact on emissions from decommissioning Stage II in its jurisdiction by using EPA approved equations from the same 2012 guidance, to assess compliance with CAA 110(l). A detailed spreadsheet with the equation calculations and supporting inputs is included in the docket for this action.

The demonstration indicates that the emissions benefit of retaining Stage II requirements is rapidly diminishing with vehicle fleet turnover and ORVR penetration. As discussed in the EPA 2012 Guidance, the EPA has developed equations to assist states in evaluating the emissions consequences of phasing out existing Stage II programs. These equations may be used to calculate an ''increment,'' which identifies the area-wide emission control gained from Stage II installations as ORVR technology phases in. For example, using the equations in the EPA 2012 Guidance, SWCAA calculated the increment declining from 4.0% in 2020 to 1.1% in 2023 for Clark County, the most populous county in SWCAA's jurisdiction. Projecting these increments to full implementation of the rule in 2023, the removal of Stage II vapor recovery systems would result in minimal increases in VOC emissions of 18.31 tons per year (tpy) for SWCAA's entire jurisdiction. Additionally, SWCAA calculated the emission reduction benefits of enhanced conventional nozzles and low permeation hoses. These emission reduction benefits are estimated to be 33.84 tpy, outweighing the emissions increase from decommissioning Stage II

[2] Stage I vapor recovery is a system in which gasoline vapors are forced from the storage tank into a vapor-tight gasoline tank truck or vapor collection and control system through direct displacement by the gasoline loaded into the storage tank.

[3] The guidance document is available at: *https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20120807_page_stage2_removal_guidance.pdf.*

requirements. Overall, the 2020 regulatory changes are projected to result in a net reduction of 15.99 tpy VOC with full implementation of the rule. In addition, the EPA expects that market saturation of ORVR-equipped vehicles will remain static or increase in the years after 2023, meaning the air quality benefits of these changes will continue into the future.

Lastly, the removal of Stage II is consistent with the current maintenance plan update for the Vancouver portion of the Portland/Vancouver ozone area (80 FR 48033, August 11, 2015). As previously discussed, this maintenance plan update was approved by the EPA in 2015. The associated modeling, included in the docket for this action, anticipated the decommissioning of Stage II in the projection of continued ozone attainment for the 1997 8-hour ozone NAAQS.[4] For the 2008 and 2015 ozone NAAQS, all counties within SWCAA's jurisdiction are designated attainment/unclassifiable. We believe that removal of Stage II vapor recovery systems would have a negligible impact on ozone levels which are offset by the emission reduction benefits of other requirements in the revised SWCAA 491. Thus, we proposed to determine that approval of the SIP revision would not interfere with any applicable requirement concerning attainment and maintenance of any ozone standard and is compliant with CAA section 110(l).

IV. Proposed Action

We are proposing to find that SWCAA's demonstration for removal of Stage II equipment meets section 110(l) of the Act. Therefore, we are proposing to approve and incorporate by reference SWCAA 491 ''Emission Standards and Controls for Sources Emitting Gasoline Vapors'' state effective February 7, 2020. This version of the regulation removes from the Washington SIP the requirement for Stage II vapor recovery systems in SWCAA's jurisdiction and adds additional VOC controls such as the installation of enhanced conventional nozzles and low permeation hoses, as well as other historic changes since the EPA's last approval as discussed in section II of this preamble.

V. Incorporation by Reference

In this document, the EPA is proposing to include in a final rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference SWCAA 491 discussed in section IV of this preamble. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

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

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

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

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

The Southwest Clean Air Agency 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. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

[4] Consistent with EPA guidance, SWCAA evaluated compliance with the 1997 8-hour ozone NAAQS because the former 1-hour ozone NAAQS was replaced by the 1997 8-hour standard. See 62 FR 38856 (July 18, 1997) and 75 FR 24542 (May 5, 2010).

Dated: August 1, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

[FR Doc. 2023–16791 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2023–0023; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BH13

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Sacramento Mountains Checkerspot Butterfly

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*), a butterfly from New Mexico, under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,636.9 acres (662.4 hectares) in Otero County, New Mexico, fall within the boundaries of the proposed critical habitat designation. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

DATES: We will accept comments received or postmarked on or before October 10, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see ADDRESSES, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 25, 2023.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2023–0023, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2023–0023, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: For this proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available, along with other supporting materials, at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023 and on the Service's website at *https://www.fws.gov/about/region/southwest.*

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; telephone 505–346–2525. 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:

Executive Summary

Why we need to publish a rule. Under the Act, when we determine that any species is an endangered or threatened species, we are required to designate critical habitat, to the maximum extent prudent and determinable. Designations of critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to designate critical habitat for the Sacramento Mountains checkerspot butterfly, which is listed as an endangered species under the Act.

The basis for our action. Under section 4(a)(3) of the Act, if we determine that a species is an endangered or threatened species we must, to the maximum extent prudent and determinable, designate critical habitat. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Specific information on:

(a) The amount and distribution of Sacramento Mountains checkerspot butterfly habitat;

(b) Any additional areas occurring within the range of the species in Otero County, New Mexico, that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) To evaluate the potential to include areas not occupied at the time of listing, we particularly seek comments regarding whether occupied areas are adequate for the conservation of the species. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the

conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

(7) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(9) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and the description of the environmental impacts in the draft environmental assessment is complete and accurate and any additional information regarding probable economic impacts that we should consider.

(10) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those on Tribal lands. We are considering the land owned by the Mescalero Apache Tribe in Unit 3 (Spud Patch Canyon) for exclusion. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final designation may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On January 25, 2022, we published a proposed rule in the **Federal Register** (87 FR 3739) to list the Sacramento Mountains checkerspot butterfly as an endangered species (16 U.S.C. 1531 *et seq.*). At the time of our proposal, we determined that designation of critical habitat was prudent but not determinable because we lacked specific information on the impacts of our designation. In our proposed listing rule, we stated we were in the process of obtaining information on the impacts of the designation. We published the final listing rule on January 31, 2023. Please refer to the proposed and final listing rules (87 FR 3739, January 25, 2022; 88 FR 6177; January 31, 2023) for a detailed description of previous Federal actions concerning this butterfly.

Peer Review

An assessment team prepared a current condition assessment report for the Sacramento Mountains checkerspot butterfly. The assessment team was composed of Service biologists, in consultation with other species experts. The current condition assessment report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past and present factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the Sacramento Mountains checkerspot butterfly current condition assessment report. We sent the report to five independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2021–0069, which is the docket for the listing rules for the Sacramento Mountains checkerspot butterfly, or Docket No. FWS–R2–ES–2023–0023, which is the docket number for this rulemaking. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the current condition assessment report, which is the foundation for this proposed rule.

Background

The Sacramento Mountains checkerspot butterfly (butterfly) is a subspecies of the Anicia checkerspot, or variable checkerspot, in the Nymphalidae (brush-footed butterfly) family that is native to the Sacramento Mountains in south-central New Mexico. The Sacramento Mountains checkerspot butterfly inhabits high-altitude meadows in the upper-montane and subalpine zone at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains, which is an isolated mountain range in south-central New Mexico (Service 2005 et al., p. 9). The species requires host plants for

larvae, nectar sources for adults, and climatic moisture.

Since 1998, populations have been known from 10 meadow units on U.S. Forest Service (Forest Service) land (Forest Service 1999, p. 2). The meadows cover the occupied areas within the species' range and give the most accurate representation of species and habitat conditions available. These meadow units include Bailey Canyon, Pines Meadow Campground, Horse Pasture Meadow, Silver Springs Canyon, Cox Canyon, Sleepygrass Canyon, Spud Patch Canyon, Deerhead Canyon, Pumphouse Canyon, and Yardplot Meadow. The species has been extirpated from several of these meadows recently. The Yardplot Meadow was sold and developed, while suitable habitat in Horse Pasture Meadow was eliminated by logging (Forest Service 2017, p. 3) but has since become somewhat revegetated. No adults or caterpillars have been detected within Pumphouse Canyon since 2003, and the species has likely been extirpated at that site (Forest Service 2017, p. 3). In 2020, all 10 meadows were surveyed for butterflies and larvae; a total of 8 butterflies were detected in only Bailey Canyon and Pines Meadow Campground combined (Forest Service 2020a, p. 3), and no larval tents were found at any site (Forest Service 2020a, pp. 1–3; Hughes 2020, pers. comm.).

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the current condition assessment report (Service 2022, entire) and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented

under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features.

A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of Sacramento Mountains checkerspot butterfly from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the current condition assessment report (Service 2022, entire; available on *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023).

The main larval host plant for the Sacramento Mountains checkerspot butterfly is the New Mexico beardtongue (*Penstemon neomexicanus*) (Ferris and Holland 1980, p. 7), also known as New Mexico penstemon. The larvae rely nearly entirely upon the New Mexico beardtongue during pre- and post-diapause. Because of the Sacramento Mountains checkerspot butterfly's dependency on New Mexico beardtongue, it is vulnerable to any type of habitat degradation that reduces the host plant's health and abundance (Service et al. 2005, p. 9). New Mexico beardtongue is a member of the Plantaginaceae, or figwort, family (Oxelman et al. 2005, p. 425). These perennial plants prefer wooded slopes or open glades in ponderosa pine and spruce/fir forests at elevations between 1,830 and 2,750 m (6,000 and 9,000 ft) (New Mexico Rare Plant Technical Council 1999, entire). New Mexico beardtongue is native to the Sacramento Mountains within Lincoln and Otero Counties (Sivinski and Knight 1996, p. 289). The plant is perennial, has purple or violet-blue flowers, and grows to be half a meter tall (1.9 ft). New Mexico beardtongue occurs in areas with loose soils or where there has been recent soil disturbance, such as eroded banks and pocket gopher burrows (Pittenger and Yori 2003, p. ii).

The preferred adult nectar source is orange sneezeweed (*Hymenoxys hoopesii*), a native perennial forb (Service et al. 2005, p. 9). To contribute to the species' viability, orange sneezeweed must bloom at a time that corresponds with the emergence of adult Sacramento Mountains checkerspot butterflies. Although orange sneezeweed flowers are most frequently used, the butterfly has been observed collecting nectar on various other native nectar sources (Service et al. 2005, pp. 9–10). If orange sneezeweed is not blooming during the adult flight period (*i.e.,* experiencing phenological mismatch), the butterfly's survival and fecundity could decrease.

Before human intervention, the habitat of the Sacramento Mountains checkerspot butterfly was dynamic, with meadows forming and reconnecting due to natural wildfire regimes (Service et al. 2005, p. 21). These patterns would have facilitated natural dispersal and recolonization of meadow habitats following disturbance events, especially when there was high butterfly population density in adjacent meadows (Service et al. 2005, p. 21). Currently, spruce-fir forests punctuate suitable butterfly habitat (*i.e.,* mountain meadows), creating intrinsic barriers to butterfly dispersal and effectively isolating populations from one another (Pittenger and Yori 2003, p. 1). Preliminary genetic research suggested there is extremely low gene flow across the species' range or between meadows surveyed (Ryan 2021, pers. comm.). If new sites are to become colonized or recolonized by the butterfly, meadow areas will need to be connected enough to allow dispersal from occupied areas. Therefore, habitat connectivity is needed for genetically healthy populations across the species' range (Service 2022, p. 11).

We have determined that the following physical or biological features are essential to the conservation of the Sacramento Mountains checkerspot butterfly:

(1) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft))

within the Sacramento Mountains of southern New Mexico.

(2) The larval food plant (host plant), primarily New Mexico beardtongue (*Penstemon neomexicanus*), or other potential host plants such as other *Penstemon* species and tobacco root (*Valeriana edulis*), is present as:

(a) Patches of plants clustered together;

(b) Large, robust individual plants; and/or

(c) Stands of plants adjacent to other tobacco root plants.

(3) Access to nectar sources, primarily orange sneezeweed (*Hymenoxys hoopesii*), native Asteraceae species, and other native flowering plants.

(4) Habitat connectivity consisting of up to 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(5) Less than 5 percent canopy cover.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

A detailed discussion of activities influencing the Sacramento Mountains checkerspot butterfly and its habitat can be found in the proposed listing rule (87 FR 3739; January 25, 2022). It is possible all areas of critical habitat may require some level of management to address the current and future threats to the physical or biological features. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change (*i.e.,* drought, altered precipitation regime), and altered fire regime. Management activities that could ameliorate these threats include, but are not limited to, erecting exclosures or other methods to remove browse pressure from large ungulates; growing and transplanting nectar sources, including orange sneezeweed, New Mexico beardtongue, and other native nectar sources; managing invasive plant species; reducing recreational use; and instituting fire management aimed at reducing tree stocking within forested areas surrounding meadows. These management activities may protect the physical or biological features for the species by improving and protecting suitable habitat and connectivity throughout the range of the butterfly.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are proposing to designate critical habitat in areas within the geographical area occupied by the species at the time of listing. We also are proposing to designate specific areas outside the geographical area occupied by the species because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species. Occupied areas are inadequate for the conservation of this species because the species needs to have sufficient quality and quantity of habitat for adequately resilient populations, numerous populations to create redundancy to survive catastrophic events, and enough genetic diversity to allow for adaptations to changing environmental conditions (representation) to achieve viability. Currently, the Sacramento Mountains checkerspot butterfly is extant in two locations, representing only two metapopulation units, which is insufficient to support a robust, functioning metapopulation structure and, therefore, the viability of the species. We are reasonably certain that the unoccupied areas will contribute to the conservation of the species and contain one or more of the physical or biological features and are, therefore, considered habitat for the species. Additionally, the unoccupied units qualify as ''habitat'' for the species because they contain the resources necessary (*i.e.,* open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains checkerspot butterfly.

To identify critical habitat units for the Sacramento Mountains checkerspot butterfly, we used a variety of sources for species data. We used literature published on the species (Ferris and Holland 1980, entire; Forest Service 1999, entire; Pittenger and Yori 2003, entire) and the conservation plan developed by the Service (2005, entire) to determine habitat needs and locations of the butterfly. We also relied on annual Forest Service survey reports and data collected between 1999 and 2020 (Forest Service 1999, entire; Forest Service 2017, entire; Forest Service 2020a, entire) and associated mapping data (Forest Service 2020b, unpaginated) provided by the Forest Service for areas currently occupied by the Sacramento Mountains checkerspot butterfly and areas surveyed regularly. We supplemented this information with expert knowledge gathered during the development of the current condition assessment report (Service 2022, entire).

We determined that an area (in this case a meadow) was occupied at the time of listing for Sacramento Mountains checkerspot butterfly if:

(1) The meadow is located within the historical range of the species;

(2) The meadow contains at least physical or biological features (1) through (3), and (5), as described above under *Summary of Essential Physical or Biological Features;*

(3) Adults have been observed during surveys from 3 or more of the most recent consecutive years (2021 and earlier); and

(4) There is evidence of reproduction during one of the three most recent consecutive surveys (2021 and earlier).

Therefore, if meadows do not meet these criteria, we determined that those areas were unoccupied at the time of listing. The sources of data for our occupied proposed critical habitat units for the Sacramento Mountains checkerspot butterfly were the original digitized polygons provided by the Forest Service.

For areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the original digitized polygons provided by the Forest Service and the 2020 National Agricultural Imagery Program (NAIP) 0.6-meter imagery. We resampled the NAIP imagery to 1 meter using ESRI ArcGIS Pro and classified that data into two classes: open space or tree cover. We were then able to identify areas that had greater than 95 percent open canopy, as required by the species. Using the Focal Statistics results (95–100 percent) as a guide, we digitized new polygons at the 1:5000 scale and updated the original Forest Service polygons to include and connect areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly.

In summary, for areas outside the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

(1) Areas within the historical range of the species (*i.e.,* areas where the butterfly was detected by Forest Service surveys, but not necessarily in the past 3 consecutive years).

(2) Areas with 95 percent or greater open canopy.

(3) Areas not currently occupied but presumed to be suitable habitat because they contain at least some of the essential physical or biological features.

(4) Habitat that provides connectivity due to its proximity between currently occupied and/or unoccupied areas.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Sacramento Mountains checkerspot butterfly. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species.

Units are proposed for designation based on one or more of the physical or biological features being present to support the Sacramento Mountains checkerspot butterfly's life-history processes. Some units contain all of the identified physical or biological features and support multiple life-history processes. Some units contain only some of the physical or biological features necessary to support the Sacramento Mountains checkerspot butterfly's particular use of that habitat.

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023 and on our internet site *https://www.fws.gov/about/region/southwest.*

Proposed Critical Habitat Designation

We are proposing nine units as critical habitat for the Sacramento Mountains checkerspot butterfly. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly. The nine areas we propose as critical habitat are: (1) Bailey Canyon; (2) Pines Meadow Campground; (3) Spud Patch Canyon; (4) Silver Springs Canyon; (5) Horse Pasture Meadow; (6) Sleepygrass Canyon; (7) Pumphouse Canyon; (8) Deerhead Canyon; and (9) Cox Canyon. Table 1 shows the proposed critical habitat units, the approximate area, land ownership, and occupancy of each unit.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR SACRAMENTO MOUNTAINS CHECKERSPOT BUTTERFLY

[Area estimates reflect all land within critical habitat unit boundaries, including areas being considered for exclusion]

Unit name	Occupied	Land ownership * acres (hectares)			Total
		Federal	Tribal	Private	
1. Bailey Canyon	Yes	200.5 (81.1)			200.5 (81.1)
2. Pines Meadow Campground	Yes	62.2 (25.2)		0.2 (0.08)	62.4 (25.2)
3. Spud Patch Canyon	No	203.9 (82.5)	22.4 (9.1)	50.9 (20.6)	277.2 (112.2)
4. Silver Springs Canyon	No	132.9 (53.8)		70.5 (28.5)	203.4 (82.3)
5. Horse Pasture Meadow	No	82.4 (33.4)			82.4 (33.4)
6. Sleepygrass Canyon	No	123.5 (50.0)		100.0 (40.5)	223.5 (90.5)
7. Pumphouse Canyon	No	134.4 (54.4)		2.2 (0.9)	136.6 (55.3)
8. Deerhead Canyon	No	22.1 (8.9)		11.0 (4.5)	33.1 (13.4)
9. Cox Canyon	No	132.1 (53.5)		285.7 (115.6)	417.8 (169.0)
Total		1,093.9 (442.7)	22.4 (9.1)	520.5 (210.6)	1,636.9 (662.4)

* **Note:** Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Sacramento Mountains checkerspot butterfly, below. All areas in the unoccupied units (Units 3 through 9) meet the definition of critical habitat because they are outside the geographical area occupied by the species at the time of listing, were historically occupied by the Sacramento Mountains checkerspot butterfly, and are essential for the conservation of the species (see each unit description below for details). Units 3 through 9 qualify as habitat for the species because they contain the resources necessary (*i.e.,* open meadow, grassland habitat with nectar sources) to support the life processes of the Sacramento Mountains checkerspot butterfly. The Forest Service is assessing the unoccupied meadows to prioritize them for habitat restoration efforts that would benefit the Sacramento Mountains checkerspot butterfly. Once restored, these areas will be used to establish future occupancy via translocations and reintroductions. Establishing new populations in suitable habitat through captive rearing

and reintroduction or translocation is part of our recovery planning efforts for the Sacramento Mountains checkerspot butterfly. Individuals from extant meadows (Bailey Canyon and Pines Meadow Campground) may be translocated to currently unoccupied meadows once they contain suitable habitat. Additionally, captive rearing efforts are ongoing from which we plan to reintroduction individuals to restored meadows. We are reasonably certain that these areas will contribute to the conservation of the Sacramento Mountains checkerspot butterfly because these areas were historically occupied by the species and, since the species is currently restricted to two canyon systems, it is necessary to expand the existing population into other areas to reach recovery. Furthermore, we are working closely with the Forest Service, where a majority of the proposed critical habitat falls on Forest Service-managed lands, to ensure conservation measures and habitat restoration are conducted and ongoing in all areas possible to support the species for translocations and reintroductions. Additionally, the threats specified in each unit (see descriptions below), can be managed in ways to ensure survival and future reproduction of reintroduced populations. Site-specific reasons that we are reasonably certain that each area will contribute to the conservation of the species are explained below.

Unit 1: Bailey Canyon

Unit 1 consists of approximately 200.5 ac (81.1 ha) and is in the Sacramento Ranger District in the northwestern portion of the butterfly's range. The unit is occupied and is located entirely on the Lincoln National Forest. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.*

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing this unit by surveying for the butterfly during the active period, erecting exclosures to allow habitat to recover, and planting New Mexico beardtongue and other native nectar sources. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from large ungulates.

Unit 2: Pines Meadow Campground

Unit 2 consists of approximately 62.4 ac (25.2 ha) and is located in the northwestern portion of the butterfly's range. The unit is primarily in the Sacramento Ranger District. The unit is occupied and contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features.*

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is actively managing some areas of this unit by surveying for the butterfly during the species' active period and erecting exclosures to allow habitat to recover. This unit may require special management considerations to control invasive plant species, reduce recreational use, and reduce or remove browse pressure from f large ungulates.

Unit 3: Spud Patch Canyon

Unit 3 consists of a total of approximately 277.2 ac (112.2 ha) and is located in the northeastern portion of the butterfly's historical range. The unit is primarily within the Sacramento Ranger District. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is unoccupied and is essential for the conservation of the species because it contains most of the physical or biological features essential to the species and was historically occupied by the species. This unit would provide a suitable reintroduction site for the species and once established, would increase the species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat. The Forest Service is currently conducting riparian restoration in this area, which will help expand and revitalize habitat for the Sacramento Mountains checkerspot butterfly through the reestablishment of native plant species. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is surveying for adult butterflies annually in some of the areas on the Lincoln National Forest in this unit. Within this unit, a total of 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe is being considered for exclusion.

Unit 4: Silver Springs Canyon

Unit 4 consists of approximately 203.4 ac (82.3 ha) in the north-central portion of the butterfly's historical range and lies to the northeast of the village of Cloudcroft. The unit is partly within the Sacramento Ranger District and is unoccupied. This unit contains physical or biological features (1), (3), and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate population from the other meadows proposed for designation as critical habitat if a population is reestablished in this areas in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit is primarily on federally owned lands and abuts areas that are currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is also surveying the areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 5: Horse Pasture Meadow

Unit 5 consists of approximately 82.4 ac (33.4 ha) and is located in the central portion of the butterfly's historical range. It lies to the east of the village of Cloudcroft. This unit is unoccupied, contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features,* and is entirely on the Lincoln National Forest in the Sacramento Ranger District. This unit is essential for the conservation of the species because it contains all of the physical or biological features essential to the conservation of the species and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a

population be reestablished in this area in the future, contributing to metapopulation dynamics while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit abuts an area that is currently occupied by the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Suitable habitat in Horse Pasture Meadow was previously eliminated by logging to create a helicopter pad. The butterfly has not been detected in this unit since construction of the helicopter pad, which was constructed for helicopters that transport people and supplies to fight forest fires. The helicopter pad is no longer there, and there is open meadow habitat. This unit has been somewhat revegetated, and New Mexico beardtongue and nectar sources now exist in this area. Additional habitat restoration techniques could be used to restore butterfly habitat in this area. Forest Service is planning to actively manage this former habitat to encourage species recovery.

Unit 6: Sleepygrass Canyon

Unit 6 consists of approximately 223.5 ac (90.5 ha) and is located in the central portion of the butterfly's historical range, east of the village of Cloudcroft. This unit is unoccupied; 55.3 percent of the unit is located on the Lincoln National Forest in the Sacramento Ranger District, and 44.7 percent is located on privately owned land. This unit contains all of the physical or biological features described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains all of the physical or biological features and would increase species redundancy by serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, is located partially on Federal land, and abuts two other areas that contain several of the essential physical or biological features for the Sacramento Mountains checkerspot butterfly, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. Forest Service is surveying areas on the Lincoln National Forest in this unit annually for adult butterflies.

Unit 7: Pumphouse Canyon

Unit 7 consists of a total of approximately 136.6 ac (55.3 ha) and is located in the southern portion of the butterfly's range, southeast of the village of Cloudcroft. The unit is unoccupied and contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains several of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat, and serving as a separate population from other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future. Because this unit abuts an area that contains several of the essential physical or biological features for the Sacramento Mountains checkerspot butterfly, and is located mostly on Federal lands, we are reasonably certain that the unit will contribute to the conservation of the species.

A portion of this unit is part of an active grazing allotment. The Forest Service consults on active grazing allotment permits every 5 years. Threats that are occurring in this area include incompatible grazing by large ungulates (including livestock), recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service restored this area using invasive species management, and native habitat has already been established. The Forest Service is also surveying the portions of this unit located on the Lincoln National Forest for adult butterflies annually.

Unit 8: Deerhead Canyon

Unit 8 consists of approximately 33.1 ac (13.4 ha) and is southeast of the village of Cloudcroft in the southern portion of the butterfly's historical range. This unit is unoccupied and contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species, and would increase species redundancy and representation by serving as a separate source population should any catastrophic events impact the other meadows proposed for designation as critical habitat should a population be reestablished in this area in the future, while enhancing connectivity between meadows with suitable habitat. Because this unit is mostly located on Federal land and would contribute to metapopulation dynamics and genetic rescue if a population were to be reestablished in this area, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and nonnative plants, climate change, and altered fire regime. The Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

Unit 9: Cox Canyon

Unit 9 consists of approximately 417.8 ac (169.0 ha) and is located in the southern portion of the butterfly's historical range, south of the village of Cloudcroft. This unit is unoccupied; 31.62 percent is located on the Lincoln National Forest, and 68.38 percent is located on privately owned land. This unit contains physical or biological features (1) through (3) and (5), as described above under *Summary of Essential Physical or Biological Features.* This unit is essential for the conservation of the species because it contains most of the physical or biological features essential to the conservation of the species and would increase species redundancy and representation by serving as a separate source population from other meadows proposed for designation as critical habitat if a population were to be reestablished here, while enhancing connectivity between meadows with recently detected butterflies and meadows that contain suitable habitat. Because this unit would contribute to metapopulation dynamics should a population be reestablished, we are reasonably certain that the unit will contribute to the conservation of the species.

Threats that are occurring in this area include incompatible grazing by large ungulates, recreation, invasive and

nonnative plants, climate change, and altered fire regime. Forest Service is surveying the portions of this unit on the Lincoln National Forest for adult butterflies annually.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation: (a) if the amount or extent of taking specified in the incidental take statement is exceeded; (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action. The reinitiation requirement applies only to actions that remain subject to some discretionary Federal involvement or control. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (*e.g.,* land management plans issued by the Bureau of Land Management in certain circumstances.

Application of the ''Destruction or Adverse Modification'' Standard

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support the physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would remove or alter Sacramento Mountains checkerspot butterfly's native food plants (New Mexico beardtongue, orange sneezeweed, and other native nectar sources), or tobacco root. Such activities could include, but are not limited to, grading, leveling, plowing, mowing, burning, herbicide or pesticide spraying, incompatible grazing, or otherwise disturbing non-forested openings that result in the death of or injury to eggs, larvae, or adult Sacramento Mountains checkerspot butterflies. These activities could significantly impair or eliminate the habitat necessary for the taxon's breeding, foraging, sheltering, or other essential life functions.

(2) Actions that would alter the soil structure on which native food plants are dependent. Such activities could include, but are not limited to, erosion control activities, such as the installation of structures or vegetation and grading for construction purposes. These activities could significantly impair or eliminate the habitat that is essential for the survival and reproduction of Sacramento Mountains checkerspot butterfly's native food plants.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the ''2016 Policy''; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a ''significant regulatory action'' and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of $200 million or more in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for Sacramento Mountains checkerspot butterfly is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Sacramento Mountains checkerspot butterfly (IEc 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation.

The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impact above and beyond the impact of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, first we identified, in the IEM dated November 3, 2022, probable incremental economic impacts associated with the following categories of activities: (1) Fire management (*i.e.,* fuels reduction projects, controlled burns); (2) habitat restoration (*i.e.,* growing and planting native plants, building and maintaining exclosures, selective watering); (3) erosion control; (4) invasive plant management; (5) recreation management; (6) road construction and maintenance; and (7) grazing. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Sacramento Mountains checkerspot butterfly is present, Federal agencies are already required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations will include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the Sacramento Mountains checkerspot butterfly's critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Sacramento Mountains checkerspot butterfly includes approximately 1,636.9 acres (662.4 hectares) in nine units in Otero County, New Mexico. Two of the units are occupied, and seven of the units are unoccupied, by the Sacramento Mountains checkerspot butterfly. The unoccupied areas comprise 84 percent of the total proposed critical habitat area. Approximately 32 percent of the total proposed designation is located on private lands, 67 percent on Federal lands, and 1 percent on Tribal lands.

For the areas that are occupied by the species (16 percent of the proposed critical habitat designation), the economic impacts of designating critical habitat under section 7 of the Act are likely limited to additional administrative efforts to consider adverse modification under section 7. This is because any activities occurring in these areas and that require Federal approval or funding will be subject to section 7 consultation requirements regardless of critical habitat designation because the species may be present and any recommended project modifications to avoid adversely modifying critical habitat are the same as those needed to avoid jeopardizing the species.

For the areas unoccupied by the species (84 percent of the proposed critical habitat designation), incremental section 7 costs may include the administrative costs of consultation, as well as the costs of developing and implementing conservation measures for the species. This may include invasive species management activities, feral horse/large ungulate management activities (including fencing), and other land management activities by the Forest Service on the Lincoln National Forest. On private lands, consultation activities and related conservation actions are anticipated to be limited. Because a portion of Unit 3 (Spud Patch Canyon) is on Mescalero Apache Tribal land, we are considering that area for exclusion. Therefore, the probable economic impact may be less than anticipated for this unit.

The overall incremental costs of critical habitat designation for the Sacramento Mountains checkerspot butterfly are anticipated to be less than $117,000 per year during the next 10 years. In total, fewer than one programmatic consultation, one formal consultation, two informal consultations, and six technical assistance efforts are anticipated to occur annually in proposed critical habitat areas. The incremental administrative costs of consultations are approximately $32,000 per year (2022 dollars). Project modifications in unoccupied habitat for the Sacramento Mountains checkerspot butterfly have the potential to increase conservation in these areas, resulting in an incremental benefit. Data limitations preclude our ability to monetize these benefits; however, project modifications are unlikely to exceed $200 million in a given year. Data limitations impede our ability to confidently estimate the total incremental costs of establishing critical habitat for the Sacramento Mountains checkerspot butterfly. However, available information suggests it is unlikely that the incremental costs will reach $200 million in a given year based on the estimated annual number of consultations and per-unit consultation costs. The designation is unlikely to trigger additional requirements under State or local regulations and is not expected to affect property values.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under the authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs)—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

When analyzing other relevant impacts of including a particular area in a designation of critical habitat, we weigh those impacts relative to the conservation value of the particular area. To determine the conservation value of designating a particular area, we consider a number of factors, including, but not limited to, the additional regulatory benefits that the area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

In the case of the Sacramento Mountains checkerspot butterfly, the benefits of critical habitat include public awareness of the presence of the Sacramento Mountains checkerspot butterfly and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the Sacramento Mountains checkerspot butterfly due to protection from destruction or adverse modification of critical habitat. Continued implementation of an ongoing management plan that provides conservation equal to or more than the protections that result from a critical habitat designation would reduce those benefits of including that specific area in the critical habitat designation.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Tribal Lands

Several Executive Orders, Secretary's Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretary's Order that applies to both the Service and NMFS—Secretary's Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(B)(4) of the appendix requires the Service to consult with affected Tribes, ''when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-

owned fee lands, or the exercise of Tribal rights.'' That provision also instructs the Service to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Service to ''evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.''

Our implementing regulations at 50 CFR 424.19 and the 2016 Policy are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis under section 4(b)(2) of the Act, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, tribally owned fee lands, or Tribal rights may be affected by including any particular areas in the designation. We evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas and give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not override the Act's statutory requirement of designation of critical habitat. As stated above, we must consult with any Tribe when a designation of critical habitat may affect Tribal lands or resources. The Act requires us to identify areas that meet the definition of ''critical habitat'' (*i.e.,* areas occupied at the time of listing that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species), without regard to land ownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretary's statutory authority under the Act or other statutes. The proposed critical habitat designation includes Mescalero Apache Tribal lands.

Mescalero Apache Tribal Resources— The Mescalero Apache Tribe owns 22.4 ac (9.1 ha) of land in the Spud Patch Canyon Unit (Unit 3). The Mescalero Apache Tribe does not have any conservation plans regarding the Sacramento Mountains checkerspot butterfly. We solicited information from the Mescalero Apache Tribe within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We also provided the Mescalero Apache Tribe the opportunity to review a draft of the current condition assessment report and provide input prior to making our final determination on the status of the Sacramento Mountains checkerspot butterfly. The Mescalero Apache Tribe is a valued partner in endangered species conservation within the State of New Mexico. We have recently invited the Mescalero Apache Tribe to participate in conducting surveys for the Sacramento Mountains checkerspot butterfly on Forest Service land. We recognize and endorse their fundamental right to provide for Tribal resource management activities and we will continue to coordinate with the Mescalero Apache Tribe on this rulemaking.

Summary of Exclusions Considered Under 4(b)(2) of the Act

We are considering excluding the following areas under section 4(b)(2) of the Act from the final critical habitat designation for the Sacramento Mountains checkerspot butterfly: 22.4 ac (9.1 ha) of land owned by the Mescalero Apache Tribe in Unit 3 of the Spud Patch Canyon Unit based on Tribal resources and government-to-government relationships of the United States with Tribal entities. We specifically solicit comments on the inclusion or exclusion of such areas. If through this proposed rule's public comment period (see **DATES**, above) we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

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

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not

have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Sacramento Mountains checkerspot butterfly in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical

habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Sacramento Mountains checkerspot butterfly, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

However, when any of the areas that meet the definition of ''critical habitat'' for the species are in States within the Tenth Circuit, such as that of the Sacramento Mountains checkerspot butterfly, we undertake a NEPA analysis for that critical habitat designation consistent with the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996). We invite the public to comment on the extent to which this proposed critical habitat designation may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We solicited information from the Mescalero Apache Nation within the range of the Sacramento Mountains checkerspot butterfly to inform the development of the current condition assessment report, but we did not receive a response. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the Sacramento Mountains checkerspot butterfly.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish

and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. In § 17.95, amend paragraph (i) by adding an entry for ''Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*)'' following the entry for ''Quino Checkerspot Butterfly (*Euphydryas editha quino*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*)

(1) Critical habitat units are depicted for Otero County, New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Sacramento Mountains checkerspot butterfly consist of the following components:

(i) Open meadow, grassland habitat within the larger mixed-conifer forest in high-altitude areas within the upper-montane and subalpine zones at elevations between 2,380 and 2,750 meters (m) (7,800 and 9,000 feet (ft)) within the Sacramento Mountains of southern New Mexico.

(ii) The larval food plant (host plant), primarily New Mexico beardtongue (*Penstemon neomexicanus*), or other potential host plants such as other *Penstemon* species and tobacco root (*Valeriana edulis*), is present as:

(A) Patches of plants clustered together;

(B) Large, robust individual plants; and/or

(C) Stands of plants adjacent to other tobacco root plants.

(iii) Access to nectar sources, primarily orange sneezeweed (*Hymenoxis hoopesii*), native Asteraceae species, and other native flowering plants.

(iv) Habitat connectivity consisting of less than 890 m (2,920 ft) between populations or areas of suitable habitat to allow for dispersal and gene flow.

(v) Less than 5 percent canopy cover.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the final rule.

(4) Data layers defining map units were created using U.S. Department of Agriculture, Forest Service shapefiles delimiting the known range of the species based on surveys. Then additional areas were mapped using satellite imagery of meadow habitat within the appropriate elevation (2,380 to 2,750 m (7,800 to 9,000 feet)). The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site at *https://www.fws.gov/about/region/southwest,* at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2023–0023, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

Figure 1 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (5)

BILLING CODE 4333–15–P

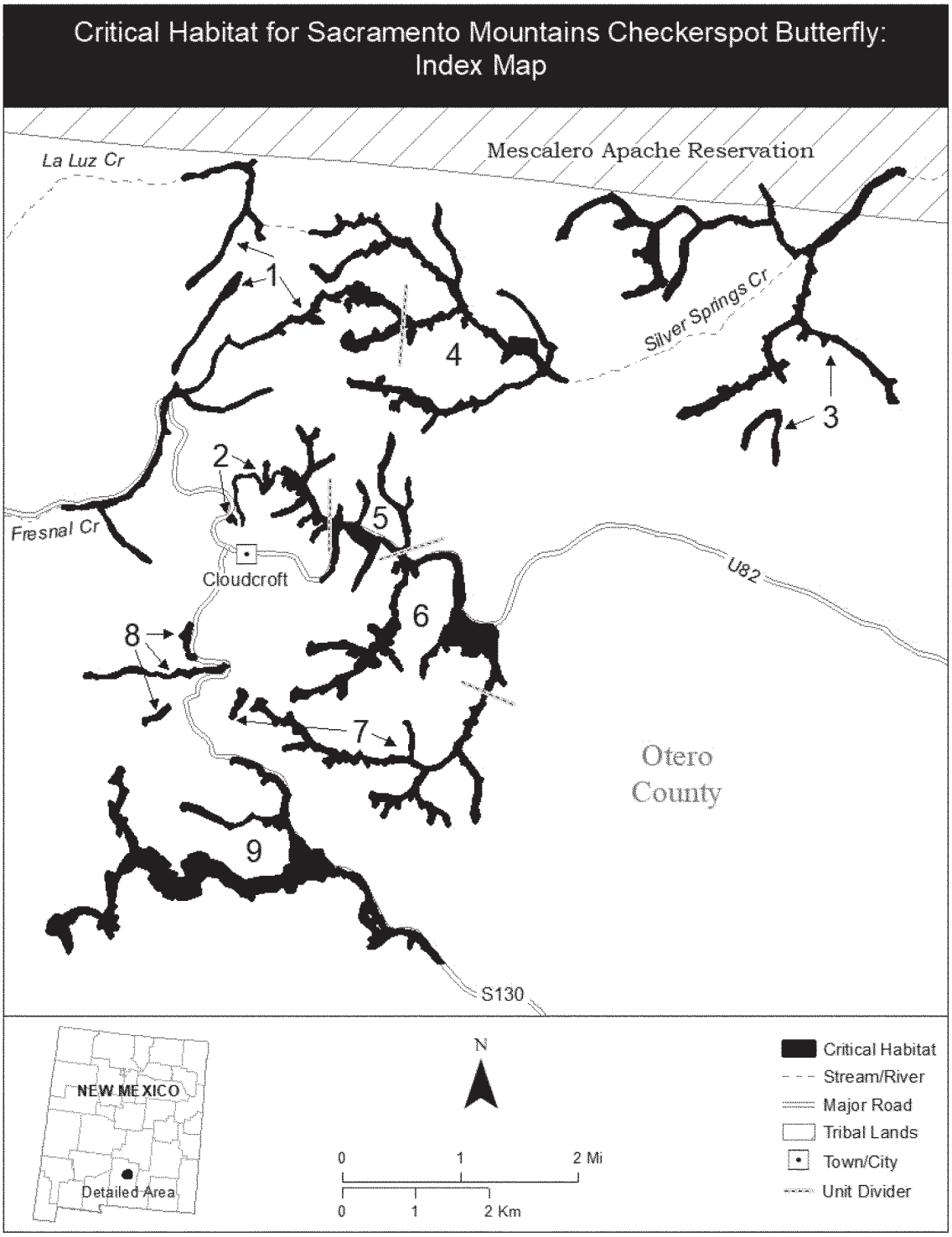
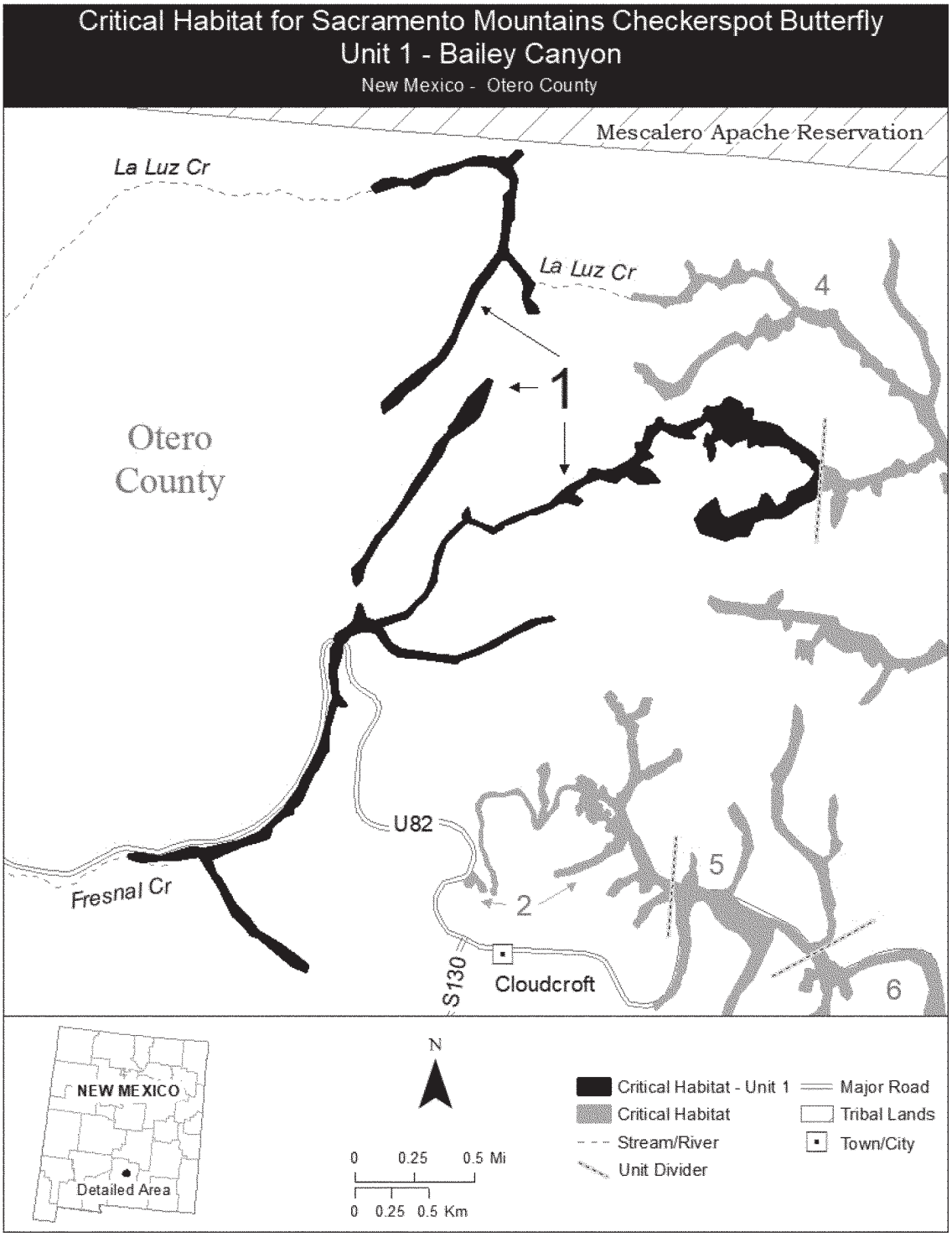


Figure 2 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (6)(ii)

(6) Unit 1: Bailey Canyon; Otero County, New Mexico.

(i) Unit 1 consists of 200.5 ac (81.1 ha) in Otero County and is composed of lands entirely in Federal ownership.

(ii) Map of Unit 1 follows:



(7) Unit 2: Pines Meadow Campground; Otero County, New Mexico.

(i) Unit 2 consists of 62.4 ac (25.2 ha) in Otero County and is composed of lands in Federal (62.2 ac (25.2 ha)) and private (0.2 ac (0.08 ha)) ownership.

(ii) Map of Unit 2 follows:

Figure 3 to Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) paragraph (7)(ii)

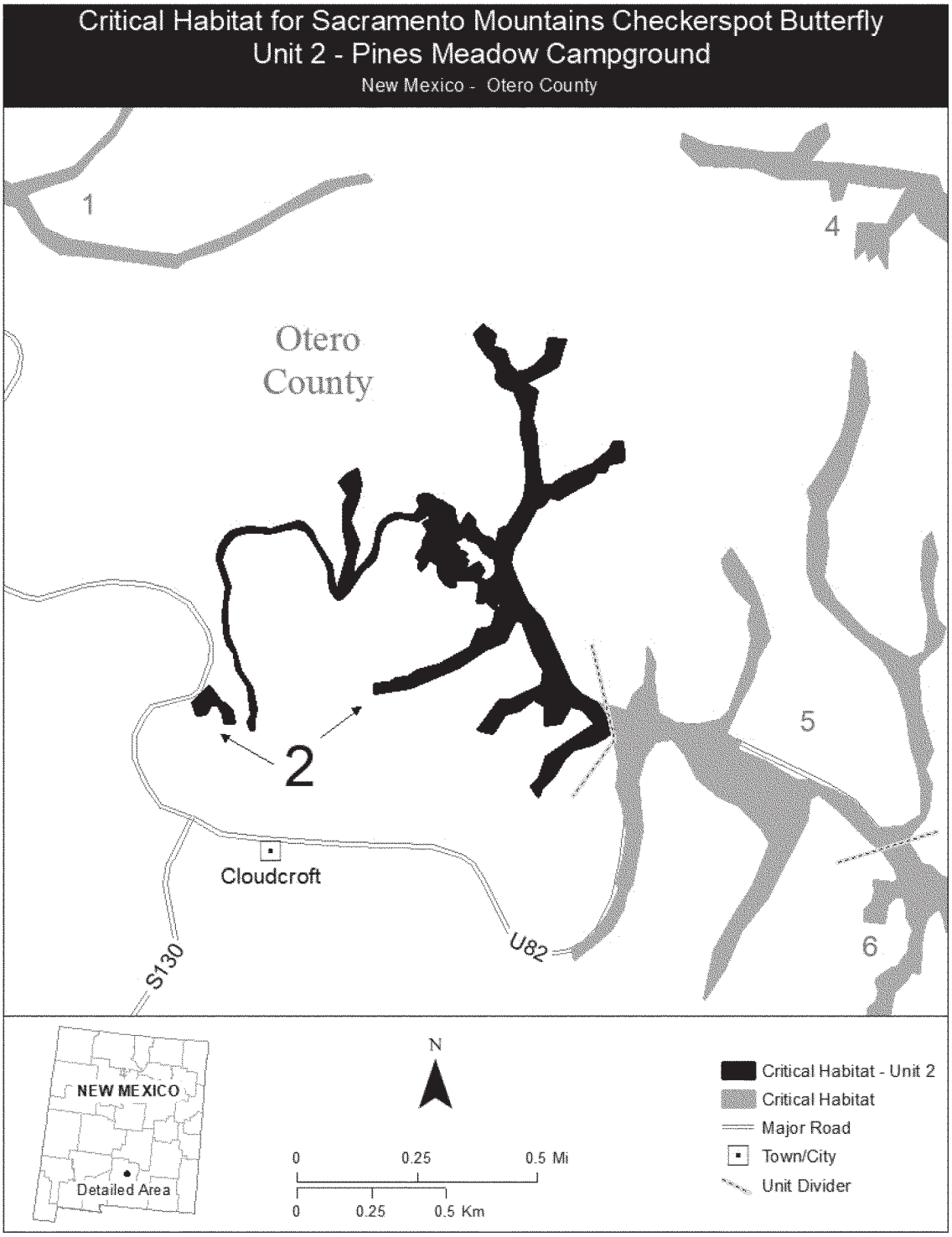


Figure 4 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (8)(ii)

(8) Unit 3: Spud Patch Canyon; Otero County, New Mexico.

(i) Unit 3 consists of 277.2 ac (112.2 ha) in Otero County and is composed of lands in Federal (203.9 ac (82.5 ha)), Tribal (22.4 ac (9.1 ha)), and private (50.9 ac (20.6 ha)) ownership.

(ii) Map of Unit 3 follows:

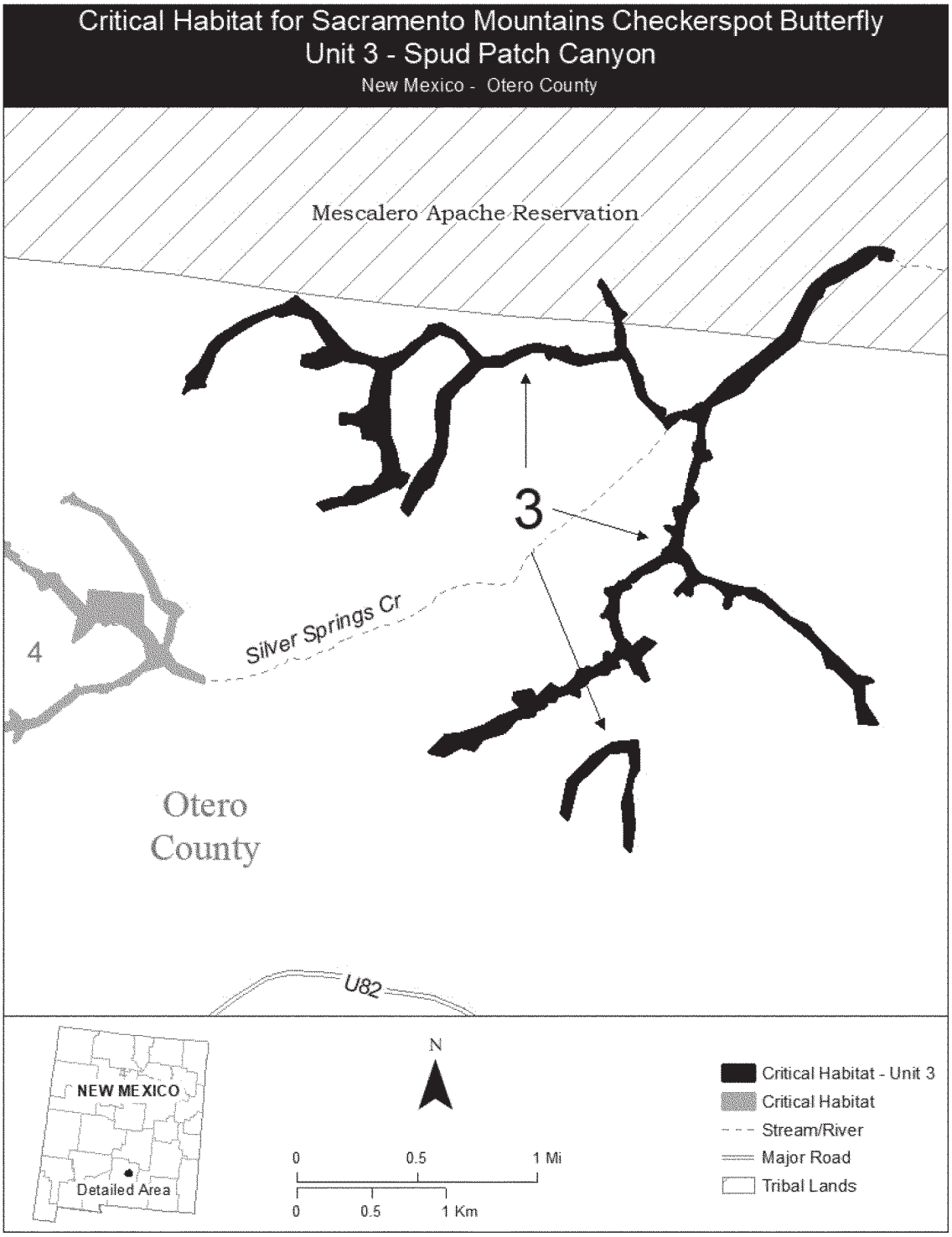
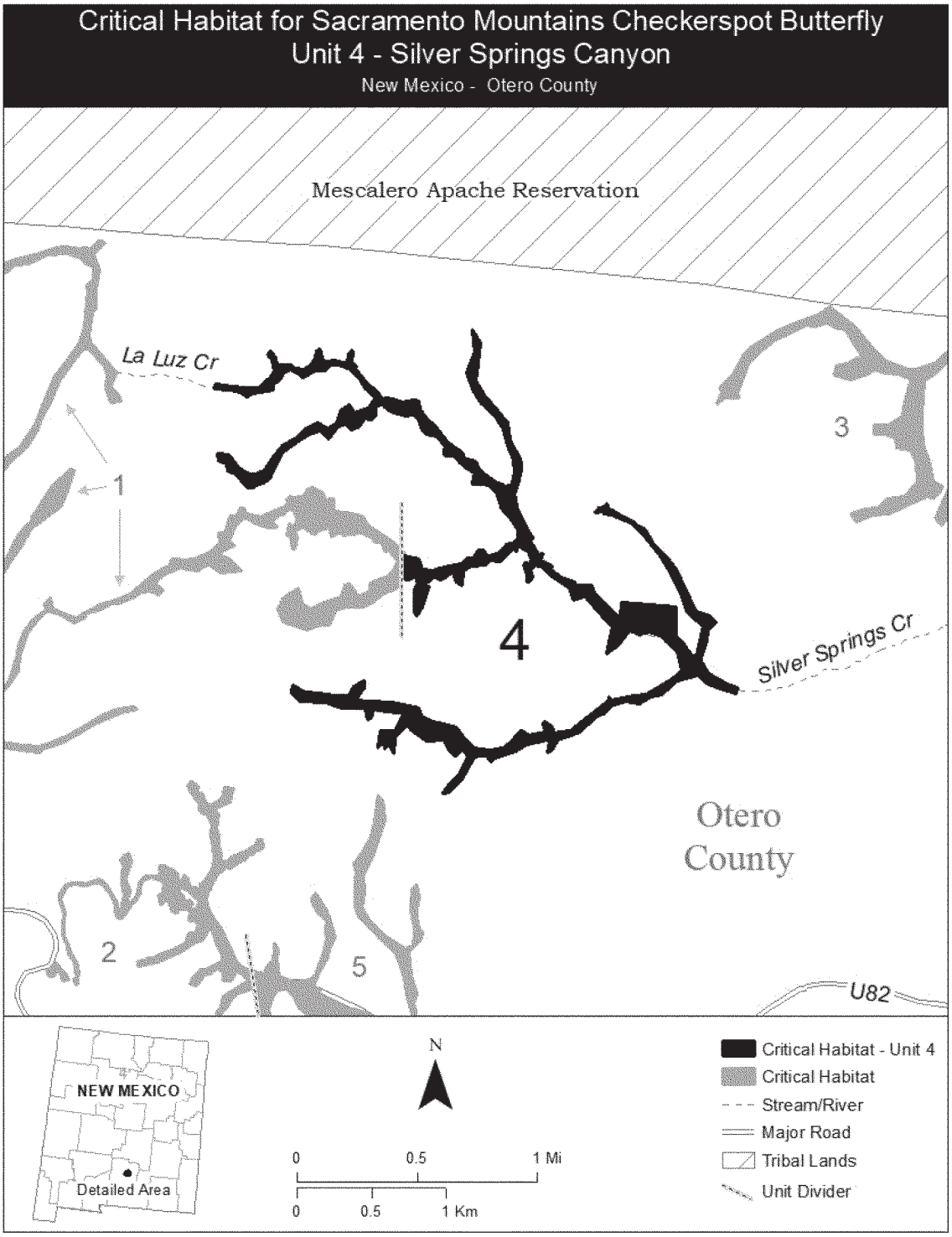


Figure 5 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (9)(ii)

(9) Unit 4: Silver Springs Canyon; Otero County, New Mexico.

(i) Unit 4 consists of 203.4 ac (82.3 ha) in Otero County and is composed of lands in Federal (132.9 ac (53.8 ha)) and private (70.5 ac (28.5 ha)) ownership.

(ii) Map of Unit 4 follows:

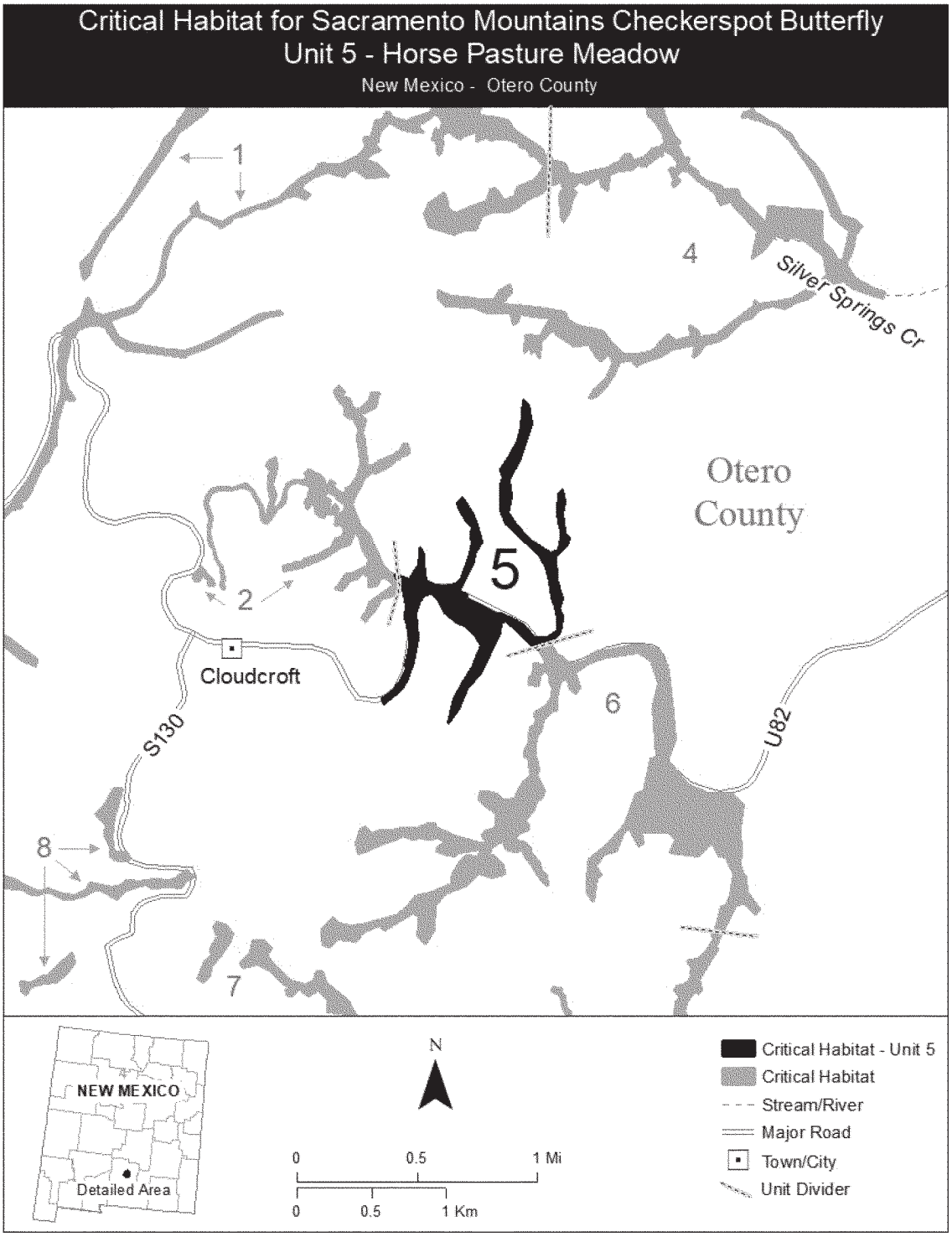


(10) Unit 5: Horse Pasture Meadow; Otero County, New Mexico.

(i) Unit 5 consists of 82.4 ac (33.4 ha) in Otero County and is composed of lands entirely in Federal ownership.

(ii) Map of Unit 5 follows:

Figure 6 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (10)(ii)

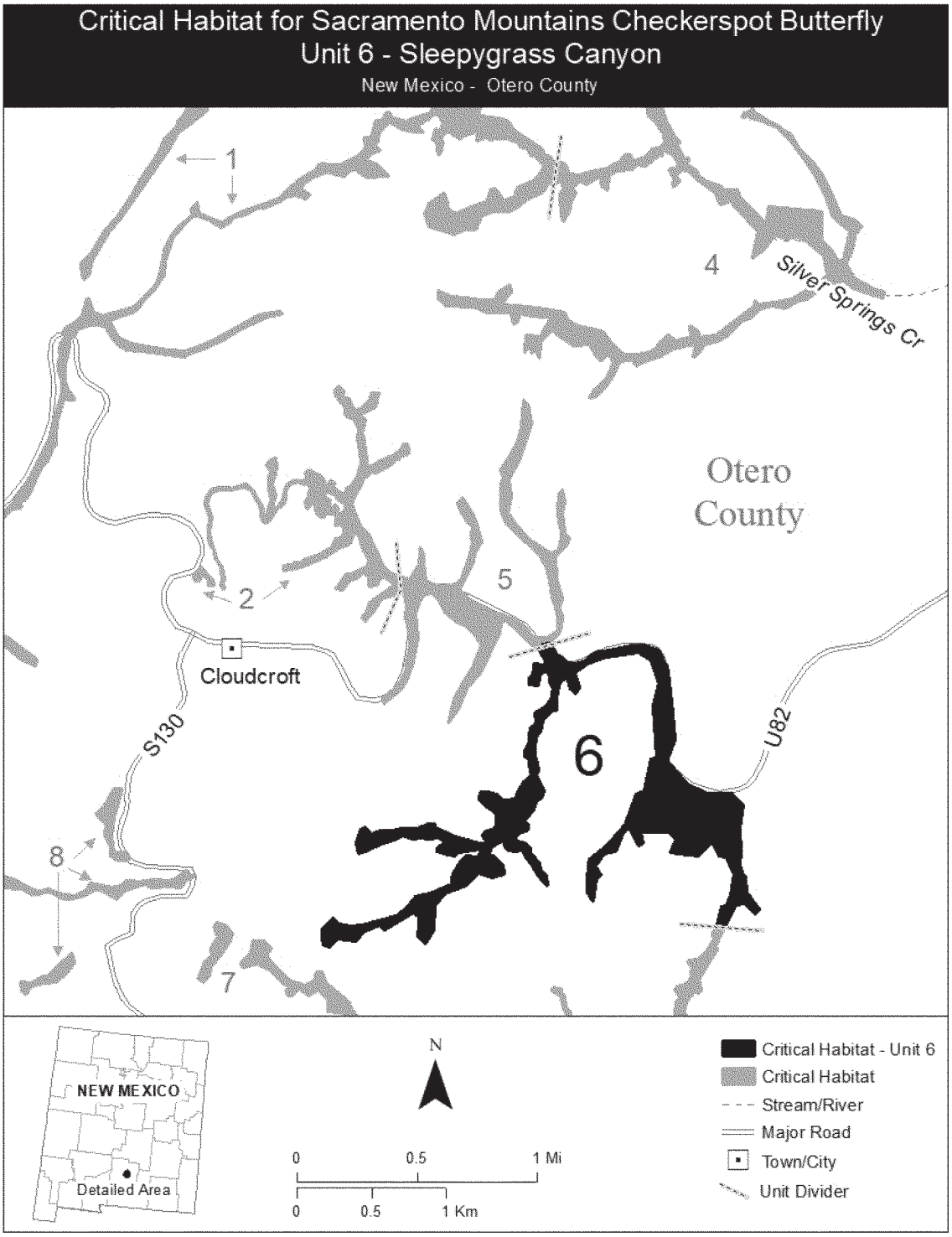


(11) Unit 6: Sleepygrass Canyon; Otero County, New Mexico.

(i) Unit 6 consists of 223.5 ac (90.5 ha) in Otero County and is composed of lands in Federal (123.5 ac (50.0 ha)) and private (100.0 ac (40.5 ha)) ownership.

(ii) Map of Unit 6 follows:

Figure 7 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (11)(ii)



(12) Unit 7: Pumphouse Canyon; Otero County, New Mexico.

(i) Unit 7 consists of 136.6 ac (55.3 ha) in Otero County and is composed of lands in Federal (134.4 ac (54.4 ha)) and private (2.2 ac (0.9 ha)) ownership.

(ii) Map of Unit 7 follows:

Figure 8 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (12)(ii)

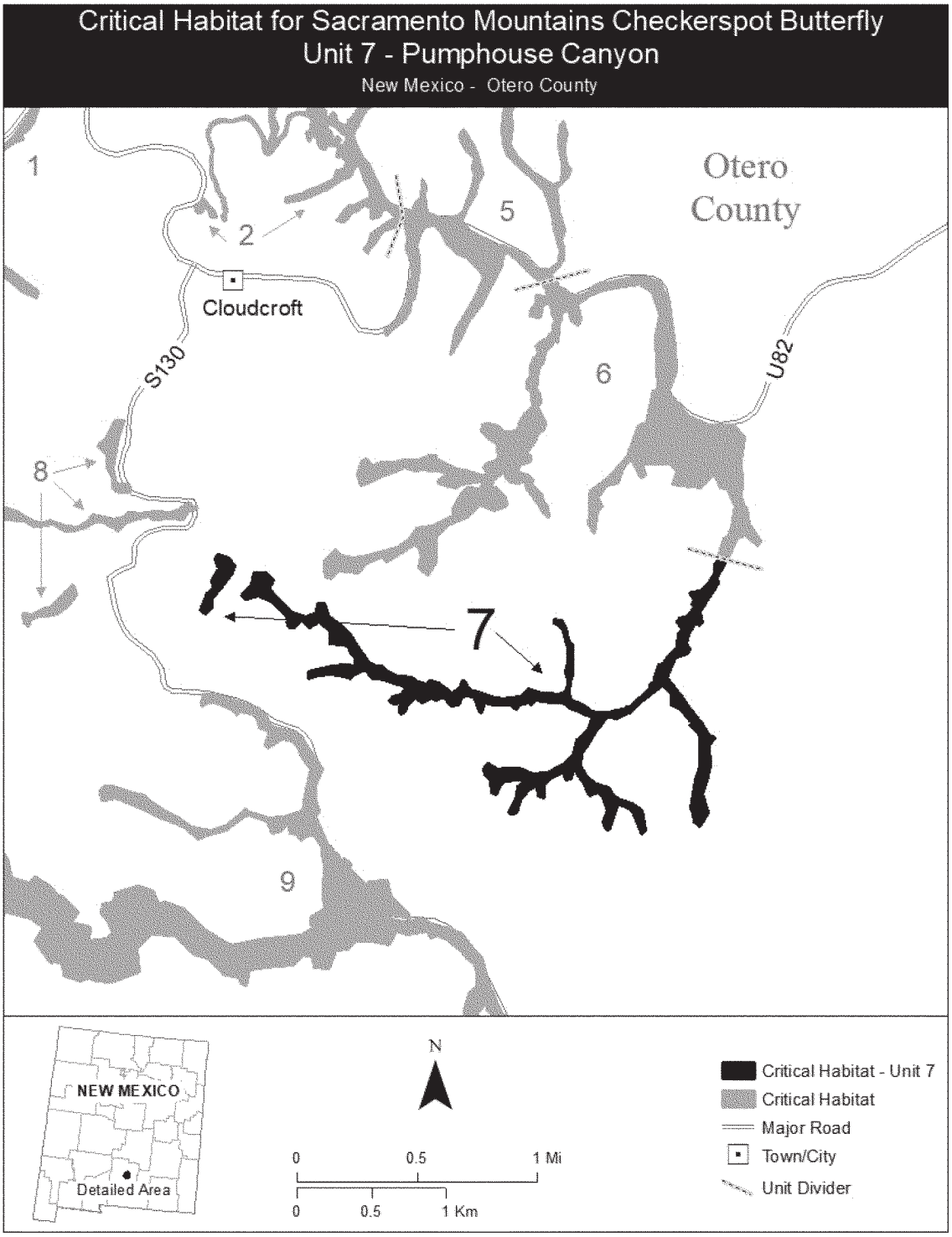
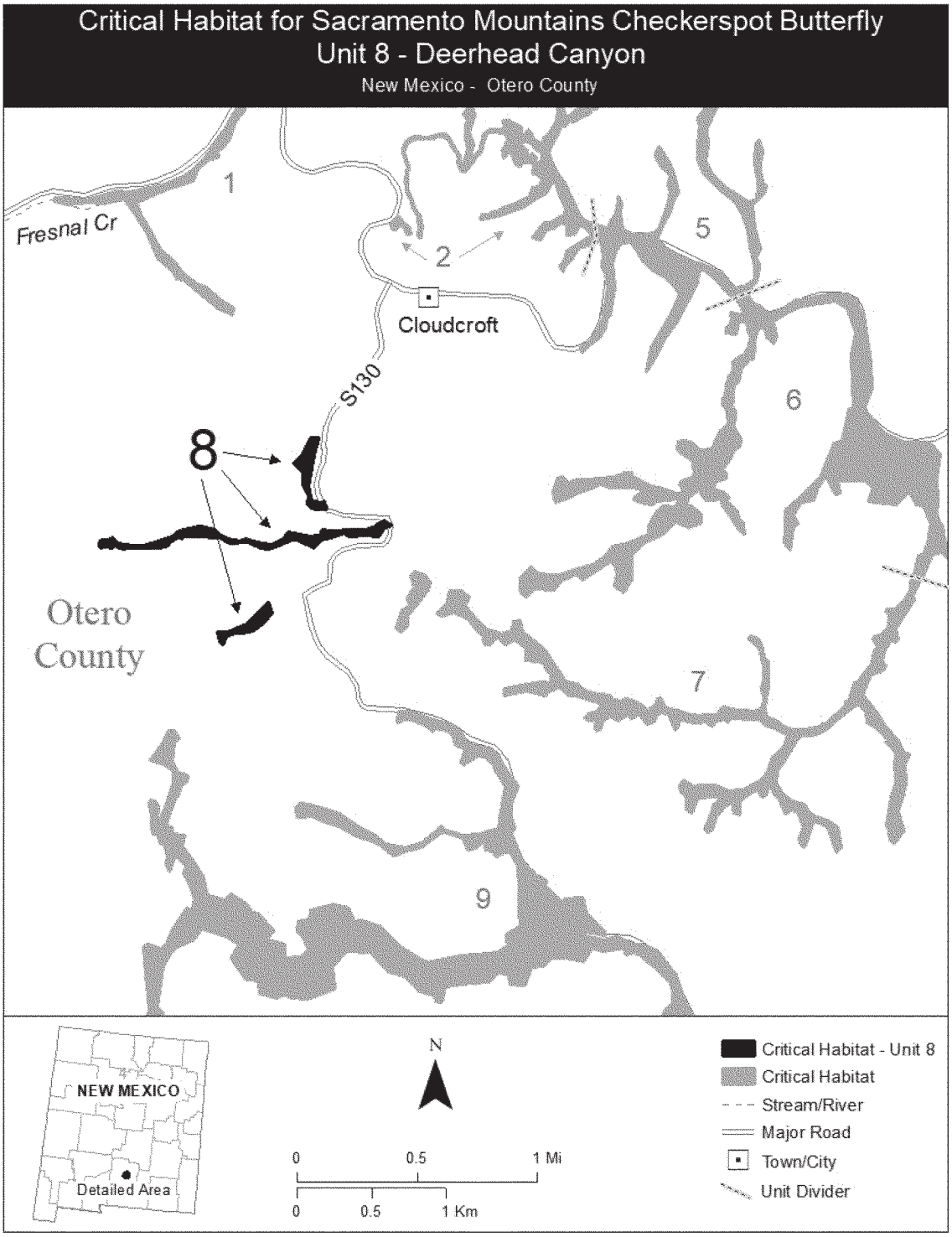


Figure 9 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (13)(ii)

(13) Unit 8: Deerhead Canyon; Otero County, New Mexico.

(i) Unit 8 consists of 33.1 ac (13.4 ha) in Otero County and is composed of lands in Federal (22.1 ac (8.9 ha)) and private (11.0 ac (4.5 ha)) ownership.

(ii) Map of Unit 8 follows:

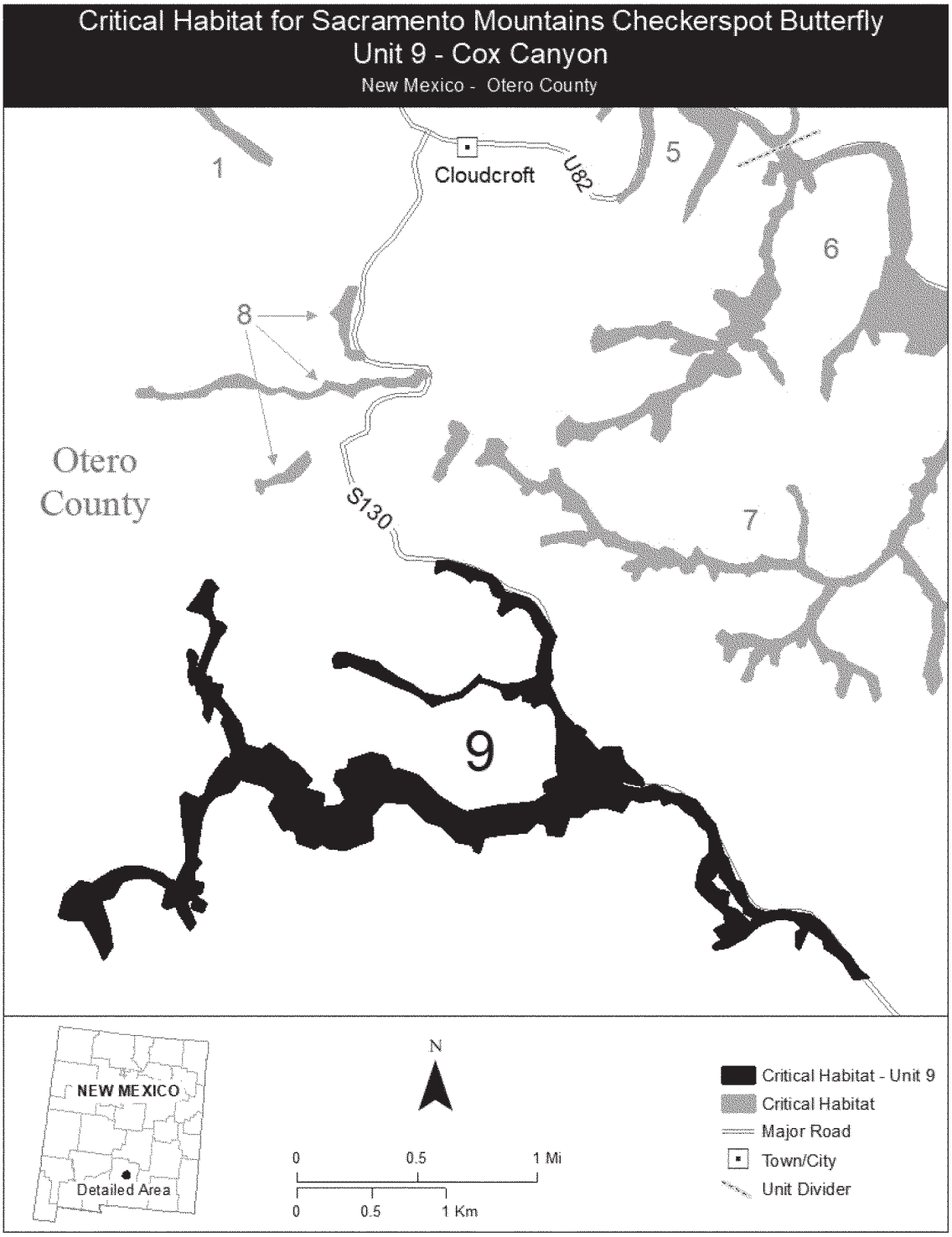


(14) Unit 9: Cox Canyon; Otero County, New Mexico.

(i) Unit 9 consists of 417.8 ac (169.0 ha) in Otero County and is composed of lands in Federal (132.1 ac (53.5 ha)) and private (285.7 ac (115.6 ha)) ownership.

(ii) Map of Unit 9 follows:

Figure 10 to Sacramento Mountains checkerspot butterfly (*Euphydryas anicia cloudcrofti*) paragraph (14)(ii)



* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–16967 Filed 8–9–23; 8:45 am]

BILLING CODE 4333–15–C

Notices

Federal Register
Vol. 88, No. 153
Thursday, August 10, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

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 September 11, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

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

Rural Housing Service

Title: 7 CFR 4280—Common Forms Package for Financial Assistance Forms for Loans/Grants.

OMB Control Number: 0575–NEW.

Summary of Collection: The Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS) agencies within the Rural Development mission area, hereinafter referred to as Agency, is the credit Agency for agriculture and rural development for the United States Department of Agriculture. The Agency offers loans, grants and loan guarantees to help create jobs and support economic development and essential services such as housing; health care; first responder services and equipment; and water, electric and communications infrastructure.

The Authorities that allow the Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS), Agencies within Rural Development (RD) are as follows:

The RHS is authorized under various sections of Title V of the Housing Act of 1949, as amended, to provide financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings, which will provide modest, decent, safe, and sanitary housing to eligible individuals in rural areas. The Consolidated Farm and Rural Development Act, as amended, authorizes the credit programs of the RHS, RBCS and RUS to provide financial assistance for essential community facilities such as construction of community facilities and water and waste systems; and the improvement, development, and financing of businesses, industries, and employment.

Need and Use of the Information: The information will be collected through the use of forms that can be accessed electronically (or in hard copy) for use as attachments to financial assistance applications. The information is collected once and is not typically shared, unless by a FOIA request. (USDA agencies and staff offices will have the option of adding the forms to their individual application packages on the *Grants.gov* website that is managed by the U.S. Department of Health and Human Services. The formal process of having the forms added to *Grants.gov* will occur after they are approved by the Office of Management and Budget (OMB)).

Description of Respondents: Businesses or other for-profits; farms; not-for-profit institutions.

Number of Respondents: 1.

Frequency of Responses: Annually.

Total Burden Hours: 1.

Rural Housing Service

Title: 7 CFR 1910–B and C, Federal Debt and Employment Verification Compliance Requirements.

OMB Control Number: 0575–NEW.

Summary of Collection: The Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS) agencies within the Rural Development mission area, hereinafter referred to as Agency, is the credit Agency for agriculture and rural development for the United States Department of Agriculture. The Agency offers offer loans, grants and loan guarantees to help create jobs and support economic development and essential services such as housing; health care; first responder services and equipment; and water, electric and communications infrastructure on an equal opportunity basis.

The information collection under OMB Number 0575-New will enable the Agencies to effectively monitor a recipient's compliance with the federal debt reporting and to determine employment verification and eligibility for Federal financial assistance.

The Agencies offer supervised credit programs to build modest housing and essential community facilities in rural areas. Section 517 (d) of Title V of the Housing Act of 1949, as amended, provides the authority for the Secretary of Agriculture to issue loan guarantees for the acquisition of new or existing dwellings and related facilities to provide decent, safe, and sanitary living conditions and other structures in rural areas.

Need and Use of the Information: This information collection will be utilized by the Rural Housing Service (RHS), Rural Business and Cooperative Service (RBCS) and Rural Utilities service (RUS), Agencies within Rural Development (RD) for various loan and grant making activities. Information requested can include financial documents such as confirmation of household income, assets and liabilities,

a credit record, evidence the borrower has adequate repayment ability for the loan amount requested and if the condition and location of the property meet program guidelines. All information is necessary to confirm the borrower qualifies for all assistance for which they are eligible.

Description of Respondents: Businesses or other for-profits; Not-for-profit institutions.

Number of Respondents: 1.

Frequency of Responses: Annually.

Total Burden Hours: 4.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–17181 Filed 8–9–23; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

U.S. Codex Office

[Docket No. USDA–2023–0011]

International Standard-Setting Activities

AGENCY: Trade and Foreign Agricultural Affairs (TFAA), USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of the sanitary and phytosanitary (SPS) standard-setting activities of the Codex Alimentarius (Codex), in accordance with section 491 of the Trade Agreements Act of 1979, as amended, and the Uruguay Round Agreements Act. This notice also provides a list of other standard-setting activities of Codex, including commodity standards, guidelines, codes of practice, and revised texts. This notice, which covers Codex activities during the time periods of June 1, 2022 to May 31, 2023 and June 1, 2023 to May 31, 2024, seeks comments on standards under consideration and recommendations for new standards.

DATES: Comments must be received on or before October 13, 2023.

ADDRESSES: The U.S. Codex Office (USCO) invites interested persons to submit their comments on this notice. Comments may be submitted by one of the following methods:

- *Federal e-Rulemaking Portal:* This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at the website for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Trade and Foreign Agricultural Affairs, U.S. Codex Office, 1400 Independence Avenue SW, Mailstop S4861, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Room 4861, Washington, DC 20250–3700.

Instructions: All items submitted by mail or email are to include the Agency name (*i.e.,* USCO) and docket number USDA–2023–0011. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information to *http://www.regulations.gov.*

Please state that your comments refer to Codex. If your comments relate to specific Codex committees, please identify the committee(s) in your comments and submit a copy of your comments to the U.S. delegate to the committee.

Docket: For access to background documents or comments received, email *uscodex@usda.gov* to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Frances Lowe, United States Manager for Codex Alimentarius, U.S. Department of Agriculture, Office of the Under Secretary for Trade and Foreign Agricultural Affairs, U.S. Codex Office, 1400 Independence Avenue SW, Room 4861, Washington, DC 20250–3700, Email: *uscodex@usda.gov,* Telephone: 202–205–7760.

For information pertaining to committees, contact the U.S. delegate for that committee. A complete list of delegates and alternate delegates is accessible via the internet at: *https://www.usda.gov/sites/default/files/documents/us-codex-program-officials.pdf.* Documents pertaining to Codex and specific committee agendas are accessible via the internet at *http://www.fao.org/fao-who-codexalimentarius/meetings/en/.* The U.S. Codex Office also maintains a website at *http://www.usda.gov/codex,* a link that offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscription themselves and have the option to password protect their accounts.

SUPPLEMENTARY INFORMATION:

Background

The World Trade Organization (WTO) was established on January 1, 1995, as the common international institutional framework for the conduct of trade relations among its members in matters related to the Uruguay Round Trade Agreements. The WTO is the successor organization to the General Agreement on Tariffs and Trade (GATT). United States membership in the WTO was approved and the Uruguay Round Agreements Act (Uruguay Round Agreements) was signed into law by the President on December 8, 1994, Public Law 103–465, 108 Stat. 4809. The Uruguay Round Agreements became effective with respect to the United States on January 1, 1995. The Uruguay Round Agreements amended the Trade Agreements Act of 1979. Pursuant to section 491 of the Trade Agreements Act of 1979, as amended, the President is required to designate an agency to be ''responsible for informing the public of the sanitary and phytosanitary (SPS) standard-setting activities of each international standard-setting organization'' (19 U.S.C. 2578). The main international standard-setting organizations are the Codex Alimentarius (Codex), the World Organisation for Animal Health (WOAH, founded as OIE), and the International Plant Protection Convention (IPPC). The President, pursuant to Proclamation No. 6780 of March 23, 1995, (60 FR 15845), designated the U.S. Department of Agriculture as the agency responsible for informing the public of the SPS standard-setting activities of each international standard-setting organization. The Secretary of Agriculture has delegated to the Trade and Foreign Agricultural Affairs Mission Area the responsibility to inform the public of the SPS standard-setting activities of Codex. The Trade and Foreign Agricultural Affairs Mission Area has, in turn, assigned the responsibility for informing the public of the SPS standard-setting activities of Codex to the U.S. Codex Office (USCO).

Codex was created in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Codex is the principal international organization for establishing standards for food. Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers, ensure fair practices in the food trade, and promote coordination of food standards work undertaken by international governmental and nongovernmental organizations. In the United States, U.S. Codex activities are managed and carried out by the United States Department of Agriculture (USDA); the Food and Drug Administration (FDA), Department of

Health and Human Services (HHS); the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC); and the Environmental Protection Agency (EPA).

As the agency responsible for informing the public of the SPS standard-setting activities of Codex, the USCO publishes this notice in the **Federal Register** annually. *Attachment 1: Sanitary and Phytosanitary Activities of Codex* sets forth the following information:

1. The SPS standards under consideration or planned for consideration; and

2. For each SPS standard specified:

a. A description of the consideration or planned consideration of the standard

b. Whether the United States is participating or plans to participate in the consideration of the standard

c. The agenda for United States participation, if any; and

d. The agency responsible for representing the United States with respect to the standard.

To obtain copies of the standards listed in *Attachment 1: Sanitary and Phytosanitary Activities of Codex,* please contact the U.S. delegate or the U.S. Codex Office.

This notice also solicits public comment on standards that are currently under consideration or planned for consideration and recommendations for new standards. The U.S. delegate, in conjunction with the responsible agency, will take the comments received into account in participating in the consideration of the standards and in proposing matters to be considered by Codex.

The U.S. delegate will facilitate public participation in the United States Government's activities relating to Codex. The U.S. delegate will maintain a list of individuals, groups, and organizations that have expressed an interest in the activities of the Codex committees and will disseminate information regarding U.S. delegation activities to interested parties. This information will include the status of each agenda item; the U.S. Government's position or preliminary position on each agenda item; and the time and place of planning meetings and debriefing meetings following the Codex committee sessions. In addition, the USCO makes much of the same information available through its web page at *http://www.usda.gov/codex.* If you would like to access or receive information about specific committees, please visit the web page or notify the appropriate U.S. delegate or the U.S. Codex Office, Room 4861, 1400 Independence Avenue SW, Washington, DC 20250–3700, Email: *uscodex@usda.gov.*

The information provided in *Attachment 1: Sanitary and Phytosanitary Activities of Codex* describes the status of Codex standard-setting activities by the Codex committees for the time periods from June 1, 2022 to May 31, 2023 and June 1, 2023 to May 31, 2024. A list of forthcoming Codex sessions may be found at: *https://www.fao.org/fao-who-codexalimentarius/meetings/en/.*

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the USCO will announce this **Federal Register** publication on-line through the U.S. Codex web page located at: *https://www.federalregister.gov/agencies/us-codex-office.*

Done at Washington, DC.

Mary Frances Lowe,

U.S. Manager for Codex Alimentarius.

Attachment 1: Sanitary and Phytosanitary Activities of Codex

Codex Alimentarius Commission and Executive Committee

The Codex Alimentarius Commission (Commission or CAC) convened its 45th Session (CAC45) from November 21–25, 2022, in Rome, Italy, with report adoption taking place virtually on December 12–13, 2022 and continued by written procedure. The relevant document is REP22/CAC. The actions taken by the Commission at CAC45 (*e.g.,* adoption and revocation of standards, approval of new work, discontinuation of work, amendments, etc.) are described below under the respective Codex committees.

The Commission is scheduled to convene its 46th Session (CAC46) from November 27 to December 2, 2023. At its 46th Session, the Commission will consider adopting standards recommended by committees at Step 8 or 5/8 (final adoption) and advance the work of committees by adopting draft standards at Step 5 (interim adoption, for further comment and consideration by the relevant committee). The Commission will also consider revocation of Codex texts; proposals for new work; discontinuation of work; amendments to Codex standards and related texts; and matters arising from the Reports of the Commission, the Executive Committee, and subsidiary bodies. Although the agenda for the 46th Session is not yet available, it is expected that the Commission will also consider Codex budgetary and financial matters; FAO/WHO scientific support to Codex (activities, budgetary and financial matters); matters arising from FAO/WHO; reports of side events; election of the chairperson and vice-chairpersons and members of the Executive Committee elected on a geographical basis; designation of countries responsible for appointing the chairpersons of Codex subsidiary bodies; any other business; and adoption of the report.

The Executive Committee (CCEXEC) is composed of the Commission chairperson; vice-chairpersons; seven members elected by the Commission from each of the following geographic regions: Africa, Asia, Europe, Latin America and the Caribbean, Near East, North America, and the South West Pacific; and regional coordinators from the six regional coordinating committees. The United States currently participates as an advisor to Canada, the member elected on a geographical basis from North America.

CCEXEC convened its 82nd Session (CCEXEC82) virtually June 20–24, 2022, with virtual report adoption on June 30, 2022. The relevant document is REP22/EXEC1. CCEXEC82 conducted Critical Review of the standards development work of the Codex Committees on Fats and Oils (CCFO), Nutrition and Foods for Special Dietary Uses (CCNFSDU), Food Hygiene (CCFH), and Residues of Veterinary Drugs in Foods (CCRVDF). CCEXEC82 also considered the progress of three Sub-Committees concerned with (1) the development of practical guidance on the application of the *Statements of Principle concerning the Role of Science in the Codex decision-making process and the extent to which other factors are taken into account,* (2) new food sources and production systems, and (3) a model for future Codex work; reviewed and made recommendations to the Directors General of FAO and WHO on applications from international non-governmental organizations for observer status in Codex; and discussed the status of work under the Codex Strategic Plan 2020–2025 and plans for commemorating the 60th Anniversary of the CAC in 2023. The report and recommendations of CCEXEC82 were considered by the Codex Alimentarius Commission at its 45th Session (CAC45, November 2022).

CCEXEC convened its 83rd Session (CCEXEC83) from November 14 to 18, 2022, in Rome, Italy. The relevant document is REP22/EXEC2. In addition to making recommendations to CAC45 on the work of Codex committees, CCEXEC83 discussed practical guidance

on the application of the *Statements of Principle concerning the Role of Science in the Codex decision-making process and the extent to which other factors are taken into account;* new food sources and production systems; the Future of Codex; the Codex Strategic Plan 2020–2025; and the 60th anniversary of the Commission.

CCEXEC convened its 84th Session (CCEXEC84) from July 10–14, 2023, in Geneva, Switzerland. The relevant document is REP23/EXEC1. In addition to discussing recommendations to CAC46 on the work of Codex committees, CCEXEC84 discussed the Blueprint on the Future of Codex; recommendations on the Future of Codex in the context of 60th anniversary celebrations; monitoring the implementation of the Codex Strategic Plan 2020–2023; and plans for the development of the Codex Strategic Plan for 2026–2031. The Executive Committee also considered the following agenda items: applications from international non-governmental organizations for observer status in Codex; and regional standards. The Executive Committee agenda for the 85th Session (CCEXEC85, November 2023) is not yet available.

Responsible Agency: USDA/TFAA/USCO.

U.S. Participation: Yes, as advisor to Canada (current CCEXEC member elected on a geographical basis from North America).

Codex Committee on Contaminants in Foods

The Codex Committee on Contaminants in Foods (CCCF) establishes or endorses permitted maximum levels (MLs) and guideline levels (GLs) for contaminants and naturally occurring toxicants in food and feed; prepares priority lists of contaminants and naturally occurring toxicants for risk assessment by the Joint FAO/WHO Expert Committee on Food Additives (JECFA); considers and elaborates methods of analysis and sampling for the determination of contaminants and naturally occurring toxicants in food and feed; considers and elaborates standards or codes of practice for related subjects; and considers other matters assigned to it by the Commission in relation to contaminants and naturally occurring toxicants in food and feed.

The Committee had the following items which were considered and approved by the 45th Session of the Codex Alimentarius Commission (CAC45) in November 2022:

Final Adoption at Step 8 or Step 5/8

- *Code of Practice for the Prevention and Reduction of Cadmium Contamination in Cocoa Beans* (CXC 81–2022)
- ML for cadmium in cocoa powder (100% cocoa solids on a dry matter basis)
- MLs for lead in cereal-based foods for infants and young children, white and refined sugar, corn and maple syrups, honey and sugar-based candies
- MLs for methylmercury in orange roughy and pink cusk eel
- MLs for total aflatoxins (AFT) in maize grain, destined for further processing; flour meal, semolina and flakes derived from maize; husked rice; polished rice; sorghum grain, destined for further processing; cereal-based food for infants and young children (excluding foods for food aid programs); and cereal-based food for infants and young children for food aid programs

Interim Adoption at Step 5

- ML for lead in ready-to-eat meals for infants and young children
- Draft Code of Practice for Prevention and Reduction of Mycotoxin Contamination in Cassava and Cassava-Based Products

Discontinuation

- Work on MLs for lead in fresh eggs, dried garlic, and molasses

The CCCF convened its 16th Session (CCCF16) from April 17–21, 2023, in Utrecht, Netherlands, with report adoption taking place virtually on April 26, 2023. The relevant document is REP23/CF16. CCCF16 advanced the following items for consideration by the CAC46 in November 2023:

For final adoption at Step 8 and Step 5/8

- MLs for lead for soft brown, raw, and non-centrifugal sugars
- MLs for lead for ready-to-eat meals for infants and young children
- Code of Practice for Prevention and Reduction of Mycotoxin Contamination in Cassava and Cassava-Based Products
- Sampling plans for total aflatoxins in certain cereals and cereal-based products including foods for infants and young children
- MLs for Ochratoxin A (OTA) in chili pepper, paprika and nutmeg; and
- MLs for total aflatoxins (AFT) in chili pepper and nutmeg

For Approval as New Work

- Code of Practice/Guidelines for the Prevention or Reduction of Ciguatera Poisoning

For Discontinuation

- Work on AFT in ginger, paprika, black and white pepper, and turmeric.

The CCCF is scheduled to convene its 17th session (CCCF17) from April 15–19, 2024. The CCCF17 location and agenda are currently unavailable.

The Committee is expected to continue working on:

- ML for total aflatoxins in ready to-eat (RTE) peanuts and associated sampling plan (definition of RTE peanuts)
- Sampling plans for OTA and AFT (chili pepper, paprika, and nutmeg)
- New work on a Code of Practice/Guidelines for the prevention or reduction of ciguatera poisoning
- Discussion paper on pyrrolizidine alkaloids
- Discussion paper on new measures supporting the revision of the *Code of Practice for the Prevention and Reduction of Aflatoxin Contamination in Peanuts* (CXC 55–2004)
- Discussion paper on new measures supporting the revision of the *Code of Practice for the Reduction of Aflatoxin B1 in Raw Materials and Supplemental Feeding Stuffs for Milk-Producing Animals* (CXC 45–1997)
- Discussion paper on the need and feasibility of possible follow up actions on tropane alkaloids
- Discussion paper on possible risk management measure(s) for acrylamide in foods, taking into account the most recent JECFA evaluations
- Discussion paper on the development of a Code of Practice for the Prevention and Reduction of Cadmium Contamination in Foods
- General guidance on data analysis for development of maximum levels and improved data collection
- Review of Codex standards for contaminants
- Follow-up work to the outcomes of JECFA evaluations and FAO/WHO expert consultations
- Reconsider the opportunity to develop discussion papers on the need and feasibility of possible follow-up actions on ergot alkaloids and trichothecenes (T–2, HT–2 and DAS)
- Priority list of contaminants for evaluation by JECFA

Responsible Agencies: HHS/FDA; USDA/Food Safety and Inspection Service (FSIS).

U.S. Participation: Yes.

Codex Committee on Fats and Oils

The Codex Committee on Fats and Oils (CCFO) is responsible for elaborating worldwide standards for fats

and oils of animal, vegetable, and marine origin, including margarine and olive oil.

The Committee had the following items which were considered and approved by CAC45 in November 2022:

Final Adoption at Step 8 and Step 5/8

- Revision to the *Standard for Named Vegetable Oils* (CXS 210–1999): Essential composition of sunflower seed oils

Interim Adoption at Step 5

- Draft revision to the *Standard for Named Vegetable Oils* (CXS 210–1999): Inclusion of avocado oil

Approved as New Work

- Amendment/revision to the *Standard for Named Vegetable Oils* (CXS 210–1999) to include camellia seed oil; sacha inchi oil; and high oleic acid soya bean oil
- Amendment/revision to the *Standard for Fish Oils* (CXS 329–2017) to include Calanus oil

The CCFO is scheduled to convene for its 23rd Session (CCFO23) from February 19–23, 2024, in Kuala Lumpur, Malaysia. The CCFO23 agenda is currently unavailable.

The Committee is expected to continue work on:

- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of avocado oil
- Revision of the *Standard for Olive Oils and Pomace Olive Oils* (CXS 33–1981)
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of camellia seed oil
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of sacha inchi oil
- Amendment/Revision of the *Standard for Named Vegetable Oils* (CXS 210–1999): inclusion of high oleic acid soya bean oil
- Amendment/Revision of the *Standard for Fish Oils* (CXS 329–2017): inclusion of Calanus oil
- Consideration of proposals on new substances to be added to the List of Acceptable Previous Cargoes

Responsible Agencies: HHS/FDA/Center for Food Safety and Applied Nutrition (CFSAN); USDA/Agricultural Research Service (ARS).

U.S. Participation: Yes.

Codex Committee on Fish and Fishery Products

The Committee on Fish and Fishery Products (CCFFP) is responsible for elaborating standards for fresh, frozen, and otherwise processed fish, crustaceans, and mollusks. The CCFFP is working by correspondence and is expected to complete its pending work by October 1, 2023.

The Committee is working on:

- The *Standard for Canned Sardines and Sardine-Type Products* (CXS 94–1981), inclusion of the fish species *S. lemuru* (Bali Sardinella) in the list of *Sardinella* species under Section 2.1

Responsible Agencies: HHS/FDA; DOC/NOAA/National Marine Fisheries Service (NMFS).

U.S. Participation: Yes.

Codex Committee on Food Additives

The Codex Committee on Food Additives (CCFA) establishes or endorses acceptable MLs for individual food additives; prepares a priority list of food additives for risk assessment by the JECFA; assigns functional classes to individual food additives; recommends specifications of identity and purity for food additives for adoption by the Codex Alimentarius Commission; considers methods of analysis for the determination of additives in food; and considers and elaborates standards or codes of practice for related subjects such as the labeling of food additives when sold as such.

The CCFA convened its 53rd Session (CCFA53) from March 27–31, 2023, in Hong Kong, China. The relevant document is REP23/FA. CCFA53 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Inclusion of the provision for trisodium citrate (INS 331(iii)) in FC 01.1.1 in the *General Standard for Food Additives (GSFA)* (CXS 192–1995)
- Inclusion of the provisions for food additives in FC 14.2.3 (CXS 192–1995)
- Inclusion of the provisions for riboflavin, synthetic (INS 101(i)), riboflavin 5′-phosphate sodium (INS 101(ii)), riboflavin from Bacillus subtilis (INS 101(iii)), riboflavin from Ashbya gossypii (INS 101(iv)) and spirulina extract (INS 134) in Table 3 (CXS 192–1995)
- Proposed draft revision of the *Class Names and the International Numbering System for Food Additives* (CXG 36–1989)
- Proposed draft *Specifications for the Identity and Purity of Food Additives* (CXA 6–2021)

The CCFA is scheduled to convene its 54th Session (CCFA54) from April 22–26, 2024. The CCFA54 agenda is currently unavailable.

The Committee is expected to continue work on:

- The alignment and the endorsement of food-additive provisions referred by commodity committees
- New or revised provisions of the GSFA
- Revision of the *Class Names and the International Numbering System for Food Additives* (CXG 36–1989)
- Proposal for additions and changes to the Priority List of Substances proposed for evaluation by JECFA
- Mapping food categories of the GFSA to the FoodEx2 Database
- Discussion paper on the development of a standard for yeast
- Discussion paper to identify the outstanding issues with respect to avoiding future divergence between the GSFA, commodity standards and other texts

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on Food Hygiene

The Codex Committee on Food Hygiene (CCFH) is responsible for developing basic provisions on food hygiene applicable to all food; considering and amending or endorsing provisions on food hygiene contained in Codex commodity standards and Codex codes of practice developed by other committees; considering specific food hygiene problems assigned to it by the Commission; suggesting and prioritizing areas where there is a need for microbiological risk assessment at the international level and developing questions to be addressed by the risk assessors; and considering microbiological risk management matters in relation to food hygiene and in relation to the FAO/WHO risk assessments.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- *Guidelines on the Management of Biological Foodborne Outbreaks* (CXG 96–2022)
- Proposed draft Decision Tree as an Annex to the *General Principles of Food Hygiene* (CXC 1–1969)

The CCFH convened its 53rd Session (CCFH53) from November 27–December 2, 2022, in San Diego, California, with report adoption taking place virtually on December 8, 2022. The relevant document is REP 23/FH. CCFH53 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 5/8

- Draft Guidelines for the Control of Shiga Toxin-Producing *Escherichia coli* (STEC) in Raw Beef, Fresh Leafy Vegetables, Raw Milk and Raw Milk Cheeses, and Sprouts (General Section, Annex I on Raw Beef, and Annex III on Raw Milk and Raw Milk Cheeses)
- Draft Guidelines for the Safe Use and Reuse of Water in Food Production and Processing (General Section and Annex I on Fresh Produce)

For Approval as New Work

- Revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Pathogenic Vibrio Species in Seafood* (CXG–73–2010)
- Guidelines for Food Hygiene Control Measures in Traditional Markets for Food

The CCFH is scheduled to convene its 54th Session (CCFH54) from March 11–15, 2024, in Nairobi, Kenya. The CCFH54 agenda is currently unavailable.

The Committee is expected to continue work on:

- Proposed Draft Guidelines for the Control of Shiga Toxin-Producing *Escherichia coli* (STEC) in Raw Beef, Raw Milk and Raw Milk Cheeses, Fresh Leafy Vegetables, and Sprouts: (Annex II on Fresh Leafy Vegetables and Annex IV on Sprouts)
- Proposed Draft Guidelines for the Safe Use and Reuse of Water in Food Production: Annex II on Fisheries and Annex III on Dairy Products)
- Proposed Draft Guidelines for Food Hygiene Control Measures in Traditional Markets for Food
- Revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Pathogenic Vibrio Species in Seafood* (CXG 73–2010)
- Alignment of other CCFH documents with the revised *General Principles of Food Hygiene* (CXC 1–1969)
- Discussion paper on revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Viruses in Food* (CXG 79–2012)
- Discussion paper on revision of the *Guidelines for the Control of Campylobacter and Salmonella in Chicken Meat* (CXG 78–2011)
- Discussion paper on revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Listeria monocytogenes in Foods* (CXG 61–2007)
- New work proposals/forward workplan

Responsible Agencies: HHS/FDA/CFSAN; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Food Import and Export Inspection and Certification Systems

The Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS) is responsible for developing principles and guidelines for food import and export inspection and certification systems, with a view to harmonizing methods and procedures that protect the health of consumers, ensure fair trading practices, and facilitate international trade in foodstuffs; developing principles and guidelines for the application of measures by the competent authorities of exporting and importing countries to provide assurance, where necessary, that foodstuffs comply with requirements, especially statutory health requirements; developing guidelines for the utilization, as and when appropriate, of quality assurance systems to ensure that foodstuffs conform with requirements and promote the recognition of these systems in facilitating trade in food products under bilateral/multilateral arrangements by countries; developing guidelines and criteria with respect to format, declarations, and language of such official certificates as countries may require with a view towards international harmonization; making recommendations for information exchange in relation to food import/export control; consulting as necessary with other international groups working on matters related to food inspection and certification systems; and considering other matters assigned to it by the Commission in relation to food inspection and certification systems.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Approved as New Work

- Development of principles and guidelines on the use of remote audit and verification in regulatory frameworks

The CCFICS convened its 26th Session from May 1–5, 2023, in Hobart, Tasmania, Australia. The relevant document is REP 23/FICS. The Committee advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Proposed draft guidelines on recognition and maintenance of equivalence of national food control systems (NFCS)
- Proposed draft principles and guidelines on the use of remote audit and inspection in regulatory frameworks

For Approval as New Work

- Project document for the on review and update of the *Principles for Traceability/Product Tracing as a Tool within a Food Inspection and Certification System* (CXG 60–2006)

The CCFICS is scheduled to convene its 27th Session (CCFICS27) from September 16–20, 2024, in Australia. The CCFICS27 agenda is currently unavailable.

The Committee is expected to continue work on:

- Development of guidance on the prevention and control of food fraud
- Proposed draft consolidated Codex guidelines related to equivalence
- Reviewing and updating the list of emerging global issues
- Review and update of the *Principles for Traceability/Product Tracing as a Tool Within a Food Inspection and Certification System* (CXG 60–2006)
- Discussion paper and project document on guidance on appeals mechanisms in the context of rejection of imported food
- Discussion paper and project document on the standardization of sanitary requirements

Responsible Agencies: USDA/FSIS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on Food Labelling

The Codex Committee on Food Labelling (CCFL) drafts provisions on labeling applicable to all foods; considers, amends, and endorses draft specific provisions on labeling prepared by the Codex committees drafting standards, codes of practice, and guidelines; and studies specific labeling problems assigned to it by the Codex Alimentarius Commission. The Committee also studies problems associated with the advertisement of food with particular reference to claims and misleading descriptions.

The CCFL convened its 47th Session (CCFL47) from May 15–19, 2023, in Gatineau (Ottawa), Canada. The relevant document is REP23/FL. CCCFL47 advanced the following items for consideration by the CAC46 in November 2023:

For Interim Adoption at Step 5

- Proposed draft revision to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): provisions relevant to allergen labelling
- Proposed draft Guidelines on the Provision of Food Information for Prepackaged Foods to be Offered Via E-Commerce
- Proposed draft Guidelines on the Use of Technology to Provide Food Information

For approval as new work:

- Amendments to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): labelling of prepackaged foods in joint presentation and multipack formats

In addition, CCFL47 endorsed labeling provisions in standards developed by other Codex committees, including the Codex Committee on Fresh Fruits and Vegetables (CCFFV); the Codex Committee on Spices and Culinary Herbs (CCSCH); and the Codex Coordinating Committee for Asia (CCASIA). For the Standard for Dried Floral Parts—Saffron, CCFL47 agreed to endorse all labeling provisions except those on country of origin and country of harvest, referring these two provisions back to the CCSCH for reconsideration.

The CCFL is scheduled to convene its 48th session (CCFL48) from October 28 to November 1, 2024, in Ottawa, Canada. The CCFL48 agenda is currently unavailable.

The Committee is expected to continue work on:

- Proposed draft Guidelines on the Provision of Food Information for Prepackaged Foods to be Offered via E-Commerce
- Proposed draft revision to the *General Standard for the Labelling of Prepackaged Foods* (CXS 1–1985): Provisions relevant to allergen labeling and guidelines on precautionary allergen labeling
- Proposed draft Guidelines on the Use of Technology to Provide Food Information
- Discussion Paper on the Labelling of alcoholic beverages
- Redrafting of the Discussion Paper on the Application of food labelling provisions in emergencies
- Discussion Paper on Trans Fatty Acids (TFA)
- Redrafted Discussion Paper on Sustainability Labelling Claims: Revision to the *General Guidelines on Claims* (CXG 1–1979)
- Discussion Paper on the Definition for Added Sugars
- Update to the Discussion Paper on Future work and Direction of CCFL and Criteria for the evaluation and prioritization of work of CCFL

Responsible Agencies: HHS/FDA/CFSAN; USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Fresh Fruits and Vegetables

The Codex Committee on Fresh Fruits and Vegetables (CCFFV) is responsible for elaborating worldwide standards and codes of practice, as may be appropriate, for fresh fruits and vegetables, consulting as necessary, with other international organizations in the standards development process to avoid duplication.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 5/8

- *Standard for onions and shallots* (CXS 348–2022)
- *Standard for berry fruits* (not yet published; document number not yet assigned) *Interim adoption at Step 5*
- Proposed draft standard for fresh dates

Approved as New Work

- New regional standard for *Castilla lulo* (approved to be undertaken as a regional standard by the Regional Coordinating Committee for Latin America and the Caribbean)
- New standard for fresh curry leaves

In addition, the Committee agreed to the following item for internal use by the Committee:

- Glossary of terms used in the layout for Codex standards for fresh fruits and vegetables

The date and location of the 23rd Session of the CCFFV (CCFFV23) have not yet been determined. The CCFFV23 agenda is currently unavailable.

The Committee is expected to continue work on:

- New work proposals
- Draft standard for fresh dates
- Draft standard for fresh curry leaves

Responsible Agencies: USDA/Agricultural Marketing Service (AMS), HHS/FDA/CFSAN.

U.S. Participation: Yes.

Codex Committee on General Principles

The Codex Committee on General Principles (CCGP) is responsible for procedural and general matters referred to it by the Codex Alimentarius Commission, including: (a) The review or endorsement of procedural provisions/texts forwarded by other subsidiary bodies for inclusion in the *Procedural Manual* of the Codex Alimentarius Commission; and (b) The consideration and recommendation of other amendments to the Procedural Manual.

The 33rd Session of the CCGP (CCGP33) is scheduled for October 2–6, 2023, in Bordeaux, France.

The Committee is expected to discuss:

- Revisions/amendments to Codex texts
- Format and structure of the Codex *Procedural Manual*
- Review and possible amendments to the rules of procedure on Sessions of the Commission
- Review and possible amendment of the Principles concerning the participation of international non-governmental organizations in the work of the Codex Alimentarius Commission

Responsible Agencies: USDA/TFAA/USCO

U.S. Participation: Yes.

Codex Committee on Methods of Analysis and Sampling

The Codex Committee on Methods of Analysis and Sampling (CCMAS) defines the criteria appropriate to Codex Methods of Analysis and Sampling; serves as a coordinating body for Codex with other international groups working on methods of analysis and sampling and quality assurance systems for laboratories; specifies, on the basis of final recommendations submitted to it by the bodies referred to above, reference methods of analysis and sampling appropriate to Codex standards which are generally applicable to a number of foods; considers, amends if necessary, and endorses as appropriate, methods of analysis and sampling proposed by Codex (commodity) committees, except for those methods of analysis and sampling for residues of pesticides or veterinary drugs in food, the assessment of microbiological quality and safety in food, and the assessment of specifications for food additives; elaborates sampling plans and procedures, as may be required; considers specific sampling and analysis problems submitted to it by the Commission or any committees; and defines procedures, protocols, guidelines or related texts for the assessment of food laboratory proficiency, as well as quality assurance systems for laboratories.

The CCMAS convened its 42nd Session (CCMAS42) from June 12–16, 2023, in Budapest, Hungary, with virtual report adoption on June 20, 2023. The relevant document is REP23/

MAS. The Committee advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8

- Revised *Guideline on Measurement Uncertainty* (CXG 54–2004)

For Revocation

- *General Standard for Methods for Contaminants* (CXS 228–2001)

The CCMAS is scheduled to convene its 43rd Session CCMAS43 from May 13–17, 2024, in Budapest, Hungary. The CCMAS43 agenda is currently unavailable.

The Committee is expected to continue work on:

- Amendments to certain provisions in *Recommended Methods of Analysis and Sampling* (CXS 234–1999)
- Review of methods for fish and fishery products and fruit juices

Responsible Agencies: HHS/FDA/CFSAN; USDA/AMS.

U.S. Participation: Yes.

Codex Committee on Nutrition and Foods for Special Dietary Uses

The Codex Committee on Nutrition and Foods for Special Dietary Uses (CCNFSDU) is responsible for studying nutrition issues referred to it by the Codex Alimentarius Commission. The Committee also drafts general provisions, as appropriate, on nutritional aspects of all foods and develops standards, guidelines, or related texts for foods for special dietary uses in cooperation with other committees where necessary; considers, amends if necessary, and endorses provisions on nutritional aspects proposed for inclusion in Codex standards, guidelines, and related texts.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- Guidelines for Ready-to-Use Therapeutic Foods (RUTF)

The CCNFSDU convened its 43rd Session (CCNFSDU43) from March 7–10, 2023, in Dusseldorf, Germany, with virtual report adoption on March 15, 2023. The relevant document is REP23/NFSDU. CCNFSDU43 advanced the following items for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8 and Step 5/8

- Revised *Standard for Follow-up Formula* (renamed as the Standard for Follow-up Formula for Older Infants and Product for Young Children) (CXS156–1987)

For Interim Adoption at Step 5

- General Principles for establishing Nutrient Reference Values (NRVs–R) for persons aged 6 to 36 month*s*

The CCNFSDU is scheduled to convene its 44th Session (CCNFSDU44) from October 2–6, 2024. The CCNFSDU44 location and agenda are currently unavailable.

The Committee is expected to continue work on:

- General Principles for the Establishment of Nutrient Reference Values–Requirements (NRVs–R) for persons aged 6–36 months
- Collection and review of information on the use and use levels for five identified additives and their technological justification
- Redrafting of the prioritization mechanism/emerging issues for new work proposals
- Redrafting a revised Discussion Paper on harmonized probiotic guidelines
- Redrafting the Discussion Paper on Guidelines including General Principles for the Nutritional Composition of Foods and Beverages made from Plant-based and other Alternative Protein Sources

Responsible Agencies: HHS/FDA/CFSAN; USDA/ARS.

U.S. Participation: Yes.

Codex Committee on Pesticide Residues

The Codex Committee on Pesticide Residues (CCPR) is responsible for establishing maximum residue limits (MRLs) for pesticide residues in specific food items or in groups of food; establishing MRLs for pesticide residues in certain animal feeding stuffs moving in international trade where this is justified for reasons of protection of human health; preparing priority lists of pesticides for evaluation by the Joint FAO/WHO Meeting on Pesticide Residues (JMPR); considering methods of sampling and analysis for the determination of pesticide residues in food and feed; considering other matters in relation to the safety of food and feed containing pesticide residues; and establishing maximum limits for environmental and industrial contaminants showing chemical or other similarity to pesticides in specific food items or groups of food.

The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8 and 5/8

- Over 300 Maximum Residue Limits (MRLs) for different combinations of pesticides/commodities
- Guidelines for the recognition of active substances or authorized uses of active substances of low public health concern that are considered exempted from the establishment of Codex maximum residue limits (MRLs) or do not give rise to residues
- Revision of *Classification of Food and Feed* (CXA 4–1989): definitions for edible offal, fat, meat, and muscle, including the definitions for the portion of the commodity to which MRLs apply and which is analyzed for fat and muscle; consequential amendment to Class D, Processed Food of Plant Origin; inclusion of additional commodities for citrus fruits pulps (dried) and oils (edible) and soya flour

The CAC45 also discontinued work, approved new work, and revoked existing MRLs as recommended by CCPR53, and noted the discontinuation of discussion of review of the international estimated short-term intake (IESTI) equations.

The CCPR convened its 54th Session (CCPR54) in Beijing, China from June 26–July 1, 2023. The relevant document is REP23/PR. CCPR54 advanced the following items for consideration by the CAC46 in November 2023:

For final adoption at Step 8 and 5/8

- Over 400 Maximum Residue Limits (MRLs) for different combinations of pesticides/commodities
- Revision of the *Classification of Food and Feed* (CXA 4–1989):
  - the revised Class B- Primary food commodities of animal origin and Class E -Processed Foods of Animal Origin (All Types) and their respective table of representative commodities;
  - the consequential amendment to Table 2, Subgroup 12C Eggplant and eggplant-like commodities to the *Principles and Guidance on the Selection of Representative Commodities for the Extrapolation of MRLs for Pesticides to Commodity Groups* (CXG 84–2012);
  - the consequential amendment to the revised definition for the portion of the commodity to which MRLs apply and which is analyzed for Group 006—Tropical Fruits of Inedible Peel and 023—Oil fruits; and
  - the consequential amendments to the inclusion of new commodities/commodity codes in Class A—Primary food commodities of plant

origin and Class D—Processed commodities of plant origin

For Revocation

- The *Guidelines on Portion of Commodities to which MRLs Apply and which is Analyzed* (CXG 41–1993), noting that the *Classification of Food and Animal Feeds* (CXA 4–1989) should be the single, authoritative reference of food and feed for the establishment of MRLs for pesticides

For Approval as New Work

- Guidance for monitoring the purity and stability of reference materials of multi-class pesticides during prolonged storage

The CAC46 will also consider discontinuation of work and revocation of existing MRLs as recommended by CCPR54.

The CCPR is scheduled to convene its 55th Session (CCPR55) from June 3–8, 2024, in China. The CCPR55 agenda is currently unavailable.

The Committee is expected to continue work on:

- Coordination of work between CCPR and CCRVDF: Joint CCPR/CCRVDF Working Group on Compounds for Dual Use
- National registration of pesticides
- Management of unsupported compounds without public health concern scheduled for periodic review
- Establishment of Codex schedules and priority lists of pesticides for evaluation/re-evaluation by JMPR
- Enhancement of the operational procedures of CCPR and JMPR

Responsible Agencies: EPA/Office of Chemical Safety and Pollution Prevention (OCSPP)/Office of Pesticide Programs (OPP); USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Residues of Veterinary Drugs in Foods

The Codex Committee on Residues of Veterinary Drugs in Foods (CCRVDF) determines priorities for the consideration of residues of veterinary drugs in foods and recommends MRLs for veterinary drugs. The Committee also develops codes of practice, as may be required, and considers methods of sampling and analysis for the determination of veterinary drug residues in food.

The Committee had the following item which was considered and approved by the CAC45 in November 2022:

Interim Adoption at Step 5

- MRLs for zilpaterol hydrochloride (cattle kidney, liver, muscle)

The CCRVDF convened its 26th Session (CCRVDF26) from February 13–17, 2023, in Portland, Oregon. The relevant document is REP23/RVDF. CCRVDF26 advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8 and 5/8

- 57 maximum residue limits (MRLs) for 13 veterinary drugs

For Approval

- Priority List of veterinary drugs requiring evaluation or re-evaluation by JECFA

The CCRVDF is scheduled to convene its 27th Session (CCRVDF27) from October 21–25, 2024. The CCRVDF27 location, and agenda are currently unavailable.

The Committee is expected to continue work on:

- Extrapolation of MRLs between species and to edible offal tissues
- Establishment of action levels for residues of veterinary drugs in edible tissues caused by unavoidable and unintended carryover of veterinary drug residues in animal feed
- Coordination between CCRVDF and CCPR on issues affecting both committees (*e.g.,* harmonization of MRLs for similar edible commodities of animal origin; harmonization of risk assessment methodologies; data-sharing for dual-use compounds)
- Priority List of veterinary drugs requiring evaluation or re-evaluation by JECFA

Responsible Agencies: HHS/FDA/Center for Veterinary Medicine (CVM); USDA/FSIS.

U.S. Participation: Yes.

Codex Committee on Spices and Culinary Herbs

The Codex Committee on Spices and Culinary Herbs (CCSCH) is responsible for elaborating worldwide standards for spices and culinary herbs in their dried and dehydrated state in whole, ground, and cracked or crushed form. CCSCH also consults, as necessary, with other international organizations in the standards development process to avoid duplication.

The CCSCH convened its 6th Session (CCSCH6) virtually from September 26 to October 10, 2022. The relevant document is REP22/SCH. The Committee had the following items which were considered and approved by the CAC45 in November 2022:

Final Adoption at Step 8

- Standard for Dried Floral Parts—Saffron (not yet published)
- *Standard for Dried Seeds—Nutmeg* (CXS 352–202)
- Standard for Dried or Dehydrated Chili Pepper and Paprika (not yet published)
- Amendments to the labelling provisions for non-retail containers in the eight existing spices and culinary herb (SCH) standards, for consistency with the new *General Standard for the Labelling of Non-Retail Containers of Foods* (CXS 346–2021)

Interim Adoption at Step 5

- Proposed draft standard for dried small cardamom
- Proposed draft group standard for spices in the form of dried fruits and berries (allspice, juniper berry, star anise and vanilla)

The CCSCH is scheduled to convene its 7th Session (CCSCH7) from January 29–February 2, 2024, in India. The CCSCH7 agenda is currently unavailable.

The committee is expected to continue work on:

- Proposed draft standard for turmeric
- Proposed draft standard for spices in dried fruits and berries—vanilla
- Update to the SCH Grouping Template

Responsible Agencies: USDA/AMS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Adjourned Codex Commodity Committees

Several Codex Alimentarius Commodity Committees have adjourned *sine die.* The following Committees fall into this category:

Cereals, Pulses and Legumes—adjourned sine die 2020

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Cocoa Products and Chocolate—adjourned sine die 2001

Responsible Agency: HHS/FDA/CFSAN.

U.S. Participation: Yes.

Meat Hygiene—adjourned sine die 2003

Responsible Agency: USDA/FSIS.

U.S. Participation: Yes.

Milk and Milk Products—adjourned sine die 2017

Responsible Agency: USDA/AMS; HHS/FDA/CFSAN.

U.S. Participation: Yes.

Natural Mineral Waters—adjourned sine die 2008

Responsible Agency: HHS/FDA/CFSAN.
U.S. Participation: Yes.

Processed Fruits and Vegetables—adjourned sine die 2020

Responsible Agency: USDA/AMS; HHS/FDA/CFSAN.
U.S. Participation: Yes.

Sugars—adjourned sine die 2019

Responsible Agency: HHS/FDA/CFSAN.
U.S. Participation: Yes.

Vegetable Proteins—adjourned sine die 1989

Responsible Agency: USDA/ARS.
U.S. Participation: Yes.

FAO/WHO Regional Coordinating Committees

The FAO/WHO Regional Coordinating Committees define the problems and needs of the regions concerning food standards and food control; promote within the Committee contacts for the mutual exchange of information on proposed regulatory initiatives and problems arising from food control and stimulate the strengthening of food control infrastructures; recommend to the Commission the development of worldwide standards for products of interest to the region, including products considered by the Committees to have an international market potential in the future; develop regional standards for food products moving exclusively or almost exclusively in intra-regional trade; draw the attention of the Commission to any aspects of the Commission's work of particular significance to the region; promote coordination of all regional food standards work undertaken by international governmental and non-governmental organizations within each region; exercise a general coordinating role for the region and such other functions as may be entrusted to them by the Commission; and promote the use of Codex standards and related texts by members.

There are six regional coordinating committees:

- Coordinating Committee for Africa
- Coordinating Committee for Asia
- Coordinating Committee for Europe
- Coordinating Committee for Latin America and the Caribbean
- Coordinating Committee for the Near East
- Coordinating Committee for North America and the South West Pacific

Coordinating Committee for Africa

The Coordinating Committee for Africa (CCAFRICA) convened its 24th Session (CCAFRICA24) virtually from September 5–9, 2022, with report adoption taking place on September 13, 2022.

The CCAFRICA had the following items which were considered and adopted by the CAC45 in November 2022:

Final Adoption at Step 8

- Regional standard for dried meat (not yet published)

Final Adoption at Step 5/8

- *Guidelines for Developing Harmonized Food Safety Legislation for the CCAFRICA Region* (CXG 98–2022)

The CCAFRICA plans to convene its 25th Session (CCAFRICA25) in approximately two years' time. The CCAFRICA25 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Asia

The Coordinating Committee for Asia (CCASIA) convened its 22nd Session (CCASIA22) virtually from October 12–18, 2022, with report adoption taking place on October 21, 2022.

The CCASIA advanced the following items for consideration at the CAC46 in November 2023:

For Final Adoption at Step 8 or Step 5/8

- Proposed draft regional standard for soybean products fermented with *Bacillus* species
- Proposed draft regional standard for cooked rice wrapped in plant leaves
- Proposed draft regional standard for quick frozen dumpling
- Amendment to the labelling provisions for non-retail containers in relevant CCASIA regional standards

The CCASIA plans to convene its 23rd Session (CCASIA23) in 2024. The CCASIA23 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Europe

The Coordinating Committee for Europe (CCEURO) did not meet during the time period covered by this notice and has not announced the date or location of its next session (CCEURO33). The CCEURO33 agenda is currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for Latin America and the Caribbean

The Coordinating Committee for Latin America and the Caribbean (CCLAC) convened its 22nd Session (CCLAC22) virtually from October 24–28, 2022.

The CCLAC plans to convene its 23rd Session (CCLAC23) in approximately two years' time from CCLAC22. The CCLAC23 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for North America and the South West Pacific

The Coordinating Committee for North America and the South West Pacific (CCNASWP) convened its 16th Session (CCNASWP16) in Nadi, Fiji, from January 30 to February 3, 2023.

The CCNASWP advanced the following item for consideration by the CAC46 in November 2023:

For Final Adoption at Step 8

- Draft regional standard for fermented noni fruit juice

The CCNASWP will convene its 17th Session in approximately two years' time from CCNASWP16. The CCNASWP17 date, location, and agenda are currently unavailable.

Responsible Party: USDA/TFAA/USCO.
U.S. Participation: Yes (as an observer).

Coordinating Committee for the Near East

The Coordinating Committee for the Near East (CCNE) did not meet in 2022. The CCNE plans to convene its 11th Session (CCNE11) at FAO headquarters in Rome, Italy, September 18–22, 2023. The agenda for CCNE 11 includes discussion of the following topics: alignment of regional standards, proposed draft regional standard for maamoul, Codex work relevant to the region, food safety and quality in the region including current and emerging issues—country updates, implementation of the Codex Strategic Plan 2020–2025, Discussion Paper on the development of a standard for halal products, and Nomination of the regional coordinator.

Responsible Party: USDA/TFAA/USCO.

U.S. Participation: Yes (as an observer).

Contact Information

U.S. Codex Office, United States Department of Agriculture, Room 4861, 1400 Independence Avenue SW, Washington, DC 20250–3700, Email: *uscodex@usda.gov.*

[FR Doc. 2023–17128 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Nebraska Advisory Committee; Cancellation

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of community forum meeting.

SUMMARY: The Commission on Civil Rights published a notice in the **Federal Register** concerning a community forum meeting of the Nebraska Advisory Committee. The meeting scheduled for Wednesday, August 9, 2023, at 1:00 p.m. (CST) is cancelled.

FOR FURTHER INFORMATION CONTACT: Victoria Moreno, *vmoreno@usccr.gov,* (434) 515–0204.

SUPPLEMENTARY INFORMATION: The meeting notice was originally published in the **Federal Register** of Thursday, July 27, 2023, in FR Doc. 2023–15886 in the second columns of page 48431 (88 FR 48431).

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17161 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the U.S. Virgin Islands Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the U.S. Virgin Islands Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom. The purpose of the meeting is to discuss and plan on matters related to the Committee's inaugural civil rights project.

DATES: Tuesday, September 5, 2023, from 11:00 a.m.–12:30 p.m. Atlantic Time.

ADDRESSES: The meeting will be held via Zoom.

Meeting Link (Audio/Visual): https://www.zoomgov.com/j/1603920110.

Join by Phone (Audio Only): 1–833–435–1820 USA Toll-Free; Meeting ID: 160 392 0110#.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or 1–202–656–8937.

SUPPLEMENTARY INFORMATION: This Committee meeting is available to the public through the Zoom meeting link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting ''CC'' in the meeting platform. To request additional accommodations, please email *svillanueva@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–656–8937.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, U.S. Virgin Islands Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *svillanueva@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Committee's Inaugural Civil Rights Project
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17163 Filed 8–9–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Monday, August 28, 2023, at 3:30 p.m. Atlantic Time/Eastern Time. The purpose is to continue discussion on their project on the civil rights impacts of the Insular Cases in Puerto Rico.

DATES: August 28, 2023, Monday, at 3:30 p.m. (AT and ET):

ADDRESSES: Meeting will be held via Zoom.

Registration Link (Audio/Visual): https://tinyurl.com/yvabtunr.

Join by Phone (Audio Only): 1–833 435 1820 USA Toll Free; Meeting ID: 160 718 7790#.

FOR FURTHER INFORMATION CONTACT: Email Victoria Moreno, Designated Federal Officer at *vmoreno@usccr.gov,* or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting will take place in Spanish with English interpretation. This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-

line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email *ebohor@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Victoria Moreno at *vmoreno@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–312–353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Puerto Rico Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *ebohor@usccr.gov.*

Agenda

1. Welcome & Roll Call
2. Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: August 7, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–17160 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Additional Protocol to the U.S.—International Atomic Energy Agency Safeguards

AGENCY: Bureau of Industry and Security, Department of 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 October 10, 2023.

ADDRESSES: Interested persons are invited to submit comments by email to Mark Crace, IC Liaison, Bureau of Industry and Security, at *mark.crace@bis.doc.gov* or to *PRAcomments@doc.gov.* Please reference OMB Control Number 0694–0135 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 Mark Crace, IC Liaison, Bureau of Industry and Security, phone 202–482–8093 or by email at *mark.crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Additional Protocol requires the United States to submit declaration forms to the International Atomic Energy Agency (IAEA) on a number of commercial nuclear and nuclear-related items, materials, and activities that may be used for peaceful nuclear purposes, but also would be necessary elements for a nuclear weapons program. These forms provides the IAEA with information about additional aspects of the U.S. commercial nuclear fuel cycle, including: mining and milling of nuclear materials; buildings on sites of facilities selected by the IAEA from the U.S. Eligible Facilities List; nuclear-related equipment manufacturing, assembly, or construction; import and export of nuclear and nuclear-related items and materials; and research and development. The Protocol also expands IAEA access to locations where these activities occur in order to verify the form data.

II. Method of Collection

Submitted electronically or in paper form.

III. Data

OMB Control Number: 0694–0135.

Form Number(s): AP–1 through AP–17, and AP–A through AP–Q.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time per Response: 23 minutes to 6 hours.

Estimated Total Annual Burden Hours: 920.

Estimated Total Annual Cost to Public: 5,400.

Respondent's Obligation: Mandatory.

Legal Authority: Additional Protocol Implementation Act (Title II of Pub. L. 109–401), Executive Order (E.O.) 13458.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–17117 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD203]

Endangered and Threatened Species; Notice of Intent To Prepare a Programmatic Environmental Impact Statement for NOAA's Expenditure of Funds To Increase Prey Availability for Southern Resident Killer Whales

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

ACTION: Notice of intent to prepare an environmental impact statement, request for comments.

SUMMARY: This notice announces an Environmental Impact Statement (EIS) will be prepared in accordance with the National Environmental Policy Act (NEPA) to analyze the impacts to the environment of alternatives related to a funding program addressing species affected by fisheries managed under the Pacific Salmon Treaty (PST). NMFS intends to make funding decisions related to increasing the availability of prey to Southern Resident Killer Whales (SRKWs). This notice is necessary to inform the public of NMFS's intent to prepare this EIS and to provide the public with an opportunity to provide input for NMFS's consideration.

DATES: The NMFS requests comments concerning the scope of the analysis, and identification of relevant information, studies, and analyses. All comments must be received by 11:59 p.m. Eastern Time on September 25, 2023.

ADDRESSES: Send written comments to NOAA Fisheries, 2900 NW Stewart Parkway, Roseburg, OR 97471. Comments may also be sent via email to *hatcheries.public.comment@noaa.gov.* For further information, please see the following website: *https://www.fisheries.noaa.gov/action/review-prey-increase-program-southern-resident-killer-whales.*

Instructions: It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should help NMFS identify potential alternatives, information, and analyses relevant to the proposed action. Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments.

FOR FURTHER INFORMATION CONTACT: Lance Kruzic, NMFS, 541–802–3728, *hatcheries.public.comment@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Purpose and Need for the Proposed Action

The purpose and need of the proposed action is to provide for additional prey (food) for the benefit of SRKWs, which are listed as endangered under the Endangered Species Act (ESA) consistent with applicable laws and treaties.

Preliminary Proposed Action and Alternatives

The United States and Canada have an agreement for the management of Chinook salmon and the fisheries that affect Chinook stocks that is part of the PST. This agreement was renewed in 2019 and is currently in effect through 2028. In association with the renewed agreement, the U.S. section of the Pacific Salmon Commission, the international body that implements the PST, agreed to seek Federal funding for activities to conserve certain species listed under the ESA that are affected by fisheries managed under the PST. Congress has appropriated annual funding for these activities in 2020 through 2023. A portion of the funding has been awarded to hatchery operators in the Pacific Northwest to increase production of Chinook salmon for the purpose of increasing prey for SRKWs.

NMFS is proposing to continue implementation of the funding program to increase prey for the benefit of SRKWs. Beginning in 2020, NMFS funded the production of additional hatchery Chinook salmon in existing hatchery programs in Washington, Oregon, and Idaho. Specific criteria were developed to guide these funding decisions to maximize the benefits to SRKWs, while mitigating potential adverse effects to salmon and steelhead listed under the ESA. NMFS conducted site-specific NEPA analyses for each funding decision or otherwise ensured that effects from funding specific hatcheries were evaluated within existing NEPA analyses. However, in a recent court ruling (*Wild Fish Conservancy* v. *Rumsey,* W.D. Wash., Order Adopting Report and Recommendation, August 8, 2022), the court found that NMFS failed to conduct adequate NEPA analysis for the adoption of the prey increase program. This EIS responds to the court's decision.

We will also be evaluating the effects of a No Action alternative, in which no Federal funding would be used to increase available Chinook prey for the benefit of SRKWs. NMFS is also planning to evaluate other possibilities. For example, instead of funding additional prey for SRKWs in the form of hatchery fish, funding could instead be used to improve the productivity of natural-origin salmon through habitat restoration/enhancement. Another alternative could reduce fishing impacts on select salmon stocks instead of producing additional hatchery fish. Through this notice, we are seeking input on these potential alternatives to help shape the development of our EIS consistent with our purpose and need for the proposed action.

Summary of Expected Impacts

The EIS will evaluate a range of alternatives, and the effects of these alternatives, on the human environment. Key resources to be considered include, but are not limited to, SRKWs and other wildlife species, salmon and steelhead, socioeconomics, and aquatic habitats. Considering a range of alternatives means there is a range of impacts to the key resources specified above that would be evaluated in the EIS, such as different abundances of hatchery salmon available as prey for SRKWs, reduced fishery impacts and corresponding salmon abundances, and effects of additional hatchery salmon production on ESA-listed salmon and steelhead.

Anticipated Permits and Authorizations

The following consultations, permits, and/or other authorizations may be required as part of NMFS' continued funding to increase the availability of prey (food) for SRKWs: ESA Section 7 consultations, ESA Section 4(d) authorizations or Section 10 permits, Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat consultation; and consultation with Indian Tribes.

Schedule for the Decision-Making Process

The draft environmental impact statement is scheduled to be made available for public review in the fall of

2023, and issuance of the final environmental impact statement is scheduled for spring of 2024, with a Record of Decision issued soon thereafter.

Public Scoping Process

This notice of intent initiates the scoping process, which helps guide the development of the EIS. NMFS is hosting public webinars for informational purposes within the scoping period. Information on the webinar dates and times, and instructions for connecting or calling into the webinar will be posted at: *https://www.fisheries.noaa.gov/action/review-prey-increase-program-southern-resident-killer-whales.* Accommodations for persons with disabilities are available; accommodation requests should be directed to Lance Kruzic (see **FOR FURTHER INFORMATION CONTACT**) at least 10 working days prior to the webinar.

Public comments will not be accepted during the webinars.

Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Action

The primary purpose of the scoping process is for the public to assist NMFS in developing the EIS. NMFS requests that the comments be specific. In particular, we request information regarding: any science that would be relevant in this assessment; significant issues; identification of impacts of concern; review and input regarding monitoring; possible alternatives that meet the purpose and need; effects or impacts to the human environment from the proposed action or alternatives.

Decision Maker

Regional Administrator for the West Coast Region, NMFS.

Nature of Decision To Be Made

If after publication of the Record of Decision, we determine that all requirements are met for NMFS' NEPA and ESA responsibilities, we may continue to provide funding for the production of additional prey for SRKWs.

Authority: 42 U.S.C. 4321 *et seq.;* 40 CFR parts 1500–1508; and Companion Manual for NOAA Administrative Order 216–6A, 82 FR 4306.

Dated: August 7, 2023.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–17184 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD232]

Request for Information; Data for Marine Spatial Studies in Puerto Rico and the U.S. Virgin Islands

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

ACTION: Notice; request for information.

SUMMARY: NOAA's National Ocean Service (NOS), National Centers for Coastal Ocean Science (NCCOS) in partnership with the NOAA National Marine Fisheries Service (NMFS), Southeast Fisheries Science Center (SEFSC) and Southeast Regional Office (SERO), hereafter NOAA, are working to build spatial science capacity in the U.S. Caribbean Region. Through this Request for Information, we are seeking public input to identify coastal and marine spatial data or other critical information to inform marine spatial analyses. Additionally, we are seeking feedback on data shortcomings and gaps that should be addressed prior to commencing marine spatial studies. The input we receive from meetings, as well as the responses to the items listed in the **SUPPLEMENTARY INFORMATION** section of this document, will be used to inform potential coastal and ocean development activities in Puerto Rico and the U.S. Virgin Islands (USVI), such as development of renewable energy facilities, aquaculture, and other blue economy sectors.

DATES: Interested persons are invited to provide input in response to this Request for Information through September 30, 2023. Late-filed input will be considered to the extent practicable.

Verbal input will be accepted during two public meetings to be held in St. Croix, USVI on August 28–29 and in San Juan, Puerto Rico on August 31–September 1.

ADDRESSES: Interested persons are invited to provide input using one of the following methods:

Electronic Submission: Submit electronic written public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0097 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NOAA will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Verbal submission: NOAA will accept verbal input at two meetings. The first meeting will be held at The Buccaneer Resort in St. Croix, USVI on Monday August 28, 2023 from 8:30am to 5:00pm (AST) and Tuesday, August 29, 2023 from 8:30am to 12:00pm (AST). There will be a registration window from 8:30am to 9:00am (AST) each day before the start of the meeting. The second meeting will be held at the Courtyard Marriott Isla Verde Beach Resort in San Juan, Puerto Rico on Thursday, August 31, 2023 from 8:30am to 5:00pm (AST) and Friday, September 1, 2023 from 8:30am to 12:00pm (AST). There will be a registration window from 8:30am to 9:00am (AST) each day before the start of the meeting. Simultaneous language interpretation in English and Spanish will be provided in the Puerto Rico meetings. Advanced registration is requested for the meetings by completing the registration form at *https://docs.google.com/forms/d/e/1FAIpQLSf1B1QOXhd7EJEDflyok-ATW4ZGLHRloJLSzcntmopDjhd86A/viewform?usp=sf* link or by providing an RSVP to Erica Rule at *erica.rule@noaa.gov*. The registration deadline is Monday, August 21, 2023.

Reports of meeting results will also be published and made available to the public in the weeks following the meetings. If you are unable to provide electronic written comments or participate in the meetings, please contact Jennifer Wright at *jennifer.wright@noaa.gov* or (252)418–1308 for alternative submission methods.

FOR FURTHER INFORMATION CONTACT: James Morris (*james.morris@noaa.gov*), (252)666–7433.

SUPPLEMENTARY INFORMATION:

Background

NOAA is an agency of the United States Federal government that works to conserve and manage coastal and marine ecosystems and resources. We work to make fisheries sustainable and productive, provide safe seafood to consumers, conserve threatened and endangered species and other protected resources, and maintain healthy ecosystems. NOAA has jurisdiction and

responsibility for its trust marine resources in the U.S. Caribbean as well as significant interest in supporting the resilience of coastal and marine-dependent communities in the Territories, and promoting equity and environmental justice. For these reasons, is it important for NOAA to invest in research that informs marine spatial studies in the Caribbean region, including socioeconomic research that ensures meaningful participation of Caribbean communities and supports equitable processes for planning and siting of new and existing marine industries and conservation areas.

NOAA has recently been involved in planning for the expansion of offshore aquaculture in U.S. Federal waters through the development of Aquaculture Opportunity Areas (*https://www.fisheries.noaa.gov/national/aquaculture/aquaculture-opportunity-areas*). NOAA has also been engaged with the Bureau of Ocean Energy Management (BOEM) to support siting and environmental review for offshore wind energy areas in U.S. Federal waters (*https://www.boem.gov/renewable-energy*) to ensure protection of trust resources in any offshore development activities.

Purpose of This Request for Information

The purpose of this Request for Information is to promote data development to inform marine spatial studies in Puerto Rico and the USVI, with an emphasis on data needs for offshore wind energy and aquaculture development. In addition to input received from the public through the electronic and verbal submissions, NOAA aims to inform the public about its coastal and ocean planning processes and capabilities, discuss the current data available for each ocean sector (e.g., military, fisheries, industry, natural resources), and gather ideas for other data sources. NOAA hopes to come out of the meetings with a strengthened relationship with the public and a list of data gaps and needs to pursue going forward.

Specific Information Requested To Inform Marine Spatial Studies in Puerto Rico and USVI

Through this Request for Information, NOAA seeks written public input to inform the marine spatial studies in Puerto Rico and USVI. NOAA is particularly interested in receiving input concerning the items listed below. Responses to this Request for Information are voluntary, and respondents need not reply to items listed. When providing input, please specify if you are providing general feedback on marine spatial studies and/or if you are responding to one of the specific item number(s) below:

(1) Specific datasets related to ocean sectors, natural resources, and/or human activities you recommend NOAA use in marine spatial studies.

(2) Major concerns you have related to use of any specific datasets that may be used in marine spatial studies.

(3) Major concerns you have related to the impacts of new marine industries on ecological systems in Puerto Rico and/or the USVI.

(4) Major concerns you have related to the impact of new marine industries on other ocean industries in Puerto Rico and/or the USVI.

(5) Major concerns you have related to gaps in scientific knowledge or data that could impact marine spatial study efforts.

(6) Specific data or information you recommend NOAA or other partners collect, if it is not currently available or has not been previously collected.

(7) Ways in which NOAA can better engage and collaborate with the public and Territorial communities to promote economic, social, and ecological resilience as well as protect trust resources.

Dated: August 4, 2023.

Samuel D Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2023–17119 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[0648–XD226]

Notice of Availability of Draft Environmental Assessment on the Effects of Issuing an Incidental Take Permit No. 27106

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

ACTION: Notice; availability of a Draft Environmental Assessment; request for comments.

SUMMARY: NMFS announces the availability of the Draft Environmental Assessment (EA) on the effects of issuing an Incidental Take Permit (ITP) (No. 27106) to North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries (NCDMF), pursuant to the Endangered Species Act (ESA) of 1973, as amended, for the incidental take of ESA-listed sea turtles and sturgeon associated with the otherwise lawful gill net fisheries operating in the inshore waters of North Carolina. The duration of the requested permit is 10 years. NMFS is requesting comment on the draft EA.

DATES: Written comments must be received at the appropriate address or fax number (see **ADDRESSES**) on or before September 11, 2023.

ADDRESSES: The EA is available for download and review at *https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits* under the section heading Related Documents for the Incidental Take Permit to North Carolina Division of Marine Fisheries (Sea Turtles and Sturgeon). The draft EA is also available upon written request (see **FOR FURTHER INFORMATION CONTACT**).

You may submit comments on this document, identified by NOAA–NMFS–2023–0098, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0098 in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Celeste Stout, NMFS, Office of Protected Resources at *celeste.stout@noaa.gov,* 301–427–8403; Wendy Piniak, NMFS, Office of Protected Resources at *wendy.piniak@noaa.gov,* 301–427–8402.

SUPPLEMENTARY INFORMATION: Publication of this notice begins the official public comment period for this draft EA. Per the National Environmental Policy Act (NEPA), the purpose of the draft EA is to evaluate the potential direct, indirect, and cumulative impacts caused by the issuance of Permit No. 27106 to NCDMF for the incidental take of ESA-listed sea

turtles and sturgeon associated with the otherwise lawful anchored small and large-mesh gill net fisheries operating in the inshore waters of North Carolina. All comments received will become part of the public record and will be available for review.

Section 9 of the ESA and Federal regulations prohibit the 'taking' of a species listed as endangered or threatened. The ESA defines ''take'' to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. NMFS may issue permits, under limited circumstances to take listed species incidental to, and not the purpose of, otherwise lawful activities. Section 10(a)(1)(B) of the ESA provides a mechanism for authorizing incidental take of listed species. NMFS regulations governing permits for threatened and endangered species are promulgated at 50 CFR 222.307.

Species Covered in This Notice

The following species are included in the EA: North Atlantic and South Atlantic Distinct Population Segments (DPSs) of green (*Chelonia mydas*), Kemp's ridley (*Lepidochelys kempii*), hawksbill (*Eretmochelys imbricata*), leatherback (*Dermochelys coriacea*), and Northwest Atlantic Ocean DPS of loggerhead (*Caretta caretta*) sea turtles, Gulf of Maine, New York Bight, Chesapeake, Carolina, and South Atlantic DPSs of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), and shortnose sturgeon (*Acipenser brevirostrum*).

Background

NMFS received a draft permit application and conservation plan from NCDMF on June 22, 2022. Based on our review of the draft application, we requested further information and clarification on their mitigation measures and take requests. After several draft submissions and reviews, on December 2, 2022, NCDMF submitted a complete revised application for the incidental take of ESA-listed sea turtles and sturgeon. On December 22, 2022, we published a notice of receipt (87 FR 78659) of application and conservation plan from NCDMF for an incidental take permit. In that notice, we made the ITP application and associated conservation plan available for public comment. Subsequently, we received a request to extend the public comment period. NMFS provided a 30-day extension (88 FR 3971) to the comment period which closed on February 22, 2023. We received 231 comments on the application and conservation plan and responses to these comments are available in the draft EA.

National Environmental Policy Act

This notice is provided pursuant to section 10(c) of the ESA and the National Environmental Policy Act (NEPA) regulations (40 CFR 1506.6). The draft EA was prepared in accordance with NEPA (42 U.S.C. 4321, *et seq.*), 40 CFR 1500–1508 and NOAA policy and procedures (NOAA Administrative Order [NAO] 216–6A and the Companion Manual for the NAO 216–6A).

Alternatives Considered

NMFS' proposed action is issuance of an ITP to NCDMF, which would authorize take of threatened and endangered sea turtle and sturgeon species associated with the otherwise lawful operation of NC commercial inshore large and small-mesh anchored gill net fisheries and require implementation of a conservation plan, in accordance with the requirements of the ESA. In preparing the draft EA, NMFS considered the following two alternatives for the proposed action.

Alternative 1: No Action. In accordance with the NOAA Companion Manual (CM) for NAO 216–6A, Section 6.B.i, NMFS is defining the no action alternative as not authorizing the requested incidental take of ESA-listed sea turtles and sturgeon. This is consistent with our statutory obligation under section 10(a)(1)(B) of the ESA to either: (1) deny the requested ITP or (2) grant the requested ITP and prescribe mitigation, monitoring, and reporting requirements. Under the no action alternative, NMFS would not issue the ITP, in which case, we assume NCDMF would continue to operate the fishery as described in the application without implementing the full suite of specific mitigation measures, monitoring, reporting explained in the Conservation Plan. The Council on Environmental Quality (CEQ) Regulations and the Companion Manual for NAO 216–6A require consideration and analysis of a no action alternative for the purposes of presenting a comparative analysis to the action alternatives. The no action alternative, serves as a baseline against which the impacts of the action alternatives will be compared and contrasted.

Alternative 2: Issue Permit as Requested in Application (Preferred alternative): Under Alternative 2, an ITP would be issued to exempt NCDMF from the ESA prohibition on taking sturgeon and sea turtles during operation of the otherwise lawful NC commercial inshore anchored gill net fisheries. As required under Section 10(a)(1)(B), the ITP would require NCDMF to operate as described in the application and conservation plan to avoid, minimize, and mitigate take of ESA-listed sea turtles and sturgeon.

Final permit determinations will not be completed until after the end of the 30-day comment period and will fully consider all public comments received during the comment period. NMFS will publish a record of its final action in the **Federal Register**.

Dated: August 7, 2023.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–17170 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Application for Appointment in the NOAA Commissioned Officer Corps

AGENCY: National Oceanic and 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 October 10, 2023.

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 0648–0047 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 LT Dustin Picard, Chief, NOAA Corps Recruiting Branch, (301) 713–7717, or *chief.noaacorps.recruiting@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for revision and extension of an existing information collection.

The NOAA Commissioned Officer Corps is the uniformed service of the National Oceanic and Atmospheric Administration (NOAA), a bureau of the United States Department of Commerce. Officers serve under Senate-confirmed appointments and Presidential commissions (33 U.S.C. chapter 17, subchapter 1, sections 853 and 854). The NOAA Corps provides a cadre of professionals trained in engineering, earth sciences, oceanography, meteorology, fisheries science, and other related disciplines who serve their country by supporting NOAA's mission of surveying the Earth's oceans, coasts, and atmosphere to ensure the economic and physical well-being of the Nation.

NOAA Corps officers operate vessels and aircraft engaged in scientific missions and serve in leadership positions throughout NOAA. Persons wishing to apply for an appointment in the NOAA Commissioned Officer Corps must complete an application package, including NOAA Form 56–42, at least three letters of recommendation, and official transcripts. A personal interview must also be conducted. Eligibility requirements include a bachelor's degree with at least 48 credit hours of science, engineering, or other disciplines related to NOAA's mission, excellent health, and normal color vision with uncorrected visual acuity no worse than 20/400 in each eye (correctable to 20/20).

The revision includes updates which reflect the current status of the NOAA Corps. This includes amending the essay questions and updating the instructions to reflect a new direct-to-aviation recruitment model.

II. Method of Collection

Applicants must utilize the online E-recruit electronic application to complete and digitally submit the form. An in-person interview is also required.

III. Data

OMB Control Number: 0648–0047.

Form Number(s): NOAA 56–42 and NOAA 56–42A.

Type of Review: Regular submission [revision and extension of an existing information collection.]

Affected Public: Individuals or households.

Estimated Number of Respondents: 300.

Estimated Time per Response: Written applications, 2 hours; interviews, 5 hours; references, 15 minutes.

Estimated Total Annual Burden Hours: 2,475.

Estimated Total Annual Cost to Public: $21,750.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 33 U.S.C. chapter 17, subchapter 1, sections 853 and 854.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–17169 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–T–2023–0028]

Changes to Duration of Attorney Recognition; Notice of Public Listening Session and Request for Comments

AGENCY: United States Patent and Trademark Office, U.S. Department of Commerce.

ACTION: Notice of public listening session; request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) seeks public comments on changes to the trademark rule regarding the duration of attorney recognition. In addition, the USPTO is announcing a public listening session on September 26, 2023, titled ''Changes to Duration of Attorney Recognition,'' to offer further opportunity for the public to provide input on this topic.

DATES: The public listening session will take place on September 26, 2023, from 2–3:30 p.m. ET. Anyone wishing to present oral testimony at the hearing, either in person or virtually, must submit a written request for an opportunity to do so no later than September 15, 2023. Persons seeking to attend, either in person or virtually, but not to speak at the event must register by September 18, 2023. Seating is limited for in-person attendance. The USPTO will accept written comments until October 6, 2023.

ADDRESSES:

Public Listening Session

The public listening session will take place in person in the Clara Barton Auditorium at the USPTO, 600 Dulany Street, Alexandria, VA 22314. The session will also be available via live feed for those wishing to attend remotely. Registration is required for both in-person and virtual attendance. Information on registration is available on the USPTO's website at *www.uspto.gov/about-us/events/trademark-public-listening-session-changes-duration-attorney-recognition.*

Request for Comments

For reasons of Government efficiency, commenters must submit their comments through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–T–2023–0028 on the homepage and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this request

for comments and click on the ''Comment'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery.

FOR FURTHER INFORMATION CONTACT: Catherine Cain, Office of the Deputy Commissioner for Trademark Examination Policy, at 571–272–8946 or *TMPolicy@uspto.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Trademark Rules of Practice, the USPTO will recognize an attorney qualified under 37 CFR 11.14 as an applicant's or registrant's representative if that attorney files a power of attorney, signs a document on behalf of an applicant or registrant who is not already represented, or is otherwise identified in a document submitted on behalf of an applicant or registrant who is not already represented. 37 CFR 2.17(b). Once an attorney is recognized, the USPTO will correspond only with that attorney until recognition ends. 37 CFR 2.18(a)(2). Recognition as to a pending application ends when the mark registers, when ownership changes, or when the application is abandoned. 37 CFR 2.17(g)(1). Recognition as to a registration ends when the registration is canceled or expired, when ownership changes, or upon acceptance or final rejection of a post registration maintenance filing. 37 CFR 2.17(g)(2). The USPTO does not inquire into any engagement agreement between the attorney and the applicant or registrant to determine whether representation continues after the events that trigger the end of recognition under § 2.17(g). Therefore, following such an event, the trademark rules dictate that the USPTO correspond only with the applicant or registrant. 37 CFR 2.18(a). However, past customer feedback indicated that, in most cases, even after the occurrence of an event listed in the current § 2.17(g), representation continued, and the attorney should be the only recipient of the trademark registration certificate, maintenance and renewal reminders, and any other correspondence. For this reason, the USPTO currently sends, as a courtesy, correspondence to the attorney of record, except in connection with petitions to cancel filed with the Trademark Trial and Appeal Board, which are served on the registrant.

For several years, some outside practitioners have expressed concern that the current recognition rule, when read in conjunction with the correspondence rule, is problematic for practitioners whose recognition before the Office ends even though their representation of the applicant or registrant continues based on engagement agreements. These practitioners are concerned about missing response deadlines when representation continues, if they are removed from the record when recognition ends and will no longer receive correspondence from the USPTO regarding their clients' matters following abandonment or registration. Many of these practitioners have instructed their clients to disregard anything sent directly to them about their trademark application or registration to avoid having the clients subjected to a misleading solicitation, which is a growing problem for the USPTO and its customers. If their clients disregard all communications, including USPTO correspondence sent to them pursuant to § 2.18(a), and the practitioner is no longer receiving correspondence from the USPTO, deadlines for taking action would likely be missed. This group would like the USPTO to presume that representation, and therefore recognition, continues until the attorney withdraws or is revoked so that they, and not their clients, will continue to receive correspondence from the USPTO.

Other practitioners have expressed that they did not have any concerns with the current recognition rule because they do not wish to be subject to continuing legal and ethical obligations to the client after a listed event occurs. The current rule works to their advantage because they have no obligation to file a withdrawal form with the USPTO if recognition ends automatically. However, these practitioners have expressed concern as to whether there is an ethical obligation to contact their former clients about correspondence sent to them as a courtesy by the USPTO. As noted above, the USPTO continues to list all practitioners as the attorney of record and to send correspondence to them, even after recognition ended under the rule, because of the concerns over missed response deadlines.

In response to practitioner requests, the USPTO sends the courtesy email reminder that goes out in advance of the due date for a post registration maintenance document to both the owner and the last attorney of record (who is no longer recognized under the current rule and should not receive correspondence). The USPTO implemented this courtesy practice by sending the email reminders to both the applicant/registrant and the attorney as well as the notice of registration, the notice of abandonment, and the notice that an expungement or reexamination petition had been filed against the registration.

However, the practice has caused confusion among practitioners and has created some uncertainty for the USPTO in implementing its regulations. Sending email reminders and notices to attorneys who are no longer recognized under § 2.17(g) constitutes an unofficial waiver of § 2.18(a), which governs the parties with whom the USPTO will correspond in trademark matters. Moreover, despite the obligation under § 2.18(c) to maintain current and accurate correspondence addresses, the USPTO cannot be certain that the correspondence information in its records is still accurate, particularly regarding post registration reminders and notices that are sent 5–10 years or more after registration.

II. Trademark Modernization Act Notice of Proposed Rulemaking

In a notice of proposed rulemaking (NPRM) to implement provisions of the Trademark Modernization Act (TMA), published in the **Federal Register** on May 18, 2021, the USPTO proposed to revise 37 CFR 2.17(g) (86 FR 26862). The suggested revisions indicated that, for purposes of an application or registration, recognition of a qualified attorney as the applicant's or registrant's representative would continue until the owner revoked the appointment or the attorney withdrew from representation, even when there was a change of ownership. Therefore, owners and/or attorneys would be required to proactively file an appropriate revocation or withdrawal document under 37 CFR 2.19 before a new attorney could be recognized. The amendment was proposed to address the issues discussed above.

As noted in the final rule published on November 17, 2021, the USPTO received mixed comments regarding the

proposed revisions to § 2.17(g) (86 FR 64300). While several commenters were generally in favor of ongoing attorney recognition, others preferred the current practice, citing burdens associated with the new rules.

The USPTO also proposed to remove the name of any attorney whose recognition had ended under existing § 2.17(g) from the current attorney-of-record field in the USPTO's database, along with the attorney's bar information and any docketing information. However, the attorney's correspondence information, including any correspondence email address, would be retained so the USPTO could continue to send relevant correspondence and notices to both the formerly recognized attorney and the owner. Most commenters were opposed to removing the attorney information during the transition period, stating that this would cause unnecessary burdens to reappear in records.

Based on the public comments to the TMA NPRM, the USPTO determined that additional time was needed to address the concerns expressed. Therefore, the changes proposed in the TMA NPRM were not included in the TMA final rule. The USPTO now seeks additional input on whether § 2.17(g): (1) should be amended as discussed below, or (2) should not be amended, and all attorney information be removed when recognition ends following a listed event in § 2.17(g).

III. Changes to Duration of Recognition for Representation

The USPTO now seeks additional feedback regarding possible changes to the provisions addressing the duration of recognition for representation in § 2.17(g). The changes under consideration would allow recognition as to a pending application or registration to continue until the applicant, registrant, or party to a proceeding revokes the power of attorney or the representative withdraws from representation.

As noted above, such a rule change would require an attorney who no longer represents an applicant to affirmatively withdraw or be revoked for recognition to end. Shifting the burden to the attorney to withdraw, or to the owner to file a revocation, would give the USPTO greater assurance that it is communicating with the correct party. If stakeholders support the rule change, there are at least two challenges to address:

(1) How to make withdrawal easier.

(2) How to implement the transition in the USPTO database.

Although withdrawal is relatively easy, it is worth exploring whether the USPTO can make it even easier. In addition, the USPTO must ensure that if an attorney is deceased, it can efficiently remove that practitioner from its records. Moreover, the process must be consistent with the Rules of Professional Conduct, which dictate the terms of withdrawal.

The other area of concern is the transition of the USPTO's electronic records from recognition for a set duration to continued recognition following any rule change. Two categories of attorneys would be immediately affected by any rule change: (1) attorneys who are recognized at the time the rule goes into effect, and (2) attorneys whose information remains in the record but who are not currently recognized by virtue of the previous recognition rule. The revisions under consideration would have limited effect on the first set of attorneys because their existing recognition would continue. There would be some impact on attorneys whose representation does not continue past a certain event or date and who no longer wish to be recognized by the Office as the attorney of record because they would have to proactively withdraw to avoid any ambiguity.

The attorneys in the second group for whom recognition has ended under the current rule, even though their information remains of record, cannot be retroactively recognized by implementation of the revisions under consideration even if they prefer recognition to continue. *See Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S. Ct. 468, 471–472, 102 L. Ed. 2d 493, 500 (1988). On the date the USPTO recognized these attorneys, the current rule was in effect, and they had no notice that recognition would continue beyond the events listed in § 2.17(g). To avoid this retroactive effect, the USPTO proposed in the TMA NPRM that all attorney information would be removed from the database if a recognition-ending event had already occurred. To be recognized again, these attorneys would need to: (1) reappear by filing a document, and (2) reenter bar and docket information. Some public comments filed in response to this proposal demonstrated a concern with this approach because of the burden this would place on trademark owners and attorneys. However, removal of attorney information comports with the current recognition rule and the attorneys subject to it.

The USPTO is now considering deleting all attorney information, after a listed event, from the records of all applications filed or registrations issued prior to the date of implementation of a change to § 2.17(g) stating that recognition continues until there is a revocation or withdrawal of the recognized attorney of record. The USPTO has considered requests that attorneys be given the opportunity to opt in to remaining of record in such situations. However, the USPTO has neither the staff nor the technological resources to implement an opt-in alternative as to the affected applications and registrations. In addition, such a provision would not reconcile inaccuracies in older records.

IV. Retaining the Current Provisions on Recognition for Representation

If the USPTO does not amend § 2.17(g) to allow continued recognition until there is a revocation or withdrawal of the recognized attorney of record, the USPTO would not continue the courtesy practice of sending notices or reminders to the listed attorney in addition to the applicant or registrant. Pursuant to the plain language of § 2.17(g) that recognition ends when a listed event occurs, all attorney information would be removed when such an event occurs or if it has already occurred. Thus, correspondence and relevant notices would no longer be sent to both the formerly recognized attorney and the owner. Following § 2.18(a), correspondence and notices would be sent to the applicant or registrant or to a newly recognized attorney. This option would also require a transition period during which attorney information would be removed for attorneys whose information remains in the record but who are not currently recognized by virtue of the rule.

V. Listening Session and Questions for Comments

The USPTO is holding a listening session on September 26, 2023, and is requesting public comments on the questions listed below. The USPTO will use a portion of the listening session to provide an overview of the changes under consideration. An agenda will be available approximately five days before the listening session on the USPTO website at *www.uspto.gov/about-us/events/trademark-public-listening-session-changes-duration-attorney-recognition,* which is the same link for registration.

The USPTO poses the following questions for public comment. These questions are not meant to be exhaustive. We encourage interested stakeholders to address these and/or other related issues and to submit research and data that inform and

support their comments on these topics. Commenters are welcome to respond to any or all of the questions, and are encouraged to indicate which questions their comments address.

1. Do you think the current rule should remain unchanged, or are you in favor of the revisions under consideration?

2. Do you have suggestions for handling the transition period during which attorney information is removed from the record whether the current rule is retained or revised?

3. Do you have any suggestions for making withdrawal or re-recognition easier if the rule is revised to continue recognition?

Anyone wishing to participate as a speaker, either in person or virtually, must submit a request in writing no later than September 15, 2023. Requests to participate as a speaker must be submitted to *TMPolicy@uspto.gov* and must include:

1. The name of the person desiring to participate;

2. The organization(s) that person represents, if any; and

3. The person's contact information (address, telephone number, and email).

Speaking slots are limited; the USPTO will give preference to speakers wishing to address one of the questions raised in this request for comments. Speakers will be announced a few days prior to the public listening session. The USPTO will inform each speaker in advance of their assigned time slot. If the USPTO receives more requests to speak than time allows and is unable to assign a time slot as requested, the agency will invite the requestor to submit written comments. Time slots will be at least three minutes and may be longer, depending on the number of speakers registered. A panel of USPTO personnel may reserve time to ask questions of particular speakers after the delivery of a speaker's remarks.

The public listening session will be physically accessible to people with disabilities. Individuals requiring accommodation, such as sign language interpretation or other ancillary aids, should communicate their needs to the individuals listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven business days prior to the session.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–17144 Filed 8–9–23; 8:45 am]

BILLING CODE 3510–16–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; President's Volunteer Service Awards

AGENCY: Corporation for National and Community Service.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Corporation for National and Community Service, operating as AmeriCorps, has submitted a public information collection request (ICR) entitled President's Volunteer Service Awards for review and approval in accordance with the Paperwork Reduction Act.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by September 11, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of this ICR, with applicable supporting documentation, may be obtained by calling AmeriCorps, Rhonda Taylor, at 202–606–6721 or by email to *rtaylor@cns.gov.*

SUPPLEMENTARY INFORMATION: The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose 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

A 60-day Notice requesting public comment was published in the **Federal Register** on June 2, 2023 at 88 FR 36284. This comment period ended August 1, 2023. One public comment, from the Iowa Commission on Volunteer Service, was received from this Notice. The comment was positive, mentioning the form is simple to use, and they were in favor of continuing the award option.

Title of Collection: President's Volunteer Service Award.

OMB Control Number: 3045–0086.

Type of Review: Reinstatement.

Respondents/Affected Public: Individuals.

Total Estimated Number of Annual Responses: 200,000.

Total Estimated Number of Annual Burden Hours: 66,666.

Abstract: AmeriCorps is soliciting comments concerning its proposed renewal of the President's Volunteer Service Awards (PVSA), parts A, B, C, D and E. AmeriCorps seeks to renew the current information collection with without revisions. The information collection will be used in the same manner as the existing application. AmeriCorps also seeks to continue using the current application until the revised application is approved by OMB. The current application was discontinued on July 31, 2023.

Rhonda Taylor,

Director, Partnerships & Program Engagement.

[FR Doc. 2023–17177 Filed 8–9–23; 8:45 am]

BILLING CODE 6050–28–P

U.S. INTERNATIONAL DEVELOPMENT FINANCE CORPORATION

[DFC–0016]

Submission for OMB Review; Comments Request

AGENCY: U.S. International Development Finance Corporation (DFC).

ACTION: Notice of information collection; request for comment

SUMMARY: Under the provisions of the Paperwork Reduction Act, agencies are required to publish a Notice in the **Federal Register** notifying the public that the agency is renewing an existing information collection for OMB review and approval and requests public review and comment on the submission. Comments are being solicited on the need for the information; the accuracy of the burden estimate; the quality, practical utility, and clarity of the information to be collected; and ways to

minimize reporting the burden, including automated collected techniques and uses of other forms of technology.

DATES: Comments must be received by October 10, 2023.

ADDRESSES: Comments and requests for copies of the subject information collection may be sent by any of the following methods:

- *Mail:* Deborah Papadopoulos, Records Management Specialist, U.S. International Development Finance Corporation, 1100 New York Avenue NW, Washington, DC 20527.
- *Email: fedreg@dfc.gov*.

Instructions: All submissions received must include the agency name and agency form number or OMB form number for this information collection. Electronic submissions must include the agency form number in the subject line to ensure proper routing. Please note that all written comments received in response to this notice will be considered public records.

FOR FURTHER INFORMATION CONTACT: Agency Submitting Officer: Deborah Papadopoulos, (202) 357–3979.

SUPPLEMENTARY INFORMATION: This notice informs the public that DFC will submit to OMB a request for approval of the following information collection.

Summary Form Under Review

Title of Collection: Application for Technical Assistance.

Type of Review: New form.

Agency Form Number: DFC–0017.

OMB Form Number: XXXX–XXXX.

Frequency: Once per applicant per project.

Affected Public: Business or other for-profit; not-for-profit institutions; individuals.

Total Estimated Number of Annual Number of Respondents: 250.

Estimated Time per Respondent: 1.5 hours.

Total Estimated Number of Annual Burden Hours: 375 hours.

Abstract: The Application for Technical Assistance will be the principal document used by DFC to determine the proposed transaction's eligibility for technical assistance grants from the TA unit.

Deborah Papadopoulos,

Records Management Specialist.

[FR Doc. 2023–17137 Filed 8–9–23; 8:45 am]

BILLING CODE 3210–02–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors for the U.S. Army Command and General Staff College Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Board of Visitors for the U.S. Army Command and General Staff College (CGSC). This meeting is open to the public.

DATES: The Board of Visitors will meet from 8:30 a.m. to 3:00 p.m. on Tuesday, September 12, 2023, and from 8:30 a.m. to 10:45 a.m. on Wednesday, September 13, 2023.

ADDRESSES: Lewis and Clark Center, Arnold Conference Room, 120 Stovall St., Building 127, Fort Leavenworth, KS 66048.

FOR FURTHER INFORMATION CONTACT: Dr. Dale Spurlin, Alternate Designated Federal Officer for the Committee, by email at *dale.f.spurlin.civ@army.mil,* or by telephone at (913) 684–2742.

SUPPLEMENTARY INFORMATION: The committee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), 41 CFR 102–3.140(c), and 41 CFR 102–3.150.

Purpose of the Meeting: The Board of Visitors for the U.S. Army Command and General Staff College is a non-discretionary Federal Advisory Committee chartered to provide the Secretary of Defense, through the Secretary of the Army, independent advice and recommendations on matters pertaining to the Command and General Staff College's mission, specifically academic policies, staff and faculty development, student success indicators, curricula, educational methodology and objectives; other matters relating to the CGSC that the board decides to consider; and other items that the Secretary of Defense determines appropriate. The board provides expert and continuous advice on ways to improve the Command and General Staff College (CGSC) educational program, especially with regard to is master's degree programs and the maintenance of regional academic accreditation by the Higher Learning Commission of the North Central Association of Colleges and Schools. The Secretary of Defense may act on the committee's advice and recommendations.

Agenda: Overview briefing from the CGSC Dean of Academics; updates on CGSC operations, curricula, and educational initiatives; briefing and discussion on current challenges within the CGSC; and presentation of other information appropriate to the board's interests.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. A 30-minute period between 2:30 p.m. to 3:00 p.m. on September 12, 2023, will be available for verbal public comments. Seating is on a first to arrive basis. Attendees are requested to submit their name, affiliation, and daytime phone number seven business days prior to the meeting to Dr. Spurlin, via electronic mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Because the meeting of the committee will be held in a Federal Government facility on a military base, security screening is required. A photo ID is required to enter the base. Please note that security and gate guards have the right to inspect vehicles and persons seeking to enter and exit the installation. The Lewis and Clark Center is fully handicap accessible. Wheelchair access is available in front at the main entrance of the building. For additional information about public access procedures, contact Dr. Spurlin at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the committee, in response to the stated agenda of the open meeting or regarding the committee's mission in general. Written comments or statements should be submitted to Dr. Spurlin via electronic mail at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Written comments or statements being submitted in response to the agenda set forth in this notice must be received at least five business days prior to the meeting to be considered by the committee. The Designated Federal Officer will review all timely submitted written comments or statements with the committee chairperson, and ensure the comments are provided to all members of the committee before the meeting. Written comments or statements received after this date will

be filed and presented to the committee during its next meeting.

James W. Satterwhite, Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2023–17188 Filed 8–9–23; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0147]

Agency Information Collection Activities; Comment Request; Consolidated State Plan

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before October 10, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0147. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Melissa Siry, 202–260–0926.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Consolidated State Plan.

OMB Control Number: 1810–0576.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 52.

Total Estimated Number of Annual Burden Hours: 108,155.

Abstract: This collection, currently approved by OMB under control number 1810–0576, covers the consolidated State plan (previously known as the consolidated State application), as well as assessment peer review guidance. Section 8302 of the ESEA, as amended by the ESSA, permits each SEA, in consultation with the Governor, to apply for program funds through submission of a consolidated State plan (in lieu of individual program State plans). The purpose of consolidated State plans as defined in ESEA is to improve teaching and learning by encouraging greater cross-program coordination, planning, and service delivery; to enhance program integration; and to provide greater flexibility and less burden for State educational agencies. This is a request for extension without change for this collection.

Dated: August 7, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–17165 Filed 8–9–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–958–000.

Applicants: Green Plains Atkinson LLC, Sandhill Renewable Energy, LLC.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of Green Plains Atkinson LLC, et al.

Filed Date: 8/3/23.

Accession Number: 20230803–5084.

Comment Date: 5 p.m. ET 8/15/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: August 4, 2023.

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: August 4, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–17152 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–246–000.

Applicants: Shamrock Wind, LLC.

Description: Shamrock Wind, LLC submits Notice of Self—Certification of Exempt Wholesale Generator Status.

Filed Date: 8/4/23.

Accession Number: 20230804–5038.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: EG23–247–000.

Applicants: Pioneer Hutt Wind Energy LLC.

Description: Pioneer Hutt Wind Energy LLC submits Notice of Self—Certification of Exempt Wholesale Generator Status.

Filed Date: 8/4/23.

Accession Number: 20230804–5065.

Comment Date: 5 p.m. ET 8/25/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1529–006; ER10–2472–009; ER10–2473–009; ER10–2502–010; ER11–2724–010; ER11–4436–008; ER18–2518–005; ER19–645–004.

Applicants: Black Hills Colorado Wind, LLC, Black Hills Electric Generation, LLC, Black Hills Power, Inc., Black Hills Colorado IPP, LLC, Black Hills Colorado Electric, LLC, Cheyenne Light, Fuel and Power Company, Black Hills Wyoming, LLC, Northern Iowa Windpower, LLC.

Description: Supplement to January 31, 2023, Notice of Non-Material Change in Status of Northern Iowa Windpower, LLC, et al.

Filed Date: 8/1/23.

Accession Number: 20230801–5224.

Comment Date: 5 p.m. ET 8/22/23.

Docket Numbers: ER23–1832–000.

Applicants: Homer City Generation, L.P.

Description: Refund Report: Refund Notice in ER23–1832 to be effective N/A.

Filed Date: 8/4/23.

Accession Number: 20230804–5101.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2436–001.

Applicants: Energy Harbor LLC.

Description: Tariff Amendment: Amendment to Requested Effective Date for Notice of Cancellation of Market-Based to be effective 8/1/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5094.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2560–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7020; Queue Nos. AE1–209/AE1–210 to be effective 7/5/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5003.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2561–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, SA No. 6189; Queue No. AD2–009 (amend) to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5009.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2562–000.

Applicants: Merelec USA LLC.

Description: Baseline eTariff Filing: Petition for Blanket MBR Authorization with Waivers to be effective 10/3/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5035.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2563–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: WMPA, Service Agreement No. 7005; Queue No. AG1–099 to be effective 10/2/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5037.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2564–000.

Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Virginia Electric and Power Company submits tariff filing per 35.13(a)(2)(iii: VEPCO submits one WDSA, SA No. 7018 to be effective 7/6/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5064.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2565–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 7045; Queue No. AD2–093 to be effective 10/3/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5066.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2566–000.

Applicants: Pleasants LLC.

Description: Tariff Amendment: Notice of Cancellation of Market-Based Rate Tariff to be effective 8/7/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5069.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2567–000.

Applicants: EnerSmart Los Coches BESS LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization and Request for Waivers to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5080.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2568–000.

Applicants: Duke Energy Carolinas, LLC.

Description: § 205(d) Rate Filing: DEC–CPRE Wholesale Contract Revisions to Rate Schedule No. 336 to be effective 1/1/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5081.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2569–000.

Applicants: Pacific Gas and Electric Company.

Description: Tariff Amendment: Termination of PG&E Southern Oaks and Mission Ranch UOGs (SA Nos. 448 and 449) to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5086.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2570–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA/CSA, Service Agreement Nos. 5564 and 5565; Queue No AA2–161/AE2–137 to be effective 10/4/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5103.

Comment Date: 5 p.m. ET 8/25/23.

Docket Numbers: ER23–2571–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7008; Queue No. AG1–191 to be effective 7/5/2023.

Filed Date: 8/4/23.

Accession Number: 20230804–5130.

Comment Date: 5 p.m. ET 8/25/23.

The filings are accessible in the Commission's eLibrary system (*https://*

elibrary.ferc.gov/idmws/search/fercgensearch.asp) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: August 4, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–17153 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7274–035]

Town of Wells; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent License.

b. *Project No.:* 7274–035.

c. *Date filed:* July 31, 2023.

d. *Applicant:* Town of Wells.

e. *Name of Project:* Lake Algonquin Hydroelectric Project.

f. *Location:* On the Sacandaga River in the town of Wells, Hamilton County, New York.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Matthew Taylor, Principle-in-Charge, GZA GeoEnvironmental of New York, 104 West 29th Street, 10th Floor, New York 10001; Phone at (781) 278–5803 or email at *matthew.taylor@gza.com;* or Rebekah Crewell, Supervisor, Town of Wells, P.O. Box 205, Wells, New York 12190; Phone at (518) 924–7912 or email at *supervisor-rebekah-crewell@townofwells.org.*

i. *FERC Contact:* Samantha Pollak at (202) 502–6419, or *samantha.pollak@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* September 29, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

m. The application is not ready for environmental analysis at this time.

n. *The Lake Algonquin Hydroelectric Project consists of the following facilities:* (1) a 239-foot-long, 26.5-foot-high concrete gravity dam composed of an ogee spillway section at each end and a gated spillway section in the middle with three steel 19-foot-wide by 12-foot-high vertical lift roller gates; (2) an impoundment with a surface area of 275 acres and a storage capacity of 2,557 acre-feet at an elevation of 986.84 feet National Geodetic Vertical Datum of 1929; (3) a 27-foot-high, 21-foot-wide, 52-foot-long intake structure; (4) a 10-foot-diameter, 113-foot-long steel penstock; (5) a 25-foot-wide, 63-foot-long concrete, steel, and masonry powerhouse containing one Kaplan turbine unit with a rated capacity of 740 kilowatts; (6) a 480-volt/4.8-kilovolt (kV) step-up transformer; (7) a 4.8-kV, approximately 50-foot-long overhead transmission line; and (8) appurtenant facilities.

The project operates in a run-of-river mode with a minimum flow of 20 cubic feet per second, or reservoir inflow, whichever is less. The project has an average annual generation of 1.363 megawatt-hours between 2015 and 2020.

o. Copies of the application may be viewed on the Commission's website at *https://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 (P–7274). For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or call tollfree, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.*

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter (if necessary)	September 2023.
Request Additional Information	October 2023.
Issue Acceptance Letter	December 2023.
Issue Scoping Document 1 for comments	December 2023.
Request Additional Information (if necessary)	January 2024.
Issue Scoping Document 2 (if necessary)	February 2024.
Issue Notice of Ready for Environmental Analysis	February 2024.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17155 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2444–042]

Northern States Power Corporation—Wisconsin; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2444–042.

c. *Date Filed:* July 21, 2023.

d. *Applicant:* Northern States Power Corporation—Wisconsin.

e. *Name of Project:* White River Hydroelectric Project (project).

f. *Location:* On the White River in Ashland and Bayfield Counties, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Matthew Miller, Northern States Power Company—Wisconsin, 1414 W. Hamilton Avenue, P.O. Box 8, Eau Claire, WI 54702; Phone at (715) 737–1353, or email at *matthew.j.miller@xcelenergy.com*.

i. *FERC Contact:* Taconya D. Goar at (202) 502–8394, or *Taconya.Goar@ferc.gov*.

j. *Cooperating agencies:* Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* September 19, 2023.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx*. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. All filings must clearly identify the project name and docket number on the first page: White River Hydroelectric Project (P–2444–042).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing project consists of: (1) an earthen and concrete dam that includes: (a) a 400-foot-long, 37-foot-high north earthen embankment; (b) a concrete section that includes: (i) a north abutment; (ii) a 20-foot-long, 36.5-foot-high intake structure equipped with a trashrack; (iii) a 35-foot-high gated spillway with two 25-foot-long bays that each contain a Tainter gate; and (iv) a south abutment; (c) a 300-foot-long, 37-foot-high south earthen embankment; (2) an impoundment with a surface area of 39.9 acres at an elevation of 711.6 feet National Geodetic Vertical Datum of 1929 (NGVD 29); (3) a 7-foot-diameter, 1,345-foot-long concrete pipe that conveys flows from the intake structure to a 16-foot-diameter, 62-foot-high steel surge tank; (4) two 30-foot-long steel penstocks; (5) a 69-foot-long, 39-foot-wide concrete and brick masonry powerhouse that contains one 700-kilowatt (kW) horizontal Francis turbine-generator unit and one 500-kW horizontal Francis turbine-generator unit, for a total installed capacity of 1,200 kW; and (6) a 220-foot-long, 2.4-kilovolt (kV) electric line that connects the generators to a 2.4/69-kV step-up transformer. The project creates an approximately 1,400-foot-long bypassed reach of the White River. A 1-foot-diameter steel pipe conveys flow from the intake structure to the bypassed reach.

Project recreation facilities include: (1) a boat access site and canoe portage take-out site at the north embankment of the dam; (2) an approximately 2,260 feet canoe portage trail; (3) a canoe put-in site approximately 90 feet downstream of the powerhouse; and (4) a tailrace fishing area.

The current license requires the project to operate in a run-of-river mode, such that outflow from the project approximates inflow to protect aquatic resources in the White River. The current license requires the impoundment to be maintained at an elevation between 710.4 and 711.6 feet NGVD 29. The current license also requires a minimum bypassed reach flow of 16 cubic feet per second (cfs) or inflow to the impoundment, whichever is less, to protect aquatic resources. The minimum and maximum hydraulic capacities of the powerhouse are 50 and 350 cfs, respectively. The average annual generation of the project was 4,927 megawatt-hours from 2017 through 2022.

The applicant proposes the following changes to the project boundary: (1)

revise the project boundary around the impoundment to follow a contour elevation of 711.6 NGVD 29, which would result in a reduction in the total acreage of the project boundary upstream of the dam from 76.5 to 41.2 acres; (2) revise the project boundary downstream of the dam to remove approximately 38.8 acres of land north of the access road to the powerhouse and non-project substation and approximately 12 acres of land northeast of the powerhouse; and (3) revise the project boundary downstream of the dam to include approximately 0.3 acre of land associated with a non-project substation, approximately 0.6 acre of land associated with an access road, approximately 1.3 acres of water downstream of the project, and approximately 0.3 acre east of the south earthen embankment.

The applicant proposes to: (1) continue to operate the project in a run-of-river mode to protect aquatic resources; (2) continue to maintain the impoundment elevation between 710.4 and 711.6 feet NGVD 29; (3) continue to release a minimum flow of 16 cfs or inflow, whichever is less, to the bypassed reach at all times; (4) develop an operation compliance monitoring plan; (5) consult with resource agencies and the Bad River Band of Lake Superior Tribe of Chippewa Indians prior to temporary modifications of project operation, including non-emergency impoundment drawdowns, and file a report with the Commission within 14 days after the planned deviation; (6) conduct shoreline erosion surveys every ten years; (7) develop an invasive species monitoring plan; (8) pass woody debris from the impoundment to the bypassed reach; (9) replace recreational signage; (10) maintain project recreation facilities; (11) implement the State of Wisconsin's broad incidental take permits/authorizations for Wisconsin cave bats and wood turtles; (12) avoid vegetation management and construction activities within 660 feet of bald eagle nests during the nesting season; and (13) develop a historic properties management plan.

o. At this time, the Commission has suspended access to the Commission's Public Reference Room. Copies of the application can be viewed on the Commission's website at *https://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 (P–2444). In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (*e.g.,* license application) via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. 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.*

q. *Procedural Schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter	August 2023.
Request Additional Information	August 2023.
Issue Scoping Document 1	November 2023.
Request Additional Information (if necessary)	November 2023.
Issue Acceptance Letter	December 2023.
Issue Scoping Document 2	January 2024.
Issue Notice of Ready for Environmental Analysis	January 2024.

r. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17158 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2336–101]

Georgia Power Company; Notice of Waiver of Water Quality Certification

On January 3, 2022, Georgia Power Company (Georgia Power) filed an application for a new license for the Lloyd Shoals Hydroelectric Project (project) in the above captioned docket. On June 24, 2022, Georgia Power filed with the Georgia Department of Natural Resources, Environmental Protection Division (Georgia EPD), a request for water quality certification for the project under section 401(a)(1) of the Clean Water Act.

On July 19, 2022, staff provided the certifying authority with written notice pursuant to 40 CFR 121.6(b) that the applicable reasonable period of time for the state to act on the certification request was one (1) year from the date of receipt of the request, and that the certification requirement for the license would be waived if the certifying authority failed to act by June 24, 2023. Because the state did not act by June 24, 2023, we are notifying you pursuant to 40 CFR 121.9(c), and section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), that waiver of the certification requirement has occurred.

Dated: August 4, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–17159 Filed 8–9–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R08–SFUND–2023–0366; FRL–11165–01–R8]

Proposed CERCLA Administrative Cashout Settlement for Peripheral Parties, Colorado Smelter Site, Pueblo, Colorado

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (''CERLCA''), notice is hereby given that a proposed CERCLA Cashout Settlement Agreement for Peripheral Parties (''Proposed Agreement'') associated with the Colorado Smelter Superfund Site, Pueblo, Colorado (''Site'') was executed by the U.S. Environmental Protection Agency (''EPA''), Region 8 and is now subject to public comment, after which EPA may modify or withdraw its consent if comments received disclose facts or considerations that indicate that the Proposed Agreement is inappropriate, improper, or inadequate.

DATES: Comments must be submitted on or before September 11, 2023.

ADDRESSES: The Proposed Agreement and additional background information relating to the agreement will be available upon request. Any comments or requests or for a copy of the Proposed Agreement should be addressed to Julie Nicholson, Enforcement Specialist, Superfund and Emergency Management Division, Environmental Protection Agency—Region 8, Mail Code 8SEM–PAC, 1595 Wynkoop Street, Denver, Colorado 80202, telephone number: (401) 714–6143, email address: *nicholson.julie@epa.gov,* and should reference the Colorado Smelter Superfund Site.

You may also send comments, identified by Docket ID No. EPA–R08–SFUND–2023–0366, to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Sarah Rae, Senior Assistant Regional Counsel, Office of Regional Counsel, Environmental Protection Agency, Region 8, Mail Code 8ORC–LEC, 1595 Wynkoop, Denver, Colorado 80202, telephone number: (303) 312–6839, email address: *rae.sarah@epa.gov.*

SUPPLEMENTARY INFORMATION: The Proposed Agreement would resolve potential EPA claims under section 107(a) of CERCLA, against 1000 South Santa Fe LLC and 1100 South Santa Fe LLC(''Settling Parties'') for EPA response costs at or in connection with the property located at 1101–1109 Santa Fe Avenue and 1045–1049 South Santa Fe Avenue, in Pueblo, Colorado (the ''Property''), which is part of the Colorado Smelter Superfund Site. The settlement is estimated to be $646,100, plus an additional sum for interest on that amount calculated from the effective date through the date of payment (''Payment Amount''). Settling Parties will remit the Payment Amount to EPA upon the transfer of the Property or within three years of the effective date, whichever occurs earlier. The Proposed Settlement Agreement also provides a covenant not to sue or to take administrative action from the United States to the Settling Parties pursuant to sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a) with regard to Operable Unit 02 (OU2).

For thirty (30) days following the date of publication of this document, EPA will receive electronic comments relating to the Proposed Agreement. EPA's response to any comments received will be available for public inspection by request. Please see the **ADDRESSES** section of this document for instructions.

Ben Bielenberg,

Acting Division Director, Superfund and Emergency Management Division, Region 8.

[FR Doc. 2023–17174 Filed 8–9–23; 8:45 am]

BILLING CODE 6560–50–P

EXECUTIVE OFFICE OF THE PRESIDENT

Office of the National Cyber Director

[Docket ID: ONCD–2023–0002]

RIN 0301–AA01

Request for Information on Open-Source Software Security: Areas of Long-Term Focus and Prioritization

AGENCY: Office of the National Cyber Director, Executive Office of the President, Cybersecurity and Infrastructure Security Agency, DHS, National Science Foundation, Defense Advanced Research Projects Agency, and Office of Management and Budget, Executive Office of the President.

ACTION: Request for information (RFI).

SUMMARY: The Office of the National Cyber Director (ONCD), the Cybersecurity Infrastructure Security Agency (CISA), the National Science Foundation (NSF), the Defense Advanced Research Projects Agency (DARPA), and the Office of Management and Budget (OMB) invite public comments on areas of long-term focus and prioritization on open-source software security.

DATES: Comments must be received in writing by 5 p.m. ET October 9, 2023.

ADDRESSES: Interested parties may submit comments through *www.regulations.gov.* For detailed instructions on submitting comments and additional information on this process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Requests for additional information may be sent to: *OS3IRFI@ncd.eop.gov,* Nasreen Djouini, telephone: 202–881–4697.

SUPPLEMENTARY INFORMATION: As highlighted in the National Cybersecurity Strategy (*https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf*), and its Implementation Plan Initiative 4.2.1, the ONCD has established an Open-Source Software Security Initiative (OS3I) to champion the adoption of memory safe programming languages and open-source software security. The security and resiliency of open-source software is a national security, economic, and a technology innovation imperative. Because open-source software plays a vital and ubiquitous role across the Federal Government and critical infrastructure,[1] vulnerabilities in open-source software components may cause widespread downstream detrimental effects. The Federal Government recognizes the immense benefits of open-source software, which enables software development at an incredible pace and fosters significant innovation and collaboration. In light of these factors, as well as the status of open-source software as a free public good, it may be appropriate to make open-source software a national public priority to help ensure the security, sustainability, and health of the open-source software ecosystem.

In 2021, following the aftermath of the Log4Shell vulnerability, ONCD in collaboration with the Office of Management and Budget's (OMB) Office of the Federal Chief Information Officer (OFCIO), established the Open-Source Software Security Initiative (OS3I) interagency working group with the goal of channeling government resources to foster greater open-source software security. Since then, OS3I has welcomed many other interagency partners, including the Cybersecurity Infrastructure Security Agency (CISA), the National Science Foundation (NSF), Defense Advanced Research Projects Agency (DARPA), National Institute of Standards and Technology (NIST),

[1] ''2023 Open-Source Security and Risk Analysis Report,'' Synopsys, February 22, 2023, (*https://www.synopsys.com/software-integrity/resources/analyst-reports/open-source-security-risk-analysis.html?utm_source=bing&utm_medium=cpc&utm_term=&utm_campaign=B_S_OSSRA_BMM&cmp=ps-SIG-B_S_OSSRA_BMM&msclkid=15e8216ad16511c8b01945c7b683c395*).

Center for Medicare & Medicaid Services (CMS), and Lawrence Livermore National Laboratory (LLNL) in order to identify open-source software security priorities and implement policy solutions.

Over the past year, OS3I identified several focus areas, including: (1) reducing the proliferation of memory unsafe programming languages; (2) designing implementation requirements for secure and privacy-preserving security attestations; and (3) identifying new focus areas for prioritization.

This Request for Information (RFI) aims to further the work of OS3I by identifying areas most appropriate to focus government priorities, and addressing critical questions such as:

- How should the Federal Government contribute to driving down the most important systemic risks in open-source software?
- How can the Federal Government help foster the long-term sustainability of open-source software communities?
- How should open-source software security solutions be implemented from a technical and resourcing perspective?

This RFI represents a continuation of OS3I's efforts to gather input from a broad array of stakeholders.

Three-Phase RFI Approach

For this RFI, the Government intends to engage with interested parties in three phases:

Phase I—Addressing Respondent Questions About this RFI

- If you have any questions about the context of the Government's RFI, the processes described, or the numbered topics below, you may send them to *OS3IRFI@ncd.eop.gov* by August 18, 2023.
- By August 28, 2023, the Government will post responses to select questions on *www.regulations.gov,* as appropriate.

Phase II—Submittal of Responses to the RFI by Interested Respondents

- By October 9, 2023, all interested respondents should submit a written RFI response, in MS Word or PDF format, focusing on questions for which they have expertise and insights for the Government (no longer than 10 pages typed, size eleven font) to *OS3IRFI@ncd.eop.gov* with the email subject header ''Open-Source Software Security RFI Response'' and your organization's name.
- Title page, cover letter, table of contents, and appendix are not included within the 10-page limit. In the body of the email, also include contact information for your organization (POC Name, Title, Phone, Email, Organization Name, and Organization Address).

Phase III—Government Review

- The Government reviews and publishes the RFI responses submitted during Phase II. The Government may select respondents to engage with the RFI project team to elaborate on their response to the RFI.

Participation, or lack thereof, in this RFI process has no bearing on a party's ability or option to choose to participate in or receive an award for any future solicitation or procurement resulting from this or any other activity.

Questions for Respondents

We are seeking insights and recommendations as to how the Federal Government can lead, assist, or encourage other key stakeholders to advance progress in the potential areas of focus described below.

Please consider providing input on these areas by addressing the questions below:

- Which of the potential areas and sub-areas of focus described below should be prioritized for any potential action? Please describe specific policy solutions and estimated budget and timeline required for implementation.
- What areas of focus are the most time-sensitive or should be developed first?
- What technical, policy or economic challenges must the Government consider when implementing these solutions?
- Which of the potential areas and sub-areas of focus described below should be applied to other domains? How might your policy solutions differ?

Respondents are not required to respond to every topic and are encouraged to focus on specific areas that meet their specialized expertise.

Potential Areas of Focus

- *Area:* Secure Open-Source Software Foundations
  - *Sub-area:* Fostering the adoption of memory safe programming languages
    - Supporting rewrites of critical open-source software components in memory safe languages
    - Addressing software, hardware, and database interdependencies when refactoring open-source software to memory safe languages
    - Developing tools to automate and accelerate the refactoring of open-source software components to memory safe languages, including code verification techniques
    - Other solutions to support this sub-area
  - *Sub-Area:* Reducing entire classes of vulnerabilities at scale
    - Increasing secure by default configurations for open-source software development
    - Fostering open-source software development best practices, including but not limited to input validation practices
    - Identifying methods to incentivize scalable monitoring and verification efforts of open-source software by voluntary communities and/or public-private partnerships
    - Other solutions to support this sub-area
  - Sub-Area: Strengthening the software supply chain
    - Designing tools to enable secure, privacy-preserving security attestations from software vendors, including their suppliers and open-source software maintainers
    - Detection and mitigation of vulnerable and malicious software development operations and behaviors
    - Incorporating automated tracking and updates of complex code dependencies
    - Incorporating zero trust architecture into the open-source software ecosystem
    - Other solutions to support this sub-area
  - *Sub-Area:* Developer education
    - Integrating security and open-source software education into computer science and software development curricula
    - Training software developers on security best practices
    - Training software developers on memory safe programming languages
    - Other solutions to support this sub-area
- *Area:* Sustaining Open-Source Software Communities and Governance
  - Sustaining the open-source software ecosystem (including developer communities, non-profit investors, and academia) to ensure that critical open-source software components have robust maintenance plans and governance structures
  - Other solutions to support this sub-area
- *Area:* Behavioral and Economic Incentives to Secure the Open-Source Software cosystem
  - Frameworks and models for software developer compensation that incentivize secure software development practices
  - Applications of cybersecurity insurance and appropriately-tailored software liability as mechanisms to incentivize secure software development and operational environment practices
  - Other solutions to support this sub-area

- *Area:* R&D/Innovation
  - Application of artificial intelligence and machine learning techniques to enhance and accelerate cybersecurity best practices with respect to secure software development
  - Other solutions to support this sub-area
- *Area:* International Collaboration
  - Methods for identifying and harmonizing shared international priorities and dependencies
  - Structures for intergovernmental collaboration and collaboration with various open-source software communities
  - Other solutions to support this sub-area

This RFI seeks public input as the Federal Government develops its strategy and action plan to strengthen the open-source software ecosystem. We hope that potential respondents will view this RFI as a civic opportunity to help shape the government's thinking about open-source software security.

Comments must be received no later than 5:00 p.m. ET October 9, 2023.

By October 9, 2023, all interested respondents should submit a written RFI response, in MS Word or PDF format, with their answers to questions on which they have expertise and insights for the Government through *www.regulations.gov.*

The written RFI response should address ONLY the topics for which the respondent has expertise. Inputs that meet most of the following criteria will be considered most valuable:

- Easy for executives to review and understand: Content that is modularly organized and presented in such a fashion that it can be readily lifted (by topic area) and shared with relevant executive stakeholders in an easily consumable format.
- *Expert:* The Government, through this effort, is seeking insights to understand current best practices and approaches applicable to the above topics, as well as new and emerging solutions. The written RFI response should address ONLY the topics for which the respondent has knowledge or expertise.
- *Clearly worded/not vague:* Clear, descriptive, and concise language is appreciated. Please avoid generalities and vague statements.
- *Actionable:* Please provide enough high-level detail so that we can understand how to apply the information you provide. Wherever possible, please provide credible data and specific examples to support your views. If you cite academic or other studies, they should be publicly available to be considered.
- *Cost effective & impactful:* Respondents should consider whether their suggestions have a clear return on investment that can be articulated to secure funding and support.
- *''Gordian Knot'' solutions and ideas:* Occasionally, challenges that seem to be intractable and overwhelmingly complex can be resolved with a change in perspective that unlocks hidden opportunities and aligns stakeholder interests. We welcome these ideas as well.
- All submissions are public records and may be published on *www.regulations.gov.* Do NOT submit sensitive, confidential, or personally identifiable information.

An additional appendix of no more than 5 pages long may also be included. This section should only include additional context about you or your organization.

Privacy Act Statement

Submission of comments is voluntary. The information will be used to determine focus and priority areas for open-source software security and memory-safety. Please note that all comments received in response to this notice will be posted in their entirety to *http://www.regulations.gov,* including any personal and business confidential information provided. Do not include any information you would not like to be made publicly available.

Kemba E. Walden,

Acting National Cyber Director.

[FR Doc. 2023–17239 Filed 8–9–23; 8:45 am]

BILLING CODE 3340–D3–P

EXPORT-IMPORT BANK

[Public Notice: 2023–6040]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Annual Competitiveness Report Survey of Exporters and Lenders

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Export-Import Bank of the United States (EXIM), invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. As required by Export-Import Bank Act of 1945 (see section 8A(a)(1) of EXIM's charter), EXIM will survey U.S. exporters and commercial lending institutions to understand their experience with EXIM ''meeting financial competition from other countries whose exporters compete with United States exporters.'' EXIM plans to survey exporters and lenders that have engaged with EXIM on medium- and long-term support over the previous calendar year or responded to at least one of EXIM's last two surveys. The potential respondents will be sent an electronic invitation to participate in the online survey.

DATES: Comments should be received on or before October 10, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *WWW.REGULATIONS.GOV* (EIB 00–02) or by email *Jessica.Ernst@exim.gov* or by mail to Jessica Ernst, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571 Attn: OMB 3048–14–01.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Jessica Ernst, *Jessica.Ernst@exim.gov,* 202–565–3711.

SUPPLEMENTARY INFORMATION: The proposed survey will ask participants about their potential or completed deals involving EXIM, their opinion of EXIM's policies and procedures, their interaction and perceptions of other export credit agencies, and impacts of overall market conditions on their businesses.

The survey can be reviewed at: *https://img.exim.gov/s3fs-public/EXIM+Competitiveness+Report+Exporter+and+Lender+Survey+2023.pdf.*

Titles and Form Number: EIB 00–02 Annual Competitiveness Report Survey of Exporters and Lenders.

OMB Number: 3048–0004.

Type of Review: Renewal.

Need and Use: The information requested is required by the Export-Import Bank Act of 1945, as amended, 12 U.S.C. 635g–1 (see section 8A(a)(1) of EXIM's charter) and enables EXIM to evaluate and assess its competitiveness with the programs and activities of official export credit agencies and to report on the Bank's status in this regard.

Affected Public:

The number of respondents: 100.

Estimated time per respondent: 15 minutes.

The frequency of response: Annually.

Annual hour burden: 25 total hours.

Dated: August 4, 2023.

Kalesha Malloy,

IT Specialist.

[FR Doc. 2023–17115 Filed 8–9–23; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1222; FR ID 162067]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before October 10, 2023. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–1222.

Title: Inmate Calling Services (ICS) Provider Annual Reporting, Certification, and Other Requirements, WC Docket Nos. 23–62, 12–375, DA 23–656.

Form Number(s): FCC Form 2301(a) and FCC Form 2301(b).

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 30 respondents; 33 responses.

Estimated Time per Response: 5 hours–220 hours.

Frequency of Response: Annual reporting and certification requirements, third party disclosure and waiver request requirements.

Obligation to Respond: Mandatory. Statutory authority for this collection of information is contained in sections 1, 2, 4(i)–(j), 5(c), 201(b), 218, 220, 225, 255, 276, 403, and 716 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)–(j), 155(c), 201(b), 218, 220, 225, 255, 276, 403, and 617, and the Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. 117–338, 136 Stat. 6156

Total Annual Burden: 9,690 hours.

Total Annual Cost: No cost.

Needs and Uses: In 2015, the Commission released the Second Report and Order and Third Notice of Further Proposed Rulemaking, WC Docket No. 12–375, 30 FCC Rcd 12763 (*2015 ICS Order*), in which it required that ICS providers file Annual Reports providing data and other information on their ICS operations, as well as Annual Certifications that reported data are complete and accurate and comply with the Commission's ICS rules. Pursuant to the authority delegated it by the Commission in the *2015 ICS Order,* the Wireline Competition Bureau (WCB) created a standardized reporting template (FCC Form No. 2301(a)) and a related certification of accuracy (FCC Form No. 2301(b)), as well as instructions to guide providers through the reporting process. *See* ICS Annual Reporting Form Word Template (Current), WC Docket No. 12–375 *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Word Template); ICS Annual Reporting Form Excel Template (Current), WC Docket No. 12–375, *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Excel Template); ICS Annual Reporting and Certification Instructions (Current), WC Docket No. 12–375 *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Instructions) (Certification Instructions); ICS Annual Report Certification Form (Current), WC Docket No. 12–375, *https://www.fcc.gov/general/ics-data-collections* (last visited August 4, 2023) (Certification Form).

In 2021, the Commission released the Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking WC Docket No. 12–375, 36 FCC Rcd 9519 (2021). The Commission revised its rules by adopting, among other things, lower interim rate caps for interstate calls, new interim rate caps for international calls, and a new rate cap structure that requires ICS providers to differentiate between legally mandated and contractually required site commissions. The revisions also included expanded consumer disclosure requirements, as well as new reporting requirements for providers seeking waivers of the Commission's interstate and international rates.

In 2022, the Commission released the Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking, WC Docket No. 12–375, FCC 22–76 (Sept. 30, 2022). The Commission adopted numerous requirements to improve access to communications services for incarcerated people with communication disabilities and expanded the scope of the Annual Reports to reflect these new requirements. Specifically, the Commission required ICS providers to report, at a minimum, for each facility served, the types of telecommunications relay services (TRS) that can be accessed from the facility and the number of completed calls and complaints for TTY-to-TTY calls, ASL point-to-point video calls, and each type of TRS for which access is provided. The Commission also eliminated the safe harbor, adopted in 2015, that had exempted ICS providers from any TRS-related reporting requirements if they either (1) operated in a facility that allowed the offering of additional forms of TRS beyond those mandated by the Commission or (2) had not received any complaints related to TRS calls. The Commission found that the safe harbor was no longer appropriate given the expanded reporting requirement for additional forms of TRS, and the importance of transparency regarding the state of accessible communications in incarceration settings.

The Commission also specified a number of provider obligations relating to access to and the provision of TRS. For instance, the Commission required, among other things, that an ICS provider must work with correctional authorities, equipment vendors, and TRS providers to ensure that screen-equipped communications devices such as tablets,

smartphones, or videophones are available to incarcerated people who need to use TRS for effective communication, and all necessary TRS provider software applications are included, with any adjustments needed to meet the security needs of the institution. The Commission required that providers ensure compatibility with institutional communication systems and allow operability over the inmate calling services provider's network.

On January 5, 2023, the President signed into law the Martha Wright-Reed Just and Reasonable Communications Act of 2022, Public Law 117–338, 136 Stat. 6156 (the Martha Wright-Reed Act or the Act), expanding the Commission's statutory authority over communications services between incarcerated people and the non-incarcerated to include ''any audio or video communications service used by inmates . . . regardless of the technology used.'' The new Act also amends section 2(b) of the Communications Act of 1934, as amended (the Communications Act) to make clear that the Commission's authority extends to intrastate as well as interstate and international communications services used by incarcerated people.

The Act directs the Commission to ''promulgate any regulations necessary to implement'' the statutory provisions, including its mandate that the Commission establish a ''compensation plan'' ensuring that all rates and charges for IPCS ''are just and reasonable,'' not earlier than 18 months and not later than 24 months after its January 5, 2023 enactment. The Act also requires the Commission to consider, as part of its implementation, the costs of ''necessary'' safety and security measures, as well as ''differences in costs'' based on facility size, or ''other characteristics.'' It also allows the Commission to ''use industry-wide average costs of telephone service and advanced communications services and the average costs of service a communications service provider'' in determining just and reasonable rates.

On March 17, 2023, pursuant to the directive that the Commission implement the new Act and establish just and reasonable rates for IPCS services, the Commission released *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act; Rates for Interstate Inmate Calling Services,* WC Docket Nos. 23–62, 12–375, Notice of Proposed Rulemaking and Order, FCC 23–19, 88 FR 20804 (*2023 IPCS Notice*) and 88 FR 19001 (Order) (*2023 IPCS Order*). The Commission sought comment on how to interpret the Act's language to ensure that the Commission implements the statute in a manner that fulfills Congress's intent. Because the Commission is now required or allowed to consider certain types of costs, the Act contemplates that it would undertake an additional data collection. To ensure that it has the data necessary to meet its substantive and procedural responsibilities under the Act, the Commission adopted the *2023 IPCS Order* delegating authority to WCB and the Office of Economics and Analytics (OEA) to modify the template and instructions for the most recent data collection to the extent appropriate to timely collect such information to cover the additional services and providers now subject to the Commission's authority. On April 28, 2023, WCB and OEA issued a Public Notice seeking comment on all aspects of the proposed data collection. *WCB and OEA Seek Comment on Proposed 2023 Mandatory Data Collection for Incarcerated People's Communication Services,* WC Docket Nos. 23–62, 12–375, Public Notice, DA 23–355 (WCB/OEA Apr. 28, 2023). On July 26, 2023, WCB and OEA released an Order adopting instructions, a reporting template, and a certification form to implement the 2023 Mandatory Data Collection. *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act, Rates for Interstate Inmate Calling Services,* WC Docket Nos. 23–62, 12–375, Order, DA 23–638 (July 26, 2023).

In the *2023 IPCS Order,* the Commission also reaffirmed and updated its prior delegation of authority to WCB and the Consumer and Governmental Affairs Bureau (CGB) (collectively, the Bureaus) to revise the instructions and reporting templates for the Annual Reports. Specifically, the Commission delegated to the Bureaus the authority to modify, supplement, and update the instructions and templates for the Annual Reports, as appropriate, to supplement the information the Commission will receive in response to the 2023 Mandatory Data Collection.

On August 3, 2023, the Bureaus issued a Public Notice seeking comment on proposed revisions to the instructions, template, and certification form for the Annual Reports, *https://www.fcc.gov/proposed-2023-ipcs-annual-reports,* which are necessary to reflect the revised rules improving access to communications services for incarcerated people with communication disabilities adopted in the *2022 ICS Order* and to help implement the Martha Wright-Reed Act to ensure just and reasonable rates for consumers and fair compensation for providers. *Wireline Competition Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Revisions to IPCS Providers' Annual Reporting and Certification Requirements,* Public Notice, WC Docket Nos. 23–62, 12–375, DA 23–656 (Aug. 3, 2023). *https://www.fcc.gov/document/2023-incarcerated-peoples-communications-services-annual-reports-pn.*

Notice of this document will be published in the **Federal Register**. The Bureaus will consider comments submitted in response to the Public Notice in addition to comments submitted in response to this 60-Day Notice in finalizing this information collection prior to submitting the documents to the Office of Management and Budget.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–17257 Filed 8–9–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC–2023–0057, NIOSH–156–F]

Request for Public Comment on the Draft Immediately Dangerous to Life or Health (IDLH) Value Document for Hydrogen Chloride

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for comment.

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) in the Centers for Disease Control and Prevention (CDC), an Operating Division of the Department of Health and Human Services (HHS), requests public comment and technical review on the draft Immediately Dangerous to Life or Health (IDLH) Value Profile document for the chemical hydrogen chloride (CAS# 7647–01–0).

DATES: Electronic or written comments must be received by October 10, 2023.

ADDRESSES: You may submit comments, identified by docket number CDC–2023–0057 and docket number NIOSH–156–F, by either of the following methods:

• *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.

• *Mail:* National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C–34, Cincinnati, Ohio 45226–1998.

Instructions: All information received in response to this notice must include the agency name and docket number (CDC–2023–0057; NIOSH–156–F). All relevant comments, including any personal information provided, will be posted without change to *https://www.regulations.gov.* Do not submit comments by email. CDC does not accept comments by email. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: R. Todd Niemeier, Ph.D., National Institute for Occupational Safety and Health, MS–C15, 1090 Tusculum Avenue, Cincinnati, OH 45226. Telephone: (513) 533–8166.

SUPPLEMENTARY INFORMATION: NIOSH is requesting public comment and technical review on a draft IDLH Value Profile document for the chemical hydrogen chloride. To facilitate the review of this document, NIOSH requests comment on the following specific questions for the draft Profile document:

1. Does this document clearly outline the health hazards associated with acute (or short-term) exposures to the chemical? If not, what specific information is missing from the document?

2. Are the rationale and logic behind the derivation of an IDLH value for a specific chemical clearly explained? If not, what specific information is needed to clarify the basis of the IDLH value?

3. Are the conclusions supported by the data?

4. Are the tables clear and appropriate?

5. Is the document organized appropriately? If not, what improvements are needed?

6. Are you aware of any scientific data reported in government publications, databases, peer-reviewed journals, or other sources that should be included within this document?

The draft IDLH Value Profile was developed to provide the scientific rationale behind derivation of IDLH values for the following chemical:

Document #	Chemical	CAS #
X–XX	Hydrogen Chloride	(#7647–01–0)

The IDLH Value Profile provides a detailed summary of the health hazards of acute exposures to high airborne concentrations of the chemical and the rationale for the IDLH value.

Background: In 2013, NIOSH published Current Intelligence Bulletin (CIB) 66: Derivation of Immediately Dangerous to Life or Health (IDLH) Values [*http://www.cdc.gov/niosh/docs/2014-100/pdfs/2014-100.pdf*] [NIOSH 2013]. The information presented in this CIB represents the scientific rationale and the current methodology used to derive IDLH values. Since the establishment of the IDLH values in the 1970s, NIOSH has continued to review available scientific data to improve the protocol used to derive acute exposure guidelines, in addition to the chemical specific IDLH values.

IDLH values are based on health effects considerations determined through a critical assessment of the toxicology and human health effects data. This approach ensures that the IDLH values reflect an airborne concentration of a substance that represents a high-risk situation that may endanger workers' lives or health.

The primary steps applied in the establishment of an IDLH value include the following:

1. Critical review of human and animal toxicity data to identify potentially relevant studies and characterize the various lines of evidence that can support the derivation of the IDLH value;

2. Determination of a chemical's mode of action or description of how a chemical exerts its toxic effects;

3. Application of duration adjustments (time scaling) to determine 30-minute-equivalent exposure concentrations and the conduct of other dosimetry adjustments, as needed;

4. Experimental or other data to establish a point of departure (POD) such as lethal concentrations (*e.g.,* LC50), lowest observed adverse effect level (LOAEL), or no observed adverse effect level (NOAEL);

5. Selection and application of an uncertainty factor (UF) for POD or critical adverse effect concentration, identified from the available studies to account for issues associated with interspecies and intraspecies differences, severity of the observed effects, data quality, or data insufficiencies; and

6. Development of the final recommendation for the IDLH value from the various alternative lines of evidence, with use of a weight-of-evidence approach to all the data.

Reference

NIOSH [2013]. Current intelligence bulletin 66: derivation of immediately dangerous to life or health (IDLH) values. Cincinnati, OH: US Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication 2014–100.

Dated: August 4, 2023.

John J. Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 2023–17129 Filed 8–9–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–3103]

Development of Small Dispensers Assessment Under the Drug Supply Chain Security Act; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration (FDA or Agency) is seeking stakeholder comments on the development of a technology and software assessment that examines the feasibility of dispensers with 25 or fewer full-time employees conducting interoperable, electronic tracing of products at the package level. FDA would like to obtain information regarding issues to be addressed in the assessment related to the accessibility of the necessary software and hardware to such dispensers; whether the necessary software and hardware is prohibitively expensive to obtain, install, and maintain for such dispensers; and if the necessary hardware and software can be integrated into business practices.

DATES: Either electronic or written comments on the notice must be submitted by September 11, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 11, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–3103 for ''Development of Small Dispensers Assessment under the Drug Supply Chain Security Act; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Daniel Bellingham, Office of Compliance, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–3130, *daniel.bellingham@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On November 27, 2013, the Drug Supply Chain Security Act (DSCSA) (Title II of Pub. L. 113–54) was signed into law. The DSCSA outlines steps to achieve interoperable, electronic tracing of products at the package level to identify and trace certain prescription drugs as they are distributed in the United States. Section 202 of the DSCSA added the new sections 581 and 582 to the Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360eee and 360eee–1). Under section 582(g)(3), FDA is required to enter into a contract with a private, independent consulting firm with expertise to conduct a technology and software assessment that looks at the feasibility of dispensers with 25 or fewer full-time employees conducting interoperable, electronic tracing of products at the package level. Under section 582(g)(1), dispensers and other trading partners will be required to, amongst other requirements, exchange transaction information and transaction statements in a secure, interoperable, electronic manner for each package; implement systems and processes for package-level verification, including the standardized numerical identifier; and implement systems and processes to facilitate the gathering of information necessary to produce the transaction information and statement for each transaction going back to the manufacturer if FDA or a trading partner requests an investigation in the event of a recall or for purposes of investigating a suspect or illegitimate product. These enhanced drug distribution security requirements are also referred to as ''enhanced product tracing'' or ''enhanced verification.''

II. Purpose of the Request for Comments

FDA is issuing this request for public comments prior to beginning the assessment, in accordance with section 582(g)(3)(D). The statement of work requires the selected firm to conduct an assessment that will address the proposed questions articulated below. In addition to commenting on the proposed questions below, stakeholders may provide comments on any aspect of the small dispenser assessment under the DSCSA.

Stakeholders that may be interested in responding to this request for information include manufacturers, repackagers, wholesale distributors, dispensers, State and Federal authorities, solution providers, and standards organizations, among others. FDA is particularly interested in receiving comments from the various sectors of the dispenser community, particularly pharmacies. FDA is seeking comments on the following proposed questions for small dispensers (*i.e.,* dispensers with 25 or fewer full-time employees). We are interested in receiving feedback on the questions themselves and whether or not they should be edited to be more useful for the assessment. FDA is also interested in any new questions that stakeholders may recommend.

• Have you begun preparations for DSCSA requirements regarding the interoperable, electronic tracing of products at the package level required under section 582(g)(1) of the FD&C Act (*i.e.,* enhanced product tracing or enhanced verification)?

• How are you currently exchanging data with your trading partners (*e.g.,* by

paper-based methods, electronic methods, or both)?

- If not currently exchanging data with trading partners in a fully electronic manner, will you be able to in the near future? If not, what are the barriers? Elaborate on why or how, as appropriate. Please specify issues related to:
- accessibility of necessary software and hardware;
- cost to obtain, install, and maintain necessary software and hardware, particularly if it is prohibitively expensive;
- integration of necessary software and hardware into business practices, such as with wholesale distributors;
- other relevant information related to feasibility of dispensers with 25 or fewer full-time employees to conduct interoperable, electronic tracing of product at the package level.
- What type of software systems and hardware do you currently utilize to facilitate the electronic exchange of DSCSA-related data for transactions of products?
- What new or modified software systems and hardware do you anticipate putting in place to comply with the interoperable, electronic tracing requirements?
- How likely are you to change and upgrade your existing software systems that are already in use so that you can comply with the interoperable, electronic tracing requirements?
- Have you or do you plan to connect your system(s) with your trading partner(s) (*e.g.,* manufacturer(s), repackager(s), or wholesale distributor(s)) in order to facilitate electronic DSCSA-related data exchange? If so, have you experienced technical issues when attempting to establish connectivity? If not, how do you or how do you plan to manage electronic DSCSA-related data received from an upstream trading partner (*e.g.,* maintain the data in your dispenser system or use a third-party agreement for another entity to confidentially maintain the DSCSA-related data on your behalf (*e.g.,* use of a secure web portal provided by your wholesale distributor))?
- Have you considered data integrity and security concerns when establishing agreements with third-party entities (*e.g.,* solution providers or wholesale distributors) for electronic data exchange and maintenance?
- Have you ever received transaction information from a trading partner, such as your wholesale distributor, that does not match the product that you received? If so, how long did it take to resolve the discrepancy on average? What if any unique challenges arose from these situations? How often does this happen?
- If you currently routinely scan a 2D data matrix barcode, how often do you receive a 2D data matrix barcode of the product identifier that cannot be scanned or read? Why are you unable to scan or read the 2D data matrix barcode (*e.g.,* barcode quality, scanner performance, software issue) and what is your process for handling these situations, including when manual steps are taken by your staff when an automated process was inadequate or failed?
- If you currently routinely scan the 2D data matrix barcode, how often you encounter a 2D data matrix barcode with missing or inaccurate data? What are the reasons for this and what is your process for handling these situations, including when manual steps are taken by your staff when an automated process was inadequate or failed?
- What new demands do you expect the DSCSA requirements in section 582(g)(1) of the FD&C Act to have on your current staff resources?
- How long do you expect it will take to train staff on the new requirements, how to use any new software or hardware, and any process changes? What additional resources do you anticipate needing to comply with the interoperable, electronic tracing requirements?
- Are there additional challenges not already identified when operationalizing new systems and processes for interoperable, electronic tracing of products at the package level required under section 582(g)(1) of the FD&C Act (*i.e.,* enhanced product tracing or enhanced verification)?

Stakeholders may provide other relevant information that may inform the development of the small dispenser assessment under the DSCSA.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17140 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–1529]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Voluntary Qualified Importer Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by September 11, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0840. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Voluntary Qualified Importer Program

OMB Control Number 0910–0840—Extension

This information collection supports implementation of FDA's Voluntary Qualified Importer Program (VQIP), a voluntary fee-based program that provides expedited review and import entry of human and animal foods into the United States. Program participants may import products to the United States with greater speed and predictability, avoiding unexpected

delays at the point of import entry. Importers interested in applying can start their application (Form FDA 4041) by submitting a notice of intent to participate after setting up an account through the FDA Industry Systems (FIS) website at *https://www.access.fda.gov,* which includes a VQIP Portal User Guide. To participate, importers must meet eligibility criteria and pay a user fee that covers costs associated with FDA's administration of the program. Consistent with section 743(b)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379j–31(b)(1)), FDA annually publishes a schedule of fees applicable to VQIP in the **Federal Register**.

Respondents to the information collection are persons that bring food, or cause food to be brought, from a foreign country into the customs territory of the United States (section 806 of the FD&C Act (21 U.S.C. 384b)) as a VQIP importer. A VQIP importer can be located outside the United States. Persons who may be a VQIP importer include the manufacturer, owner, consignee, and importer of record of a food, provided that the importer can meet all the criteria for participation.

To assist respondents with the information collection, we developed the guidance document entitled ''FDA's Voluntary Qualified Importer Program'' (issued November 2016, updated July 2023 to change the Paperwork Reduction Act burden statement address), available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-fdas-voluntary-qualified-importer-program.* The guidance document is prepared in a question-and-answer format and discusses eligibility criteria; includes instruction for completing a VQIP application; explains conditions that may result in revocation of participation as well as criteria for reinstatement; and communicates benefits VQIP importers can expect to receive under the program. The guidance also discusses preparation of the ''Quality Assurance Program (QAP),'' a compilation of written policies and procedures used to ensure adequate control over the safety and security of foods being imported. The guidance document was developed and issued consistent with FDA good guidance practice regulations in 21 CFR 10.115, which provides for public comment at any time.

In the **Federal Register** of May 11, 2023 (88 FR 30315), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Reporting using FIS VQIP portal/form FDA 4041	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Initial VQIP application	5	1	5	180	900
Application Renewals—subsequent year	6	1	6	20	120
Requests for reinstatement	2	1	2	10	20
Total					1,040

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

VQIP participant records consistent with implementing guidance	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Quality Assurance Program (QAP) preparation	5	1	5	160	800
QAP maintenance and updates	6	1	6	16	96
Total					896

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects an overall adjustment decrease of 1,844 hours and a corresponding decrease of 18 responses. Since our last request for OMB approval of the information collection, we have adjusted our estimate of the number of respondents based on actual participation in the program. We assume the average burden required for the respective reporting and recordkeeping activities for both initial and continued participation in the program remain constant.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17150 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2186]

Request for Nominations on the Tobacco Products Scientific Advisory Committee—Small Business Pool

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any small business tobacco manufacturing industry organizations interested in participating in the selection of a nonvoting industry representative to serve on the Tobacco Products Scientific Advisory Committee for the Center for Tobacco Products notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to be included in a pool of individuals to represent the interests of the small business tobacco manufacturing industry on the Tobacco Products Scientific Advisory Committee. A nominee may either be

self-nominated or nominated by an organization to serve as a nonvoting industry representative. This position may be filled on a rotating, sequential basis by representatives of different small business tobacco manufacturers based on areas of expertise relevant to the topics being considered by the Advisory Committee. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any small business tobacco manufacturing industry organization interested in participating in the selection of appropriate nonvoting members to represent industry interests must send a letter stating that interest to the FDA by September 11, 2023, (see sections I and II of this document for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by September 11, 2023.

ADDRESSES: All statements of interest from small business tobacco manufacturing industry organizations interested in participating in the selection process of nonvoting industry representative nominations should be sent to CAPT Serina Hunter-Thomas (see **FOR FURTHER INFORMATION CONTACT**). All nominations for nonvoting industry representatives may be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm.* Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: Serina Hunter-Thomas, Office of Science, Center for Tobacco Products, Food and Drug Administration, Center for Tobacco Products Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 1–877–287–1373 (choose Option 5), or by email: *TPSAC@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Agency intends to add nonvoting industry representative(s) to the following advisory committee:

I. Tobacco Products Scientific Advisory Committee

The Tobacco Products Scientific Advisory Committee (the Committee) advises the Commissioner of FDA (the Commissioner) or designee in discharging responsibilities related to the regulation of tobacco products. The Committee reviews and evaluates safety, dependence, and health issues relating to tobacco products and provides appropriate advice, information, and recommendations to the Commissioner.

The Committee includes three nonvoting members who represent industry interests. These members include one representative representing the interests of the tobacco manufacturing industry, one representative representing the interests of tobacco growers, and one representative representing the interests of the small business tobacco manufacturing industry, which may be filled on a rotating, sequential basis by representatives of different small business tobacco manufacturers based on areas of expertise relevant to the topics being considered by the Advisory Committee.

With this notice, nominations are sought for the following positions: A pool of individuals, with varying areas of expertise, to represent the interests of the small business tobacco manufacturing industry on a rotating, sequential basis.

II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

III. Application Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the committee of interest should be sent to the FDA Advisory Committee Membership Nomination Portal (see **ADDRESSES**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women, and men, members of all racial and ethnic groups and individuals with and without disabilities on its advisory committees and, therefore encourages nominations of appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17149 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0583]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Radioactive Drug Research Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by September 11, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0053. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three

White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Radioactive Drug Research Committees

OMB Control Number 0910–0053—Extension

This information collection request supports the implementation of statutory and regulatory requirements and associated Agency forms. Sections 201, 505, and 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 355, and 371) establish provisions under which FDA issues regulations governing the use of radioactive drugs for basic scientific research. Specifically, § 361.1 (21 CFR 361.1) sets forth specific regulations about establishing and composing radioactive drug research committees (RDRCs) and their role in approving and monitoring basic research studies using radiopharmaceuticals, including reporting, recordkeeping, and labeling requirements. No basic research study involving any administration of a radioactive drug to research subjects is permitted without the authorization of an FDA-approved RDRC (§ 361.1(d)(7)). The type of research that may be undertaken with a radiopharmaceutical drug must be intended to obtain basic information and not to carry out a clinical trial for safety or efficacy. The types of basic research permitted are specified in the regulations and include studies of metabolism, human physiology, pathophysiology, or biochemistry.

To assist respondents with the applicable reporting requirements, we developed Form FDA 2914 entitled, ''Report on Research Use of Radioactive Drugs: Membership Summary,'' available at *https://www.fda.gov/media/73820/download;* and Form FDA 2915, entitled, ''Report on Research Use of Radioactive Drugs: Study Summary,'' available at *https://www.fda.gov/media/71805/download*.

We also developed the guidance document entitled, ''Radioactive Drug Research Committee: Human Research Without An Investigational New Drug Application'' (August 2010), available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/radioactive-drug-research-committee-human-research-without-investigational-new-drug-application,* which provides information to help determine whether research studies may be conducted under an FDA-approved RDRC, or whether research studies must be conducted under an investigational new drug application (IND). It also offers answers to frequently asked questions on conducting research with radioactive drugs, and provides information on the membership, functions, and reporting requirements of an RDRC approved by FDA. All Agency guidance documents are issued consistent with our good guidance practice regulations at 21 CFR 10.115.

Types of research studies not permitted under the regulations are also specified and include those intended for immediate therapeutic, diagnostic, or similar purposes or to determine the safety or effectiveness of the drug in humans for such purposes (*i.e.,* to carry out a clinical trial for safety or efficacy). These studies require filing of an IND under 21 CFR part 312, and the associated information collections, are covered in OMB control number 0910–0014.

The primary purpose of this collection of information is to determine whether the research studies are being conducted in accordance with required regulations and that human subject safety is assured. If these studies were not reviewed, human subjects could be subjected to inappropriate radiation or pharmacologic risks. Respondents to this information collection are the chairperson or chairpersons of each individual RDRC, investigators, and participants in the studies.

In the **Federal Register** of March 16, 2023 (88 FR 16272), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; FDA form or activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
§ 361.1(c)(3) reports and (c)(4) approval; Form FDA 2914 (Membership Summary).	56	1	56	1	56
§ 361.1(c)(3) reports; Form FDA 2915 (Study Summary)	37	10	370	3	1,110
§ 361.1(d)(8); adverse events	10	1	10	0.5 (30 mins)	5
Total					1,171

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section; and activity	Number of recordkeepers	Number of records per recordkeepers	Total annual records	Average burden per recordkeeping	Total Hours
§ 361.1(c)(2); RDRC maintains meeting minutes involving use in human research subjects. § 361.1(d)(5); RDRC obtains consent of human research subjects.	56	10.61	594	4.239	2,518
Total					2,518

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden attributed to recordkeeping activities is assumed to be distributed among the individual elements and averaged among respondents. In the burden estimate, we assume an average burden per record of 10 hours for the RDRC respondents to maintain meeting minutes and 0.75 hours (45 minutes) for a subset of the respondents (37 RDRCs) to obtain consent of human research subjects.

Section 361.1(f) sets forth labeling requirements for radioactive drugs. These requirements are not in the burden estimate because they are information supplied by the Federal Government to the recipient for the purposes of disclosure to the public (5 CFR 1320.3(c)(2)).

Our estimated burden for the information collection reflects an overall decrease of 703 hours and a corresponding decrease of 158 responses. We attribute this adjustment to a decrease in the average burden per response, from 3.5 hours to 3 hours per response, associated with the public reporting burden for Form FDA 2915. The decrease is based on our program experience and matches the burden hours reflected on the form. In addition, this adjustment is also attributable to the Agency receiving fewer submissions over the last few years.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17154 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0918]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food Labeling Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by September 11, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0381. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10 a.m.–12 p.m., 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Food Labeling Requirements

OMB Control Number 0910–0381—Revision

This information collection supports statutory and regulatory requirements that govern food labeling, and information collection recommendations discussed in associated Agency guidance. Sections 4, 5, and 6 of the Fair Packaging and Labeling Act (FPLA) (15 U.S.C. 1453, 1454, and 1455) and sections 201, 301, 402, 403, 409, 411, 701, and 721 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321, 331, 342, 343, 348, 350, 371, and 379e), establish provisions under which a food product shall be deemed to be misbranded if, among other things, its label or labeling fails to bear certain required information concerning the food product, is false or misleading in any particular, or bears certain types of unauthorized claims. Implementing regulations are codified in parts 101, 102, 104, and 105 (21 CFR parts 101, 102, 104, and 105). While regulations in part 101 set forth general food labeling provisions, requirements pertaining to the common or usual name for nonstandardized foods; guidelines for nutritional quality to prescribe the minimum level or range of nutrient composition appropriate for a given class of food; and requirements for foods for special dietary use are found in parts 102, 104, and 105, respectively. The requirements are intended to ensure the safety of food products produced or sold in the United States and enable consumers to be knowledgeable about the foods they purchase and include corresponding information disclosure requirements, along with the reporting and recordkeeping provisions, subject to enforcement by FDA.

We provide information resources regarding food labeling under the FD&C Act and its amendments on our website at *https://www.fda.gov/food/food-labeling-nutrition.* Food labeling is required for most prepared foods, such as breads, cereals, canned and frozen foods, snacks, desserts, drinks, etc. Nutrition labeling for raw produce (fruits and vegetables) and fish is voluntary. We refer to these products as ''conventional'' foods. For detailed information on dietary supplement labeling requirements visit our website at *https://www.fda.gov/food/dietary-supplements.* Nutrition labeling provides information for use by consumers in selecting a nutritious diet. Other information enables consumers to comparison shop. Ingredient information also enables consumers to avoid substances to which they may be sensitive. Petitions or other requests submitted to us provide the basis for us to permit new labeling statements or to grant exemptions from certain labeling requirements. Recordkeeping requirements enable us to monitor the basis upon which certain label statements are made for food products and whether those statements are in compliance with the requirements of the FD&C Act or the FPLA. Requirements include general content and format for the labeling of food packaging, including nutrition and ingredient information. Additional regulations provide for specific nutrient content claims.

The information collection includes Form FDA 3570 entitled, ''Small Business Nutrition Labeling Exemption Notice,'' for use as applicable and available for download from our website at *https://www.fda.gov/food/labeling-nutrition-guidance-documents-regulatory-information/small-business-nutrition-labeling-exemption-notice-model-form.* We have also developed the following guidance documents to assist respondents with various aspects of the information collection:

- ''*Guidance for Industry:* Notification of a Health Claim or Nutrient Content Claim Based on an Authoritative Statement of a Scientific Body'' (June 1998). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-notification-health-claim-or-nutrient-content-claim-based-authoritative-statement.* The guidance document

discusses section 403(r)(2) and (r)(3) (21 U.S.C. 343(r)(2) and (3)) of the FD&C Act and was issued to provide instruction on the submission of information to FDA during the initial phase of implementing these new provisions.

• ''*Questions and Answers:* Labeling of Dietary Supplements as Required by the Dietary Supplement and Nonprescription Drug Consumer Protection Act'' (September 2009). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-questions-and-answers-regarding-labeling-dietary-supplements-required-dietary.* The guidance document communicates content elements and FDA enforcement of labeling requirements in section 403(y) of the FD&C Act.

• ''Substantiation for Dietary Supplement Claims Made Under Section 403(r)(6) of the Federal Food, Drug, and Cosmetic Act'' (January 2009). The guidance document is available from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-substantiation-dietary-supplement-claims-made-under-section-403r-6-federal-food.* The guidance document discusses FDA recommendations regarding claims under section 403(r)(6) of the FD&C Act.

For operational efficiency, we are revising the information collection to account for burden that may result from activities associated with the labeling of certain beers, currently approved in OMB Control No. 0910–0728. The Tobacco Tax and Trade Bureau is responsible for the dissemination and enforcement of regulations with respect to the labeling of distilled spirits, certain wines, and malt beverages issued in the Federal Alcohol Administration Act. However, and as discussed in the guidance document ''Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration'' (December 2014), certain bottled or otherwise packaged beers are subject to section 403 of the FD&C Act. The guidance document is available for download from our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-labeling-certain-beers-subject-labeling-jurisdiction-food-and-drug-administration* and provides recommendations regarding applicable labeling requirements for products under FDA's jurisdiction.

We are also revising the information collection to include new requirements applicable to the gluten-free labeling of fermented or hydrolyzed foods established through rulemaking (RIN 0910–AH00) and approved in OMB Control No. 0910–0817.

Description of Respondents: Respondents to this information collection are manufacturers, packers, and distributors of food products, as well as certain food retailers, such as supermarkets and restaurants, subject to statutory and regulatory food labeling requirements.

In the **Federal Register** of April 12, 2023 (88 FR 22045), we published a 60-day notice soliciting comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
101.9(c)(6)(i); dietary fiber	28	1	28	1	28
101.9(j)(18) and 101.36(h)(2); procedure for small business nutrition labeling exemption notice using Form FDA 3570	10,000	1	10,000	8	80,000
101.12(h); petitions to establish or amend referenced amounts customarily consumed (RACC)	1	1	1	80	80
101.69; petitions for nutrient content claims	3	1	3	25	75
101.70; petitions for health claims	5	1	5	80	400
101.108; written proposal for requesting temporary exemptions from certain regulations for the purpose of conducting food labeling experiments	1	1	1	40	40
Total			10,038		80,623

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
101.9(c)(6)(iii); added sugars [2]	31,283	1	31,283	1	31,283
101.9(c)(6)(i); dietary fiber [2]	31,283	1	31,283	1	31,283
101.9(c)(6)(i)(A) [2]; soluble fiber	31,283	1	31,283	1	31,283
101.9(c)(6)(i)(B); insoluble fiber [2]	31,283	1	31,283	1	31,283
101.9(c)(8); vitamin E [3]	31,283	1	31,283	1	31,283
101.9(c)(8); folate/folic acid [3]	31,283	1	31,283	1	31,283
New Products	216	1	216	1	216
101.12(e); recordkeeping to document the basis for density-adjusted RACC.	25	1	25	1	25
101.13(q)(5); recordkeeping to document the basis for nutrient content claims.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); recordkeeping to document nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.22(i)(4); recordkeeping to document supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.100(d)(2); recordkeeping pertaining to agreements that form the basis for an exemption from the labeling requirements of section 403(c), (e), (g)–(i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.7(t); recordkeeping pertaining to disclosure requirements for food not accurately labeled for quality of contents.	100	1	100	1	100

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]—Continued

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
101.91; Documentation necessary to verify compliance with gluten free labeling.	5,000	56	280,000	0.45 (~27 minutes)	126,000
Total	.....	.....	1,369,064	.....	990,064

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimate reflects the cumulative average burden we attribute to the reporting and recordkeeping requirements found in the applicable regulations; individual collection activities may not be evenly distributed among respondents and/or the corresponding requirements.

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

21 CFR section; activity	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
101.3, 101.22, parts 102 and 104; statement of identity labeling requirements.	25,000	1.03	25,750	0.5 (30 minutes)	12,875
101.4, 101.22, 101.100, parts 102, 104 and 105; ingredient labeling requirements.	25,000	1.03	25,750	1	25,750
101.5; requirement to specify the name and place of business of the manufacturer, packer, or distributor and, if the food producer is not the manufacturer of the food product, its connection with the food product.	25,000	1.03	25,750	0.25 (15 minutes)	6,438
101.9, 101.13(n), 101.14(d)(3), 101.62, and part 104; labeling requirements for disclosure of nutrition information.	25,000	1.03	25,750	4	103,000
101.9(g)(9) and 101.36(f)(2); alternative means of compliance permitted	12	1	12	4	48
101.10; requirements for nutrition labeling of restaurant foods	300,000	1.5	450,000	0.25 (15 minutes)	112,500
101.12(b); RACC for baking powder, baking soda, and pectin	29	2.3	67	1	67
101.12(e); adjustment to the RACC of an aerated food permitted	25	1	25	1	25
101.12(g); requirement to disclose the serving size that is the basis for a claim made for the product if the serving size on which the claim is based differs from the RACC.	5,000	1	5,000	1	5,000
101.13(d)(1) and 101.67; requirements to disclose nutrition information for any food product for which a nutrient content claim is made.	200	1	200	1	200
101.13(j)(2) and (k), 101.54, 101.56, 101.60, 101.61, and 101.62; additional disclosure required if the nutrient content claim compares the level of a nutrient in one food with the level of the same nutrient in another food..	5,000	1	5,000	1	5,000
101.13(q)(5); requirement that restaurants disclose the basis for nutrient content claims made for their food.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.14(d)(2); general requirements for disclosure of nutrition information related to health claims for food products.	300,000	1.5	450,000	0.75 (45 minutes)	337,500
101.15; requirements pertaining to prominence of required statements and use of foreign language.	160	10	1,600	8	12,800
101.22(i)(4); supplier certifications for flavors designated as containing no artificial flavors.	25	1	25	1	25
101.30 and 102.33; labeling requirements for fruit or vegetable juice beverages.	1,500	5	7,500	1	7,500
101.36; nutrition labeling of dietary supplements	300	40	12,000	4.025	48,300
101.42 and 101.45; nutrition labeling of raw fruits, vegetables, and fish ..	1,000	1	1,000	0.5 (30 minutes)	500
101.45(c); databases of nutrient values for raw fruits, vegetables, and fish.	5	4	20	4	80
101.79(c)(2)(i)(D); disclosure requirements for food labels that contain a folate/neural tube defect health claim.	1,000	1	1,000	0.25 (15 minutes)	250
101.79(c)(2)(iv); disclosure of amount of folate for food labels that contain a folate/neural tube defect health claim.	100	1	100	0.25 (15 minutes)	25
101.100(d); disclosure of agreements that form the basis for exemption from the labeling requirements of section 403(c), (e), (g), (h), (i), (k), and (q) of the FD&C Act.	1,000	1	1,000	1	1,000
101.7 and 101.100(h); disclosure requirements for food not accurately labeled for quantity of contents and for claiming certain labeling exemptions.	25,000	1.03	25,750	0.5 (30 minutes)	12,875
Nutritional labeling for new products	500	1	500	2	1,000
''Labeling of Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration''.	12	1	12	1	12
Total	.....	.....	.....	.....	1,030,270

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

These estimates reflect our continued experience with the information collection. We have made nominal adjustments to reflect the addition of burden associated with gluten and certain bottled or otherwise packaged beer; petition submissions received since our last evaluation of the information collection; and informal communications with industry regarding food product labeling.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17145 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–2986]

Agency Information Collection Activities; Proposed Collection; Comment Request; Color Additive Certification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of FDA's regulations governing batch certification of color additives manufactured for use in foods, drugs, cosmetics, or medical devices in the United States.

DATES: Either electronic or written comments on the collection of information must be submitted by October 10, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of October 10, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–2986 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Color Additive Certification.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Rachel Showalter, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 240–994–7399, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to 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, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical

utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Color Additive Certification—21 CFR Part 80

OMB Control Number 0910–0216—Extension

This information collection helps support FDA regulations governing certification for color additives used in foods, drugs, cosmetics, and medical devices. All color additives must have FDA-approval for their intended use and be listed in the color additive regulations before they are permitted for use in food, drugs, cosmetics, and many medical devices. Some color additives have an additional requirement: they are permitted only if they are from batches that FDA has certified under section 721(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379e(a)). This means that FDA chemists have analyzed a sample from the batch and have found that it meets the requirements for composition and purity stated in the regulation, called a ''listing regulation,'' for that color additive. We list color additives that have been shown to be safe for their intended uses in Title 21 of the Code of Federal Regulations (CFR). We require batch certification for all color additives listed in 21 CFR part 74 and for all color additives provisionally listed in 21 CFR part 82. Color additives listed in 21 CFR part 73 are exempted from certification.

The requirements for color additive certification are established in part 80 (21 CFR part 80). Procedures for color additive certification are set forth in part 80, subpart B (§§ 80.21 through 80.39) and communicate required data elements for requests for certification, limitations of certificates, exemptions from certification for color additive mixtures, treatment of batches pending and after certification, and recordkeeping requirements for respondents to whom a certificate is issued. During the batch certification procedure, a manufacturer of color additives must submit a ''request for certification'' that provides information about the batch, accompanied by a representative sample of a new batch of color additive, to us. FDA personnel perform chemical and other analyses of the representative sample and, providing the sample satisfies all certification requirements, issue a certificate that contains a certification lot number for the batch. The batch can then be used in FDA-regulated products marketed in the United States, in compliance with the uses and restrictions in that color additive's listing regulation. If the sample does not meet the requirements, the batch will be rejected. We require manufacturers to keep complete records showing disposal of all of the color additive covered by the certification.

FDA's web-based color certification information system is available for respondents to request color certification online, track their submissions, and obtain account status information. Prior to submitting a request for certification, the manufacturer must open a color certification account by sending a letter, as an email attachment, signed by responsible company representative, to FDA's Office of Cosmetics and Colors at *color.cert@fda.hhs.gov.* System certification results are returned electronically, allowing submitters to sell their certified color before receiving hard copy certificates.

We charge a fee for certification based on the batch weight and require manufacturers to keep records of the batch pending and after certification. The user fees support FDA's color certification program. Additional information about color additive certification is available at: *https://www.fda.gov/industry/color-additives/color-certification.*

The purpose for collecting this information is to help the Agency assure that only safe color additives will be used in foods, drugs, cosmetics, and medical devices sold in the United States.

Description of Respondents: The respondents include businesses engaged in the manufacture of color additives used in FDA-regulated foods, drugs, cosmetics, and medical devices. Respondents are from the private sector (for-profit businesses).

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
80.21 and 80.22; Request for certification accompanied by sample.	67	112	7,504	0.22 (13 minutes)	1,651

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
80.39; Record of distribution	67	112	7,504	0.25 (15 minutes)	1,876

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

We base our estimate on our review of the certification requests received over the past 3 years. Using information from industry personnel, we estimate that an average of 0.22 hour per response is required for reporting (preparing certification requests and accompanying samples) and an average of 0.25 hour per response is required for recordkeeping.

Based on a review of the information collection since our last request for OMB approval, we have slightly decreased our burden estimate based on our experience with this program. As a result, although the number of respondents increased, the number of responses per respondent decreased.

Dated: August 7, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–17173 Filed 8–9–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Advisory Committee on Seniors and Disasters and National Advisory Committee on Individuals With Disabilities and Disasters Joint Public Meeting

AGENCY: Administration for Strategic Preparedness and Response (ASPR), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The National Advisory Committee on Seniors and Disasters (NACSD) and the National Advisory Committee on Individuals with Disabilities and Disasters (NACIDD) will hold a joint public meeting using an online format on Tuesday, September 19, 2023 (1:00 p.m. to 3:00 p.m. ET). Notice of the meeting is required under section 10 (a) (2) of the Federal Advisory Committee Act (FACA). The NACSD and NACIDD provide expert advice and guidance to the U.S. Department of Health and Human Services (HHS) regarding the specific needs of older adults and people with disabilities, respectively, related to disaster preparedness and response. The Administration for Strategic Preparedness and Response (ASPR) manages and convenes the NACSD and the NACIDD on behalf of the Secretary of HHS.

FOR FURTHER INFORMATION CONTACT: Dr. Maxine Kellman, NACSD and NACIDD Designated Federal Official, (202) 260–0447; *NACSD@hhs.gov* and *NACIDD@hhs.gov.*

SUPPLEMENTARY INFORMATION:

Procedures for Public Participation: The public and expert stakeholders are invited to observe the meeting. Registration for the Zoom meeting is required. The meeting link to register will be posted on the NACSD and NACIDD websites. Anyone may submit questions and comments to the NACSD and the NACIDD by email (*NACSD@hhs.gov* and *NACIDD@hhs.gov*) at least 15 days prior to the meeting. American Sign Language translation and Communication Access Real-Time Translation will be provided. A meeting summary will be available on the NACSD and NACSD websites post meeting.

Dawn O'Connell,

Assistant Secretary for Preparedness and Response.

[FR Doc. 2023–17142 Filed 8–9–23; 8:45 am]

BILLING CODE 4150–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Cancellation of Meeting

Notice is hereby given of the cancellation of the National Cancer Institute Special Emphasis Panel, National Cancer Institute Special Emphasis Panel; SEP–9: NCI Clinical and Translational Cancer Research, October 26, 2023, 12:00 p.m. to October 26, 2023, 4:00 p.m., National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W104, Rockville, Maryland 20850 which was published in the **Federal Register** on July 28, 2023, FR Doc 2023–15995, 88 FR 48898.

This meeting is cancelled and will be rescheduled.

Dated: August 7, 2023.

Melanie Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17186 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 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 Cancer Institute Special Emphasis Panel; Integrating Health Disparities into Immuno-Oncology (HDIO).

Date: September 27, 2023.

Time: 10:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–672–6175, *singhshr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–1: NCI Clinical and Translational Cancer Research.

Date: September 28, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Pancreatic Cancer Detection Consortium U01.

Date: October 17, 2023.

Time: 12:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: E. Tian, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W618, Rockville, Maryland 20850, 240–276–6611, *tiane@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award (R50) Clinical.

Date: October 19, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov,*

Name of Committee: National Cancer Institute Special Emphasis Panel; Primary Care Needs of Cancer Survivors (U01).

Date: October 19, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W108, Rockville, Maryland 20850, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–7: NCI Clinical and Translational Cancer Research.

Date: October 19, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov,*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–10: NCI Clinical and Translational Cancer Research.

Date: October 24, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Bruce Daniel Hissong, Ph.D., Scientific Review Officer, Resource and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850, 240–276–7752, *bruce.hissong@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Assay Validation of Biomarkers (UH2/UH3).

Date: October 26, 2023.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850. 240–276–6457, *mh101v@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–2: NCI Clinical and Translational Cancer Research.

Date: November 2, 2023.

Time: 10:30 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Metastasis Research Network (U01).

Date: November 16, 2023.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850 (Telephone Conference Call)

Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W624, Rockville, Maryland 20850, 240–276–6132, *tushar.deb@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17185 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; The Connection between Neuroendocrine Processes and Alzheimer's Disease.

Date: August 24, 2023.

Time: 12:00 p.m. to 1:00 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: Mei Qin, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, 301–875–2215, *qinmei@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17122 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health (NIH) Office of Science Policy (OSP): Proposed Changes to the NIH Guidelines for Research Involving Recombinant or Synthetic Nucleic Acid Molecules (NIH Guidelines)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institutes of Health (NIH) seeks input on a proposal to revise the NIH Guidelines for Research Involving Recombinant or Synthetic Nucleic Acid Molecules (NIH Guidelines) to include specific considerations and requirements for conducting research involving gene drive modified organisms (GDMO) in contained research settings. NIH is proposing to update the NIH Guidelines to clarify minimum containment requirements, propose considerations for performing risk assessments, and define additional institutional responsibilities regarding Institutional Biosafety Committees (IBCs) and Biosafety Officers (BSOs). The proposed revisions are specific to GDMO research subject to the NIH Guidelines, conducted in contained settings and are consistent with the recommendations of

the NIH Novel and Exceptional Technology Research Advisory Committee report, Gene Drives in Biomedical Research (NExTRAC Report). NIH does not currently support research involving potential field release of GDMOs and the NIH Guidelines pertain to contained research; accordingly, no changes regarding potential field release are being proposed in this Notice. NIH is also proposing revisions to the NIH Guidelines to harmonize with the Biosafety in Microbiological and Biomedical Laboratories (BMBL), 6th edition regarding the Risk Group (RG) categorization of West Nile Virus (WNV) and Saint Louis Encephalitis Virus (SLEV).

DATES: To ensure consideration, comments must be submitted in writing by October 10, 2023.

ADDRESSES: Comments may be submitted electronically to *https://osp.od.nih.gov/proposed-amendments-to-the-nih-guidelines-for-research-involving-recombinant-or-synthetic-nucleic-acid-molecules-nih-guidelines/.* Comments are voluntary and may be submitted anonymously. You may also voluntarily include your name and contact information with your response. Other than your name and contact information, please do not include in the response any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your response. After the Office of Science Policy (OSP) has finished reviewing the responses, the responses may be posted to the OSP website without redaction.

FOR FURTHER INFORMATION CONTACT: Caroline Young, ScM, Acting Director of the Division of Biosafety, Biosecurity, and Emerging Biotechnology Policy, Office of Science Policy, at (301) 496–9838 or *SciencePolicy@od.nih.gov.*

SUPPLEMENTARY INFORMATION: The NIH currently supports basic gene drive research in contained laboratory settings as the technology holds great promise for advancing public health, particularly through the potential to reduce transmission of vector-borne human diseases such as malaria, dengue, or Zika. Under certain conditions, gene drive technology enables researchers to promote the spread of certain genetic traits that has the potential to mitigate disease by driving traits through a specific species population at a faster rate with fewer reproductive cycles.

Gene drive technology presents opportunities for many life sciences applications with potential benefits to public health, agriculture, and the environment but also raise biosafety, ethical, and social concerns. To help consider issues associated with conducting research involving GDMOs safely and responsibly, the NIH charged an advisory committee to the NIH Director, the Novel and Exceptional Technology and Research Advisory Committee (NExTRAC), to consider whether existing biosafety guidance is adequate for contained laboratory research utilizing GDMOs. The NExTRAC made multiple recommendations for strengthening NIH's existing policies and guidance, which were shared for public input and ultimately accepted by the NIH Director. These proposed changes only address the NExTRAC's recommendations pertaining to contained research. NIH does not currently support research involving potential field release of GDMOs and the NIH Guidelines pertain to contained research; as such, no changes are being proposed in this notice regarding field release research of GDMOs.

NIH is seeking input on its proposal to amend the NIH Guidelines to ensure the continued responsible research involving GDMOs in contained research settings. Specifically, NIH proposes to:

(1) clarify minimum containment requirements for research involving GDMOs;

(2) propose considerations for risk assessment;

(3) define additional institutional responsibilities for Institutional Biosafety Committees (IBCs) and Biosafety Officers (BSOs).

In addition to the amendments proposed related to contained research involving GDMOs, the NIH is seeking input on its proposal to:

1. replace the term ''helper viruses'' with the broader term ''helper systems''; and

2. reclassify WNV and SLEV as risk group 2 agents for consistency with containment guidance provided in the Biosafety in Microbiological and Biomedical Laboratories (BMBL), 6th edition.

Current Language and Proposed Amendments to the NIH Guidelines

A definition for gene drive is proposed to be added to Section I–E, specifically:

Section I–E. General Definitions

Section I–E–7. ''Gene drive'' is defined as a technology whereby a particular heritable element biases inheritance in its favor, resulting in the heritable element becoming more prevalent than predicted by Mendelian laws of inheritance in a population over successive generations.

Section II–A–3, which provides guidance for conducting a comprehensive risk assessment, has been updated in the past to provide additional guidance regarding issues that should be considered for research involving emerging technologies (*e.g.,* guidance for research with organisms involving synthetic nucleic acids when the parent organism is not obvious). Robust risk assessment for research with GDMOs may present challenges due to different or increased risks associated with the potential to persist and spread in the environment. To address some of these challenges, Section II–A–3 is proposed to be amended to include considerations for risk assessment.

Section II–A–3 currently states:

Section II–A–3. Comprehensive Risk Assessment

In deciding on the appropriate containment for an experiment, the first step is to assess the risk of the agent itself. Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, classifies agents into Risk Groups based on an assessment of their ability to cause disease in humans and the available treatments for such disease. Once the Risk Group of the agent is identified, this should be followed by a thorough consideration of how the agent is to be manipulated. Factors to be considered in determining the level of containment include agent factors such as: virulence, pathogenicity, infectious dose, environmental stability, route of spread, communicability, operations, quantity, availability of vaccine or treatment, and gene product effects such as toxicity, physiological activity, and allergenicity. Any strain that is known to be more hazardous than the parent (wild-type) strain should be considered for handling at a higher containment level. Certain attenuated strains or strains that have been demonstrated to have irreversibly lost known virulence factors may qualify for a reduction of the containment level compared to the Risk Group assigned to the parent strain (see Section V–B, Footnotes and References of Sections I–IV).

While the starting point for the risk assessment is based on the identification of the Risk Group of the parent agent, as technology moves forward, it may be possible to develop an organism containing genetic sequences from multiple sources such that the parent agent may not be obvious. In such cases, the risk assessment should include at least two levels of analysis. The first involves a

consideration of the Risk Groups of the source(s) of the sequences and the second involves an assessment of the functions that may be encoded by these sequences (*e.g.,* virulence or transmissibility). It may be prudent to first consider the highest Risk Group classification of all agents that are the source of sequences included in the construct. Other factors to be considered include the percentage of the genome contributed by each parent agent and the predicted function or intended purpose of each contributing sequence. The initial assumption should be that all sequences will function as they did in the original host context.

The Principal Investigator and Institutional Biosafety Committee must also be cognizant that the combination of certain sequences in a new biological context may result in an organism whose risk profile could be higher than that of the contributing organisms or sequences. The synergistic function of these sequences may be one of the key attributes to consider in deciding whether a higher containment level is warranted, at least until further assessments can be carried out. A new biosafety risk may occur with an organism formed through combination of sequences from a number of organisms or due to the synergistic effect of combining transgenes that results in a new phenotype.

A final assessment of risk based on these considerations is then used to set the appropriate containment conditions for the experiment (see Section II–B, Containment). The appropriate containment level may be equivalent to the Risk Group classification of the agent, or it may be raised or lowered as a result of the above considerations. The Institutional Biosafety Committee must approve the risk assessment and the biosafety containment level for recombinant or synthetic nucleic acid experiments described in Sections III–A, Experiments that Require NIH Director Approval and Institutional Biosafety Committee Approval, Before Initiation; III–B, Experiments that Require NIH OSP and Institutional Biosafety Committee Approval Before Initiation; III–C, Experiments Involving Human Gene Transfer that Require Institutional Biosafety Committee Approval Prior to Initiation; III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation.

Careful consideration should be given to the types of manipulation planned for some higher Risk Group agents. For example, the RG2 dengue viruses may be cultured under the Biosafety Level (BL) 2 containment (see Section II–B); however, when such agents are used for animal inoculation or transmission studies, a higher containment level is recommended. Similarly, RG3 agents such as Venezuelan equine encephalomyelitis and yellow fever viruses should be handled at a higher containment level for animal inoculation and transmission experiments.

Individuals working with human immunodeficiency virus (HIV), hepatitis B virus (HBV) or other bloodborne pathogens should consult the applicable Occupational Safety and Health Administration (OSHA) (*https://www.osha.gov/*) (regulation, 29 CFR 1910.1030, and OSHA publication 3127 (1996 revised). BL2 containment is recommended for activities involving all blood-contaminated clinical specimens, body fluids, and tissues from all humans, or from HIV- or HBV-infected or inoculated laboratory animals. Activities such as the production of research-laboratory scale quantities of HIV or other bloodborne pathogens, manipulating concentrated virus preparations, or conducting procedures that may produce droplets or aerosols, are performed in a BL2 facility using the additional practices and containment equipment recommended for BL3. Activities involving industrial scale volumes or preparations of concentrated HIV are conducted in a BL3 facility, or BL3 Large Scale if appropriate, using BL3 practices and containment equipment.

Exotic plant pathogens and animal pathogens of domestic livestock and poultry are restricted and may require special laboratory design, operation and containment features not addressed in Biosafety in Microbiological and Biomedical Laboratories (see Section V–C, Footnotes and References of Sections I through IV). For information regarding the importation, possession, or use of these agents see Sections V–G and V–H, Footnotes and References of Sections I through IV.

Risk mitigation strategies employed in contained settings are not likely to differ for GDMOs compared to other gene modified organisms in the laboratory. However, given the relative newness of GDMO technology and its use in biomedical research, any risk assessment is likely to have greater uncertainty regarding potential risks. Section II–A–3 is proposed to be amended to provide additional guidance for conducting these assessments by insertion of new paragraphs five and six:

Section II–A–3 is proposed to be amended to:

In deciding on the appropriate containment for an experiment, the first step is to assess the risk of the agent itself. Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, classifies agents into Risk Groups based on an assessment of their ability to cause disease in humans and the available treatments for such disease. Once the Risk Group of the agent is identified, this should be followed by a thorough consideration of how the agent is to be manipulated. Factors to be considered in determining the level of containment include agent factors such as: virulence, pathogenicity, infectious dose, environmental stability, route of spread, communicability, operations, quantity, availability of vaccine or treatment, and gene product effects such as toxicity, physiological activity, and allergenicity. Any strain that is known to be more hazardous than the parent (wild-type) strain should be considered for handling at a higher containment level. Certain attenuated strains or strains that have been demonstrated to have irreversibly lost known virulence factors may qualify for a reduction of the containment level compared to the Risk Group assigned to the parent strain (see Section V–B, Footnotes and References of Sections I–IV).

While the starting point for the risk assessment is based on the identification of the Risk Group of the parent agent, as technology moves forward, it may be possible to develop an organism containing genetic sequences from multiple sources such that the parent agent may not be obvious. In such cases, the risk assessment should include at least two levels of analysis. The first involves a consideration of the Risk Groups of the source(s) of the sequences and the second involves an assessment of the functions that may be encoded by these sequences (*e.g.,* virulence or transmissibility). It may be prudent to first consider the highest Risk Group classification of all agents that are the source of sequences included in the construct. Other factors to be considered include the percentage of the genome contributed by each parent agent and the predicted function or intended purpose of each contributing sequence. The initial assumption should be that all sequences will function as they did in the original host context.

The Principal Investigator and Institutional Biosafety Committee must also be cognizant that the combination of certain sequences in a new biological context may result in an organism whose risk profile could be higher than that of the contributing organisms or sequences. The synergistic function of these sequences may be one of the key

attributes to consider in deciding whether a higher containment level is warranted, at least until further assessments can be carried out. A new biosafety risk may occur with an organism formed through combination of sequences from a number of organisms or due to the synergistic effect of combining transgenes that results in a new phenotype.

A final assessment of risk based on these considerations is then used to set the appropriate containment conditions for the experiment (see Section II–B, Containment). The appropriate containment level may be equivalent to the Risk Group classification of the agent or it may be raised or lowered as a result of the above considerations. The Institutional Biosafety Committee must approve the risk assessment and the biosafety containment level for recombinant or synthetic nucleic acid experiments described in Sections III–A, Experiments that Require NIH Director Approval and Institutional Biosafety Committee Approval, Before Initiation; III–B, Experiments that Require NIH OSP and Institutional Biosafety Committee Approval Before Initiation; III–C, Experiments Involving Human Gene Transfer that Require Institutional Biosafety Committee Approval Prior to Initiation; III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation.

Research involving gene drive modified organisms may require risk assessments that incorporate a broader scope of considerations because of greater uncertainty of the technology and potential uncertainty of the impact of the newly modified organism. Specific attention must be paid to risks of an unintended release from the laboratory and the potential impact on humans, other populations of organisms, and the environment.

Considerations for conducting risk assessments for research involving gene drive modified organisms might include:

1. The specific types of manipulations based on:

a. Function or intended function of the genetic/gene drive construct (*i.e.,* a designed or engineered assembly of sequences);

b. Source of the genetic material (*e.g.,* sequences of transgenes) in the construct;

c. The modifications to the construct;

d. Whether it is possible to predict the consequences of a construct, including the recognition of an unintended gene drive (*i.e.,* construct not specifically designed as a gene drive but nonetheless having properties of a gene drive) and the possible consequences of escape into the environment;

e. The potential ability of the gene drive to spread or persist in local populations;

2. Options for approaches to risk mitigation for specific types of risks in experiments or when dealing with a high degree of uncertainty about risks;

3. Considerations for implementing more stringent containment measures until biosafety data are accrued to support lowering containment.

Careful consideration should be given to the types of manipulation planned for some higher Risk Group agents. For example, the RG2 dengue viruses may be cultured under the Biosafety Level (BL) 2 containment (see Section II–B); however, when such agents are used for animal inoculation or transmission studies, a higher containment level is recommended. Similarly, RG3 agents such as Venezuelan equine encephalomyelitis and yellow fever viruses should be handled at a higher containment level for animal inoculation and transmission experiments.

Individuals working with human immunodeficiency virus (HIV), hepatitis B virus (HBV) or other bloodborne pathogens should consult the applicable Occupational Safety and Health Administration (OSHA) regulation, 29 CFR 1910.1030, and OSHA publication 3127 (1996 revised). BL2 containment is recommended for activities involving all blood-contaminated clinical specimens, body fluids, and tissues from all humans, or from HIV- or HBV-infected or inoculated laboratory animals. Activities such as the production of research-laboratory scale quantities of HIV or other bloodborne pathogens, manipulating concentrated virus preparations, or conducting procedures that may produce droplets or aerosols, are performed in a BL2 facility using the additional practices and containment equipment recommended for BL3. Activities involving industrial scale volumes or preparations of concentrated HIV are conducted in a BL3 facility, or BL3 Large Scale if appropriate, using BL3 practices and containment equipment.

Exotic plant pathogens and animal pathogens of domestic livestock and poultry are restricted and may require special laboratory design, operation and containment features not addressed in Biosafety in Microbiological and Biomedical Laboratories (see Section V–C, Footnotes and References of Sections I through IV). For information regarding the importation, possession, or use of these agents see Sections V–G and V–H, Footnotes and References of Sections I through IV.

In 2012 when the NIH Guidelines were updated to expand the scope to cover synthetic nucleic acid molecules, Section III–C and Section III–F–1 were amended to exempt research with certain oligonucleotides based on the lower risk posed by their transient nature. These sections also outlined criteria for higher risk nucleic acids that would not be exempt (*e.g.,* nucleic acids that replicated, were transcribed, translated, or integrated etc.). At that time, much research with oligonucleotides was likely to involve a delivery method using a recombinant nucleic acid molecule (*e.g.,* viral vector or plasmid), and thus would still be subject to the NIH Guidelines. Since then, gene editing using CRISPR/Cas systems and non-recombinant delivery methods (*e.g.,* lipid nanoparticles) has come into more common use. Currently, transgenic organisms with the same genetic modification may or may not be subject to the NIH Guidelines depending on the method of generation (*e.g.,* recombinant viral vector delivery and expression of Cas9 and guide RNAs vs. lipid nanoparticle delivery of protein Cas9 and guide RNAs). Because of the higher risks associated with stable genetic modifications to viruses, cells, or organisms, Sections III–C and III–F–1 each have a criterion that precludes the exemption of nucleic acids that integrate, the main method to introduce such changes in 2012. To avoid exempting certain gene editing approaches or GDMOs, the language in Sections III–C and III–F–1 is proposed to be amended to replace the criterion involving integration with a broader criterion covering the introduction of a stable genetic modification.

Section III–C–1 currently states in part:

Section III–C–1. Experiments Involving the Deliberate Transfer of Recombinant or Synthetic Nucleic Acid Molecules, or DNA or RNA Derived From Recombinant or Synthetic Nucleic Acid Molecules, Into One or More Human Research Participants

Human gene transfer is the deliberate transfer into human research participants of either:

1. Recombinant nucleic acid molecules, or DNA or RNA derived from recombinant nucleic acid molecules, or

2. Synthetic nucleic acid molecules, or DNA or RNA derived from synthetic nucleic acid molecules, that meet any one of the following criteria:

a. Contain more than 100 nucleotides; or

b. Possess biological properties that enable integration into the genome (*e.g., cis* elements involved in integration); or

c. Have the potential to replicate in a cell; or

d. Can be translated or transcribed.

This portion of Section III–C–1 1 is proposed to be amended to:

Section III–C–1. Experiments Involving the Deliberate Transfer of Recombinant or Synthetic Nucleic Acid Molecules, or DNA or RNA Derived From Recombinant or Synthetic Nucleic Acid Molecules, Into One or More Human Research Participants

Human gene transfer is the deliberate transfer into human research participants of either:

1. Recombinant nucleic acid molecules, or DNA or RNA derived from recombinant nucleic acid molecules, or

2. Synthetic nucleic acid molecules, or DNA or RNA derived from synthetic nucleic acid molecules, that meet any one of the following criteria:

a. Contain more than 100 nucleotides; or

b. Possess biological properties that enable introduction of stable genetic modifications into the genome (*e.g.,* cis elements involved in integration, gene editing); or

c. Have the potential to replicate in a cell; or

d. Can be translated or transcribed.

Section III–F–1 currently states:

Section III–F–1. Those synthetic nucleic acids that: (1) can neither replicate nor generate nucleic acids that can replicate in any living cell (*e.g.,* oligonucleotides or other synthetic nucleic acids that do not contain an origin of replication or contain elements known to interact with either DNA or RNA polymerase), and (2) are not designed to integrate into DNA, and (3) do not produce a toxin that is lethal for vertebrates at an LD50 of less than 100 nanograms per kilogram body weight. If a synthetic nucleic acid is deliberately transferred into one or more human research participants and meets the criteria of Section III–C, it is not exempt under this Section.

Section III–F–1 is proposed to be amended to:

Section III–F–1. Those synthetic nucleic acids that: (1) can neither replicate nor generate nucleic acids that can replicate in any living cell (*e.g.,* oligonucleotides or other synthetic nucleic acids that do not contain an origin of replication or contain elements known to interact with either DNA or RNA polymerase), and (2) are not designed to introduce a stable genetic modification, and (3) do not produce a toxin that is lethal for vertebrates at an LD50 of less than 100 nanograms per kilogram body weight. If a synthetic nucleic acid is deliberately transferred into one or more human research participants and meets the criteria of Section III–C, it is not exempt under this Section.

To provide guidance on physical containment for research involving GDMOs, Section III–D is proposed to be amended in multiple subsections to require that experiments involving GDMOs be conducted at a minimum of BL2 containment to provide the appropriate laboratory practices, containment equipment, and special laboratory design to protect laboratory workers, the public, and local ecosystems. A section specific to experiments involving GDMOs is proposed to be added as Section III–D–8. Sections III–D–4, III–D–5, and III–E–3, which cover experiments with whole animals, plants, and transgenic rodents, are also proposed to be amended to reference Section III–D–8.

Section III–D–4, which is part of Section III–D, Experiments that Require Institutional Biosafety Committee Approval Before Initiation, currently states:

Section III–D–4. Experiments Involving Whole Animals

This section covers experiments involving whole animals in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic animals) and experiments involving viable recombinant or synthetic nucleic acid molecule-modified microorganisms tested on whole animals. For the latter, other than viruses which are only vertically transmitted, the experiments may *not* be conducted at BL1–N containment. A minimum containment of BL2 or BL2–N is required.

Caution—Special care should be used in the evaluation of containment conditions for some experiments with transgenic animals. For example, such experiments might lead to the creation of novel mechanisms or increased transmission of a recombinant pathogen or production of undesirable traits in the host animal. In such cases, serious consideration should be given to increasing the containment conditions.

Section III–D–4–a. Recombinant or synthetic nucleic acid molecules, or DNA or RNA molecules derived therefrom, from any source except for greater than two-thirds of eukaryotic viral genome may be transferred to any non-human vertebrate or any invertebrate organism and propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study (see Section V–B, Footnotes and References of Sections I–IV). Animals that contain sequences from viral vectors, which do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study. Experiments involving the introduction of other sequences from eukaryotic viral genomes into animals are covered under Section III–D–4–b, Experiments Involving Whole Animals. For experiments involving recombinant or synthetic nucleic acid molecule-modified Risk Groups 2, 3, 4, or restricted organisms, see Sections V–A, V–G, and V–L, Footnotes and References of Sections I–IV. It is important that the investigator demonstrate that the fraction of the viral genome being utilized does not lead to productive infection. A U.S. Department of Agriculture permit is required for work with plant or animal pathogens (see Section V–G, Footnotes and References of Sections I–IV).

Section III–D–4–b. For experiments involving recombinant or synthetic nucleic acid molecules, or DNA or RNA derived therefrom, involving whole animals, including transgenic animals, and not covered by Section III–D–1, Experiments Using Human or Animal Pathogens (Risk Group 2, Risk Group 3, Risk Group 4, or Restricted Agents as Host-Vector Systems), or Section III–D–4–a, the appropriate containment shall be determined by the Institutional Biosafety Committee.

Section III–D–4–c. Exceptions under Section III–D–4, Experiments Involving Whole Animals

Section III–D–4–c–(1). Experiments involving the generation of transgenic rodents that require BL1 containment are described under Section III–E–3, Experiments Involving Transgenic Rodents.

Section III–D–4–c–(2). The purchase or transfer of transgenic rodents is exempt from the NIH Guidelines under Section III–F, Exempt Experiments (see Appendix C–VII, The Purchase or Transfer of Transgenic Rodents).

Section III–D–4 is proposed to be amended to state:

Section III–D–4. Experiments Involving Whole Animals

This section covers experiments involving deliberate transfer of recombinant or synthetic nucleic acid

molecules, DNA or RNA derived from recombinant or synthetic nucleic acid molecules, or recombinant or synthetic nucleic acid molecule-modified microorganisms into whole animals and experiments involving whole animals in which the animal's genome has been altered by recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic animals). Experiments involving gene drive modified animals or experiments involving viable recombinant or synthetic nucleic acid molecule-modified microorganisms, except for viruses that are only vertically transmitted, may *not* be conducted at BL1–N containment. A minimum containment of BL2 or BL2–N is required (see Section III–D–8).

Caution—Special care should be used in the evaluation of containment conditions for some experiments with transgenic animals. For example, such experiments might lead to the creation of novel mechanisms (*e.g.,* a gene drive; refer to Section III–D–8) or increased transmission of a recombinant pathogen or production of undesirable traits in the host animal. In such cases, serious consideration should be given to increasing the containment conditions.

Section III–D–4–a. Recombinant or synthetic nucleic acid molecules, or DNA or RNA molecules derived therefrom, from any source except for greater than two-thirds of eukaryotic viral genome may be transferred to any non-human vertebrate or any invertebrate organism and propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study (see Section V–B, Footnotes and References of Sections I–IV). Animals that contain sequences from viral vectors, which do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1–N and appropriate to the organism under study. Experiments involving the introduction of other sequences from eukaryotic viral genomes into animals are covered under Section III–D–4–b, Experiments Involving Whole Animals. For experiments involving recombinant or synthetic nucleic acid molecule-modified Risk Groups 2, 3, 4, or restricted organisms, see Sections V–A, V–G, and V–L, Footnotes and References of Sections I–IV. It is important that the investigator demonstrate that the fraction of the viral genome being utilized does not lead to productive infection. A U.S. Department of Agriculture permit is required for work with plant or animal pathogens (see Section V–G, Footnotes and References of Sections I–IV).

Section III–D–4–b. For experiments involving recombinant or synthetic nucleic acid molecules, or DNA or RNA derived therefrom, involving whole animals, including transgenic animals, and not covered by Section III–D–1, Experiments Using Human or Animal Pathogens (Risk Group 2, Risk Group 3, Risk Group 4, or Restricted Agents as Host-Vector Systems), or Section III–D–4–a, the appropriate containment shall be determined by the Institutional Biosafety Committee. Experiments involving gene drive modified animals generated by recombinant or synthetic nucleic acid molecules shall be conducted at a minimum of BL2 or BL2–N (see Section III–D–8).

Section III–D–4–c. Exceptions under Section III–D–4, Experiments Involving Whole Animals

Section III–D–4–c–(1). Experiments involving the generation of transgenic rodents that require BL1 containment are described under Section III–E–3, Experiments Involving Transgenic Rodents.

Section III–D–4–c–(2). The purchase or transfer of BL1 transgenic rodents is exempt from the *NIH Guidelines* under Section III–F, Exempt Experiments (see Appendix C–VII, The Purchase or Transfer of Transgenic Rodents).

Section III–D–4–c–(3). Experiments involving the generation or use of gene drive modified animals require a minimum of BL2 containment and are covered under III–D–8, Experiments Involving Gene Drive Modified Organisms.

Section III–D–5 currently states in part:

Section III–D–5. Experiments Involving Whole Plants

Experiments to genetically engineer plants by recombinant or synthetic nucleic acid molecule methods, to use such plants for other experimental purposes (*e.g.,* response to stress), to propagate such plants, or to use plants together with microorganisms or insects containing recombinant or synthetic nucleic acid molecules, may be conducted under the containment conditions described in Sections III–D–5–a through III–D–5–e. If experiments involving whole plants are not described in Section III–D–5 and do not fall under Sections III–A, III–B, III–D or III–F, they are included in Section III–E.

This portion of Section III–D–5 is proposed to be amended to:

Section III–D–5. Experiments Involving Whole Plants

Experiments to genetically engineer plants by recombinant or synthetic nucleic acid molecule methods, to use such plants for other experimental purposes (*e.g.,* response to stress), to propagate such plants, or to use plants together with microorganisms or insects containing recombinant or synthetic nucleic acid molecules, may be conducted under the containment conditions described in Sections III–D–5–a through III–D–5–e. If experiments involving whole plants are not described in Section III–D–5 and do not fall under Sections III–A, III–B, III–D or III–F, they are included in Section III–E. Experiments involving the generation or use of gene drive modified organisms require a minimum of BL2 containment and are described under Section III–D–8, Experiments Involving Gene Drive Modified Organisms.

Section III–D–8 is proposed to be added to state:

Section III–D–8. Experiments Involving Gene Drive Modified Organisms

Experiments involving gene drive modified organisms generated by recombinant or synthetic nucleic acid molecules shall be conducted at a minimum of Biosafety Level (BL) 2, BL2–N (Animals) or BL2–P (plant) containment.

Only transgenic rodents that may be contained under BL1 are covered under Section III–E–3. Section III–E–3 is proposed to be amended to reference the new Section III–D–8 to reinforce that research with GDMOs shall be conducted at a minimum of BL2. Section III–E–3, which is part of Section III–E, Experiments that Require Institutional Biosafety Committee Notice Simultaneous with Initiation, states in part:

Section III–E–3. Experiments Involving Transgenic Rodents

This section covers experiments involving the generation of rodents in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic rodents). Only experiments that require BL1 containment are covered under this section; experiments that require BL2, BL3, or BL4 containment are covered under Section III–D–4, Experiments Involving Whole Animals.

This portion of Section III–E–3 is proposed to be amended to:

Section III–E–3. Experiments Involving Transgenic Rodents

This section covers experiments involving the generation or use of rodents in which the animal's genome has been altered by stable introduction of recombinant or synthetic nucleic acid molecules, or nucleic acids derived therefrom, into the germ-line (transgenic rodents). Only experiments that require BL1 containment are covered under this section; experiments that require BL2, BL3, or BL4 containment are covered under Section III–D–4, Experiments Involving Whole Animals or Section III–D–8, Experiments Involving Gene Drive Modified Organisms.

In the NExTRAC report, the committee recommended that NIH should require appropriate expertise in the review of gene drive research by IBC members and BSO. Portions of Section IV–B are proposed to be amended regarding institutional responsibilities for the establishment of IBCs and requirements for BSOs.

Section IV–B–1–c currently states:

Section IV–B–1–c. Appoint a Biological Safety Officer (who is also a member of the Institutional Biosafety Committee) if the institution: (i) conducts recombinant or synthetic nucleic acid molecule research at Biosafety Level (BL) 3 or BL4, or (ii) engages in large-scale (greater than 10 liters) research. The Biological Safety Officer carries out the duties specified in Section IV–B–3.

Section IV–B–1–c is proposed to be amended to:

Section IV–B–1–c. Appoint a Biological Safety Officer (who is also a member of the Institutional Biosafety Committee) if the institution: (i) conducts recombinant or synthetic nucleic acid molecule research at Biosafety Level (BL) 3 or BL4, (ii) engages in large-scale (greater than 10 liters) research or (iii) conducts research involving gene drive modified organisms. The Biological Safety Officer carries out the duties specified in Section IV–B–3.

Section IV–B–2–a, Membership and Procedures of IBCs currently states in part:

Section IV–B–2–a–(1). The Institutional Biosafety Committee must comprise no fewer than five members so selected that they collectively have experience and expertise in recombinant or synthetic nucleic acid molecule technology and the capability to assess the safety of recombinant or synthetic nucleic acid molecule research and to identify any potential risk to public health or the environment. At least two members shall not be affiliated with the institution (apart from their membership on the Institutional Biosafety Committee) and who represent the interest of the surrounding community with respect to health and protection of the environment (*e.g.,* officials of state or local public health or environmental protection agencies, members of other local governmental bodies, or persons active in medical, occupational health, or environmental concerns in the community). The Institutional Biosafety Committee shall include at least one individual with expertise in plant, plant pathogen, or plant pest containment principles when experiments utilizing Appendix L, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Plants, require prior approval by the Institutional Biosafety Committee. The Institutional Biosafety Committee shall include at least one scientist with expertise in animal containment principles when experiments utilizing Appendix M, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Animals, require Institutional Biosafety Committee prior approval. When the institution conducts recombinant or synthetic nucleic acid molecule research at BL3, BL4, or Large Scale (greater than 10 liters), a Biological Safety Officer is mandatory and shall be a member of the Institutional Biosafety Committee (see Section IV–B–3, Biological Safety Officer). When the institution participates in or sponsors recombinant or synthetic nucleic acid molecule research involving human research participants, the institution must ensure that the Institutional Biosafety Committee has adequate expertise and training (using ad hoc consultants as deemed necessary). Institutional Biosafety Committee approval must be obtained from the clinical trial site.

Section IV–B–2–a–(1) is proposed to be amended to read:

Section IV–B–2–a–(1). The Institutional Biosafety Committee must comprise no fewer than five members so selected that they collectively have experience and expertise in recombinant or synthetic nucleic acid molecule technology and the capability to assess the safety of recombinant or synthetic nucleic acid molecule research and to identify any potential risk to public health or the environment. At least two members shall not be affiliated with the institution (apart from their membership on the Institutional Biosafety Committee) and who represent the interest of the surrounding community with respect to health and protection of the environment (*e.g.,* officials of state or local public health or environmental protection agencies, members of other local governmental bodies, or persons active in medical, occupational health, or environmental concerns in the community). The Institutional Biosafety Committee shall include at least one individual with expertise in plant, plant pathogen, or plant pest containment principles when experiments utilizing Appendix L, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Plants, require prior approval by the Institutional Biosafety Committee. The Institutional Biosafety Committee shall include at least one scientist with expertise in animal containment principles when experiments utilizing Appendix M, Physical and Biological Containment for Recombinant or Synthetic Nucleic Acid Molecule Research Involving Animals, require Institutional Biosafety Committee prior approval. When the institution conducts research involving gene drive modified organisms the institution must ensure that the Institutional Biosafety Committee has adequate expertise (*e.g.,* specific species containment, ecological or environmental risk assessment) using *ad hoc* consultants if necessary. When the institution conducts recombinant or synthetic nucleic acid molecule research at BL3, BL4, or Large Scale (greater than 10 liters) or research involving gene drive modified organisms, a Biological Safety Officer is mandatory and shall be a member of the Institutional Biosafety Committee (see Section IV–B–3, Biological Safety Officer). When the institution conducts research with gene drive modified organisms, the impact on ecosystems should be assessed by the Institutional Biosafety Committee (see Section V–N, Footnotes and References of Sections I–IV). When the institution participates in or sponsors recombinant or synthetic nucleic acid molecule research involving human research participants, the institution must ensure that the Institutional Biosafety Committee has adequate expertise and training (using ad hoc consultants if necessary). Institutional Biosafety Committee approval must be obtained from the clinical trial site.

Section IV–B–3, Biological Safety Officer (BSO), states in part:

Section IV–B–3–a. The institution shall appoint a Biological Safety Officer if it engages in large-scale research or

production activities involving viable organisms containing recombinant or synthetic nucleic acid molecules.

Section IV–B–3–a is proposed to be amended to clarify the requirement for a BSO to be a member of the IBC. A new Section IV–B–3–c is proposed to be added to require a BSO for research involving GDMOs. The current IV–B–3–c sections will be re-lettered to IV–B–3–d.

Section IV–B–3–a. The institution shall appoint a Biological Safety Officer if it engages in large-scale research or production activities involving viable organisms containing recombinant or synthetic nucleic acid molecules. The Biological Safety Officer shall be a member of the Institutional Biosafety Committee.

Section IV–B–3–c. The institution shall appoint a Biological Safety Officer if it engages in recombinant or synthetic nucleic acid molecule research that involves gene drive modified organisms. The Biological Safety Officer shall be a member of the Institutional Biosafety Committee.

To emphasize that GDMOs may have an impact on ecosystems, a new footnote and reference for Sections I through IV is proposed to be added.

Section V–N is proposed to state:

Section V–N Determination of whether a gene drive modified organism has a potential for serious detrimental impact on managed (agricultural, forest, grassland) or natural ecosystems should be made by the Principal Investigator and the Institutional Biosafety Committee, in consultation with scientists knowledgeable of gene drive technology, the environment, and ecosystems in the geographic area of the research.

Since research with GDMOs shall be conducted at a minimum of Biosafety Level 2, research involving host vector system organisms modified by a gene drive will not be exempt. Therefore, the exceptions (Appendices C–III–A and C–IV–A) to Appendices C–III and C–IV, *Saccharomyces* and *Kluyveromyces* Host-Vector Systems, respectively, are proposed to be amended.

Appendices C–III–A Exceptions and C–IV–A Exceptions currently state:

The following categories are not exempt from the NIH Guidelines: (i) experiments described in Section III–B which require NIH OSP and Institutional Biosafety Committee approval before initiation, (ii) experiments involving DNA from Risk Groups 3, 4, or restricted organisms (see Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, and Sections V–G and V–L, Footnotes and References of Sections I through IV) or cells known to be infected with these agents may be conducted under containment conditions specified in Section III–D–2 with prior Institutional Biosafety Committee review and approval, (iii) large-scale experiments (*e.g.,* more than 10 liters of culture), and (iv) experiments involving the deliberate cloning of genes coding for the biosynthesis of molecules toxic for vertebrates (see Appendix F, Containment Conditions for Cloning of Genes Coding for the Biosynthesis of Molecules Toxic for Vertebrates).

Appendices C–III–A Exceptions and C–IV–A Exceptions are proposed to be amended to state:

The following categories are not exempt from the NIH Guidelines: (i) experiments described in Section III–B, which require NIH OSP and Institutional Biosafety Committee approval before initiation; (ii) experiments involving DNA from Risk Groups 3, 4, or restricted organisms (see Appendix B, Classification of Human Etiologic Agents on the Basis of Hazard, and Sections V–G and V–L, Footnotes and References of Sections I through IV) or cells known to be infected with these agents may be conducted under containment conditions specified in Section III–D–2 with prior Institutional Biosafety Committee review and approval; (iii) large-scale experiments (*e.g.,* more than 10 liters of culture), (iv) experiments involving the deliberate cloning of genes coding for the biosynthesis of molecules toxic for vertebrates (see Appendix F, Containment Conditions for Cloning of Genes Coding for the Biosynthesis of Molecules Toxic for Vertebrates), and (v) experiments involving gene drive modified organisms (Section III–D–8). To provide additional guidance on containment for work with arthropods, Appendices G, L, and M are proposed to reference the Arthropod Containment Guidelines, which specifically outline practices and procedures for arthropod research, and the addendum Arthropod Containment Guidelines, which articulates containment practices for gene drive modified arthropods. Appendix G–III and Footnotes and References of Appendix G will also be modified to reference the current edition of the reference source BMBL and to correct an erroneous second citation of the BMBL.

Appendix G–III–A currently states:

Appendix G–III–A. Biosafety in Microbiological and Biomedical Laboratories, 5th edition, U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and National Institutes of Health, Bethesda, Maryland.

Appendix G–III–A is proposed to be amended to state:

Appendix G–III–A. Biosafety in Microbiological and Biomedical Laboratories, 6th edition, U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and National Institutes of Health, Bethesda, Maryland.

Appendix G–III–B currently states:

Appendix G–III–B. Biosafety in Microbiological and Biomedical Laboratories, 3rd edition, May 1993, U.S. DHHS, Public Health Service, Centers for Disease Control and Prevention, Atlanta, Georgia, and NIH, Bethesda, Maryland.

Appendix G–III–B is proposed to be amended to state:

Appendix G–III–B. Arthropod Containment Guidelines, Version 3.2, 2019, and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive, 2022, American Committee of Medical Entomology, American Society of Tropical Medicine and Hygiene, Arlington, Virginia. Appendices L and M specify containment conditions and practices for plants and animals, respectively, that preclude the use of containment as specified in Appendix G. Both Appendices L and M will be modified to incorporate the Arthropod Containment Guidelines and cross-reference to Appendix G–III–B.

Appendix L–III–C currently states:

Appendix L–III–C. Biological Containment Practices (Macroorganisms)

Appendix L–III–C–1. Effective dissemination of arthropods and other small animals can be prevented by using one or more of the following procedures: (i) use non-flying, flight-impaired, or sterile arthropods; (ii) use non-motile or sterile strains of small animals; (iii) conduct experiments at a time of year that precludes the survival of escaping organisms; (iv) use animals that have an obligate association with a plant that is not present within the dispersal range of the organism; or (v) prevent the escape of organisms present in run-off water by chemical treatment or evaporation of run-off water.

Appendix L–III–C is proposed to be amended to:

Appendix L–III–C. Biological Containment Practices (Macroorganisms)

Appendix L–III–C–1. Effective dissemination of arthropods and other small animals can be prevented by using

one or more of the following procedures: (i) use non-flying, flight-impaired, or sterile arthropods; (ii) use non-motile or sterile strains of small animals; (iii) conduct experiments at a time of year that precludes the survival of escaping organisms; (iv) use animals that have an obligate association with a plant that is not present within the dispersal range of the organism; or (v) prevent the escape of organisms present in run-off water by chemical treatment or evaporation of run-off water. Containment for arthropods is described in the Arthropod Containment Guidelines and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive (see Appendix G–III–B).

Appendix M–III–D currently states:

Appendix M–III–D. Other research with non-laboratory animals, which may not appropriately be conducted under conditions described in Appendix M, may be conducted safely by applying practices routinely used for controlled culture of these biota. In aquatic systems, for example, BL1 equivalent conditions could be met by utilizing growth tanks that provide adequate physical means to avoid the escape of the aquatic species, its gametes, and introduced exogenous genetic material. A mechanism shall be provided to ensure that neither the organisms nor their gametes can escape into the supply or discharge system of the rearing container (*e.g.,* tank, aquarium, etc.) Acceptable barriers include appropriate filtration, irradiation, heat treatment, chemical treatment, etc. Moreover, the top of the rearing container shall be covered to avoid escape of the organism and its gametes. In the event of tank rupture, leakage, or overflow, the construction of the room containing these tanks should prevent the organisms and gametes from entering the building's drains before the organism and its gametes have been inactivated.

Other types of non-laboratory animals (*e.g.,* nematodes, arthropods, and certain forms of smaller animals) may be accommodated by using the appropriate BL1 through BL4 or BL1–P through BL4–P containment practices and procedures as specified in Appendices G and L.

Appendix M–III–D is proposed to be amended to:

Appendix M–III–D. Research with animals, which may not appropriately be conducted under conditions described in Appendix M, may be conducted safely by applying practices routinely used for controlled culture of these biota. In aquatic systems, for example, BL1 equivalent conditions could be met by utilizing growth tanks that provide adequate physical means to avoid the escape of the aquatic species, its gametes, and introduced exogenous genetic material. A mechanism shall be provided to ensure that neither the organisms nor their gametes can escape into the supply or discharge system of the rearing container (*e.g.,* tank, aquarium, etc.) Acceptable barriers include appropriate filtration, irradiation, heat treatment, chemical treatment, etc. Moreover, the top of the rearing container shall be covered to avoid escape of the organism and its gametes. In the event of tank rupture, leakage, or overflow, the construction of the room containing these tanks should prevent the organisms and gametes from entering the building's drains before the organism and its gametes have been inactivated.

Other types of animals (*e.g.,* nematodes, arthropods, and certain forms of smaller animals) may be accommodated by using the appropriate BL1 through BL4 or BL1–P through BL4–P containment practices and procedures as specified in Appendices G and L. Containment for arthropods is described in the Arthropod Containment Guidelines and Addendum 1 Containment Practices for Arthropods Modified with Engineered Transgenes Capable of Gene Drive (see Appendix G–III–B).

The term ''helper virus'' is used in multiple sections of the NIH Guidelines to refer to the missing functions provided to a defective virus. However, helper systems (*e.g.,* transient transfection systems, packaging cell lines, replicon systems, etc.) are more commonly used than a helper virus. NIH OSP has interpreted the term ''helper virus'' to extend to the use of helper systems because they are also associated with the risk of generation of replication competent virus. To clarify the language in the NIH Guidelines, the term ''helper virus'' will be replaced in Sections III–D–3, and III–E–1 with the term ''helper systems''.

The risk group classification in Appendix B of two viruses, West Nile virus and St. Louis encephalitis virus, are proposed to be changed from RG3 to RG2 to be consistent with the risk assessment that is articulated in the current edition of the BMBL.

Appendix B–III–D currently states in part:

Appendix B–III–D. Risk Group 3 (RG3)—Viruses and Prions.

Alphaviruses (Togaviruses)—Group A Arboviruses currently states in part:

—St. Louis encephalitis virus.

Flaviviruses—Group B Arboviruses currently states in part:

—West Nile virus (WNV).

Appendix B–II–D is proposed to be amended to state:

Appendix B–II–D. Risk Group 2 (RG2)—Viruses.

Alphaviruses (Togaviruses)—Group A Arboviruses.

—St. Louis encephalitis virus.

Flaviviruses—Group B Arboviruses.

—West Nile virus (WNV).

Dated: August 3, 2023.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2023–17178 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Fogarty International Center Advisory Board.

This will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session can be accessed from the Fogarty International Center website (*https://www.fic.nih.gov/About/Advisory/Pages/default.aspx*).

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: Fogarty International Center Advisory Board.

Date: September 7–8, 2023.

Closed: September 7, 2023, 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate the second level of grant applications.

Place: Fogarty International Center, National Institutes of Health, Lawton

Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892.

Open: September 8, 2023, 9:00 a.m. to 3:00 p.m.

Agenda: Update and discussion of current and planned Fogarty International Center activities.

Place: Fogarty International Center, National Institutes of Health, Lawton Chiles International House (Stone House), 16 Center Drive, Conference Room, Bethesda, MD 20892 (Virtual Meeting).

Meeting Access: https://www.fic.nih.gov/About/Advisory/Pages/default.aspx.

Contact Person: Kristen Weymouth, Executive Secretary, Fogarty International Center, 31 Center Drive, Room B2C02, Bethesda, MD 20892, 301–495–1415, *kristen.weymouth@nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Persons listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.fic.nih.gov/About/Advisory/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health, HHS)

Dated: August 4, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17141 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; High Impact, Interdisciplinary Science in NIDDK Research Areas.

Date: October 10, 2023.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michelle L. Barnard, Ph.D., Scientific Review Officer, NIDDK/Scientific Review Branch, National Institutes of Health 6707 Democracy Boulevard, Room 7353, Bethesda, MD 20892–2542 (301) 594–8898 *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17124 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Biomedical Research Study Section AA–1.

Date: October 17, 2023.

Time: 9:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna Ghambaryan, M.D., Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892, (301) 443–4032, *anna.ghambaryan@nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Study Section.

Date: October 24, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892.

Contact Person: Anna Ghambaryan, M.D., Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892, 301–443–4032, *anna.ghambaryan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: August 7, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17187 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Interagency Coordinating Committee on the Validation of Alternative Methods: Request for Comment on Draft Report on Validation, Qualification, and Acceptance of New Approach Methodologies

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) announces availability of the draft document, ''Validation, Qualification, and Regulatory Acceptance of New Approach Methodologies.'' ICCVAM will accept public comments on the document through September 5, 2023; 5:00 p.m. EDT.

DATES:

Document Availability: The draft document is available at *https://ntp.niehs.nih.gov/go/ICCVAM-submit.*

Written Public Comments Submissions: Submit comments to *amber.daniel@inotivco.com* by September 5, 2023; 5:00 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Dr. Nicole Kleinstreuer, Director, National Toxicology Program (NTP) Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), email: *nicole.kleinstreuer@nih.gov,* telephone: 984–287–3150.

SUPPLEMENTARY INFORMATION:

Background: ICCVAM, a congressionally mandated committee, promotes the scientific validation and regulatory acceptance or qualification of testing methods that accurately assess the chemical safety and hazards of relevant products in an effort to replace, reduce, or refine (enhance animal well-being and lessen or avoid pain and distress) animal use.

Shortly after its establishment as a standing committee in 1997, ICCVAM published a report, ''Validation and Regulatory Acceptance of Toxicological Test Methods,'' which outlined criteria for the validation and regulatory acceptance for new and alternative test methods (62 FR 11901). This and subsequent related documents described a validation model that, while being initially useful, has lately demonstrated limitations such as being lengthy and resource-intensive and not being compatible with many modern approaches to toxicity testing. Furthermore, for some contexts of use, methods may not need to undergo every step of the validation process described by these documents to yield valuable data for a federal agency.

In 2021, ICCVAM established its Validation Workgroup to update the 1997 document and align it with the principles articulated in the 2018 ICCVAM publication, ''A Strategic Roadmap for Establishing New Approaches to Evaluate the Safety of Chemicals and Medical Products in the United States'' (83 FR 7487). The Strategic Roadmap provides a conceptual framework promoting better communication between agencies and test method developers and more flexibility in how confidence is established, to help ensure the adoption of new methods by federal agencies and regulated industries once validated for a specific purpose or context of use.

A draft version of the new document, ''Validation, Qualification, and Regulatory Acceptance of New Approach Methodologies,'' is now available for public comment.

Requests for Comments: ICCVAM invites public comments from all ICCVAM stakeholders on the draft document. The document can be found on the NICEATM website at *https://ntp.niehs.nih.gov/go/ICCVAM-submit.*

Stakeholders may submit comments via email to Ms. Amber Daniel at *amber.daniel@inotivco.com.* Commenters should include their name, affiliation (if any), mailing address, telephone, email, and sponsoring organization (if any) with their comments. Guidelines for public statements submitted to NTP are available at at *http://ntp.niehs.nih.gov/ntp/about_ntp/guidelines_public_comments_508.pdf.* All comments received will be posted on the NICEATM website and identified by the individual's name, affiliation, and sponsoring organization. Comments should be received by September 5, 2023; 5:00 p.m. EDT, to ensure consideration as the draft document is finalized.

Responses to this notice are voluntary. No proprietary, classified, confidential, or sensitive information should be included in statements submitted in response to this notice. This request for input is for planning purposes only and is not a solicitation for applications or an obligation on the part of the U.S. Government to provide support for any ideas identified in response to the request. Please note that the U.S. Government will not pay for the preparation of any information submitted or for its use of that information.

Background Information on ICCVAM and NICEATM: ICCVAM is an interagency committee composed of representatives from 17 federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods and integrated testing strategies with regulatory applicability. ICCVAM also promotes the scientific validation and regulatory acceptance of testing methods that more accurately assess the safety and hazards of chemicals and products and replace, reduce, or refine animal use.

The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) establishes ICCVAM as a permanent interagency committee of NIEHS and provides the authority for ICCVAM involvement in activities relevant to the development of alternative test methods. Additional information about ICCVAM can be found at *https://ntp.niehs.nih.gov/go/iccvam.*

NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts and publishes analyses and evaluations of data from new, revised, and alternative testing approaches. NICEATM and ICCVAM work collaboratively to evaluate new and improved testing approaches applicable to the needs of U.S. federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about NICEATM can be found at *https://ntp.niehs.nih.gov/go/niceatm.*

Dated: August 4, 2023.

Richard P. Woychik,

Director, National Institute of Environmental Health Sciences and National Toxicology Program, National Institutes of Health.

[FR Doc. 2023–17120 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C.,

as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Neurotrauma and dementia.

Date: September 12, 2023.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institutes of Health, National Institute on Aging, 7201 Wisconsin Avenue, RM: 3208, Bethesda, MD 20892, 301–496–3562, *neuhuber@ninds.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 4, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–17123 Filed 8–9–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer at *carlos.graham@samhsa.hhs.gov*.

Comments are invited on: (a) whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Project: SAMHSA Generic Clearance for the Collection of Qualitative Research and Assessment

SAMHSA is requesting approval from the Office of Management and Budget (OMB) for their Generic clearance for purposes of conducting qualitative research. SAMHSA conducts qualitative research to gain a better understanding of emerging substance use and mental health policy issues, improve the development and quality of instruments, and to ensure SAMHSA leadership, centers and offices have recent data and information to inform program and policy decision-making. SAMHSA is requesting approval for at least four types of qualitative research: (a) interviews, (b) focus groups, (c) questionnaires, and (d) other qualitative methods.

SAMHSA is the agency within the U.S. Department of Health and Human Services (HHS) that leads public health efforts to advance the behavioral health of the nation and to improve the lives of individuals living with mental and substance use disorders, and their families. It's mission is to lead public health and service delivery efforts that promote mental health, prevent substance misuse, and provide treatments and supports to foster recovery while ensuring equitable access and better outcomes. SAMHSA pursues this mission by providing grant funding opportunities and guidance to states and territories, as well as tribal and local communities; technical assistance to grantees and practitioners; publishing and sharing resources for individuals and family members seeking information on prevention, harm reduction, treatment and recovery; collecting, analyzing, and sharing behavioral health data; collaborating with other Federal agencies to evaluate programs and improve policies; and raising awareness of available resources through educational messaging campaigns and events. Integral to this role, SAMHSA conducts qualitative research and evaluation studies, develops policy analyses, and estimates the cost and benefits of policy alternatives for SAMHSA related programs.

Qualitative research and assessment are the main objectives of the activities included in this clearance. The goal of establishing the SAMHSA Generic Clearance for the Collection of Qualitative Research and Assessment is to help public health officials, policymakers, community practitioners, and the public to understand mental health and substance use trends and how they are evolving; inform the development and implementation of targeted evidence-based interventions; focus resources where they are needed most; and evaluate the success of programs and policies. A key objective is to decrease the burden on stakeholders while expanding and improving data collection, analysis, evaluation, and dissemination. To achieve this objective, SAMHSA is streamlining and modernizing data collection efforts, while also coordinating evaluation across the agency to ensure funding and policies are data driven. Additionally, the agency is utilizing rigorous evaluation and analytical processes that are in alignment with the Foundations for Evidence-Based Policymaking Act of 2018. SAMHSA, using robust methods to collect, analyze, and report valid, reliable, trustworthy, and protected data, is key to improving and impacting behavioral health treatment, prevention, and recovery for communities most in need. By using rigorous methods, and improving the quality and completeness of program data, data can be disaggregated across different population groups to assess disparities within the behavioral health care system. SAMHSA's vision will be accomplished by better leveraging optimal data to inform the agency's policies and programs.

The qualitative research participants will include grant recipients; policy experts; national, state, and local public health representatives; human service, and healthcare providers; and representatives of other health organizations. A variety of instruments and platforms will be used to collect information from respondents. The annual burden hours requested (15,000) are based on the number of collections we expect to conduct over the requested period for this clearance. The burden estimates were calculated based on the amount of IC submissions to the 0930–0393 Fast Track Generic Clearance for the Collection of Qualitative Feedback on the Substance Abuse and Mental Health Services Administration (SAMHSA) Service Delivery that are ineligible for OMB approval under it. This Generic information collection will provide a viable replacement option. Internal assessments of projected IC submission over the next three years estimate the burden hours for this information collection to be

approximately half that of the 0930–0393 Fast Track Generic Clearance for the Collection of Qualitative Feedback on the Substance Abuse and Mental Health Services Administration (SAMHSA) Service Delivery.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
SAMHSA internal and external stakeholders.	Qualitative Research	15,000	1	1	15,000

Send comments Carlos Graham, SAMHSA Reports Clearance Officer, 5600 Fishers Lane, Room 15E57–B, Rockville, Maryland 20857, *OR* email a copy to *Carlos.Graham@samhsa.hhs.gov.* Written comments should be received by October 10, 2023.

Carlos Graham,

Reports Clearance Officer.

[FR Doc. 2023–17095 Filed 8–9–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Proposed Information Collection Activity; Data Security Requirements for Accessing Confidential Data

AGENCY: Substance Abuse and Mental Health Services Administration; Center for Behavioral Health Statistics and Quality; Department of Health and Human Services.

ACTION: Submission for OMB review; comment request.

SUMMARY: Substance Abuse and Mental Health Services Administration (SAMHSA) within the Department of Health and Human Services has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995. This is the second notice for public comment; the first was published in the **Federal Register** on November 22, 2022 and no comments were received. SAMHSA is forwarding the proposed Data Security Requirements for Accessing Confidential Data information collection to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.*

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Carlos Graham, SAMHSA Reports Clearance Officer, 5600 Fishers Lane, Room 15E57–A, Rockville, Maryland 20857, *OR* email a copy to *Carlos.Graham@samhsa.hhs.gov.*

SUPPLEMENTARY INFORMATION: SAMHSA 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.

Comments: Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of [agency], including whether the information will have practical utility; (b) the accuracy of [agency's] estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information to be collected, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated or other forms of information technology should be addressed to the points of contact in the **FOR FURTHER INFORMATION CONTACT** section.

Title of collection: Data Security Requirements for Accessing Confidential Data.

OMB Control Number: 3145–0271.

Summary of Collection: Title III of the Foundations for Evidence-Based Policymaking Act of 2018 (44 U.S.C. 3583; hereafter referred to as the Evidence Act) mandates that OMB establish a Standard Application Process (SAP) for requesting access to certain confidential data assets. While the adoption of the SAP is required for statistical agencies and units designated under the Confidential Information Protection and Statistical Efficiency Act of 2018 (CIPSEA), it is recognized that other agencies and organizational units within the Executive Branch may benefit from the adoption of the SAP to accept applications for access to confidential data assets. The SAP is to be a process through which agencies, the Congressional Budget Office, State, local, and Tribal governments, researchers, and other individuals, as appropriate, may apply to access confidential data assets held by a federal statistical agency or unit for the purposes of developing evidence. With the Interagency Council on Statistical Policy (ICSP) as advisors, the entities upon whom this requirement is levied are working with the SAP Project Management Office (PMO) and with OMB to implement the SAP.

The SAP Portal is to be a single web-based common application designed to collect information from individuals requesting access to confidential data assets from federal statistical agencies and units. When an application for confidential data is approved through the SAP Portal, SAMHSA will collect information to fulfill its data security requirements. This is a required step before providing the individual with access to restricted use microdata for the purpose of evidence building. SAMHSA's data security agreements and other paperwork, along with the corresponding security protocols, allow SAMHSA to maintain careful controls on confidentiality and privacy, as required by law. SAMHSA's collection of data security information will occur outside of the SAP Portal.

The following bullets outline the major components and processes in and around the SAP Portal, leading up to SAMHSA's collection of security requirements.

- *SAP Policy:* At the recommendation of the ICSP, the SAP Policy establishes the SAP to be implemented by statistical agencies and units and incorporates directives from the Evidence Act. The

SAP Policy may be found in OMB Memorandum 23–04.

• *The SAP Portal:* The SAP Portal is an application interface connecting applicants seeking data with a catalog of metadata for data assets owned by the federal statistical agencies and units. The SAP Portal is not a new data repository or warehouse; confidential data assets will continue to be stored in secure data access facilities owned and hosted by the federal statistical agencies and units. The Portal provides a streamlined application process across agencies, reducing redundancies in the application process.

• *Data Discovery:* Individuals begin the process of accessing restricted use data by discovering confidential data assets through the SAP metadata catalog, maintained by federal statistical agencies at *www.researchdatagov.org.*

• *SAP Portal Application Process:* Individuals who have identified and wish to access confidential data assets apply through the SAP Portal. Applicants must create an account and follow all steps to complete the application. Applicants enter personal, contact, and institutional information for the research team and provide summary information about their proposed project.

• *Submission for Review:* Agencies approve or reject an application within a prompt timeframe. Agencies may also request applicants to revise and resubmit their application.

• *Access to Confidential Data:* Approved applicants are notified through the SAP Portal that their proposal has been accepted. This concludes the SAP Portal process. Agencies will contact approved applicants to initiate completion of their security documents. The completion and submission of the agency's security requirements will take place outside of the SAP Portal.

• *Collection of Information for Data Security Requirements:* In the instance of a positive determination for an application requesting access to an SAMHSA-owned confidential data asset, SAMHSA will contact the applicant(s) to initiate the process of collecting information to fulfill its data security requirements. This process allows SAMHSA to place the applicant(s) in a trusted access category.

Estimate of Burden: The amount of time to complete the agreements and other paperwork that comprise SAMHSA's security requirements will vary based on the confidential data assets requested. To obtain access to SAMHSA confidential data assets, it is estimated that the average time to complete and submit SAMHSA's data security agreements and other paperwork is 40 minutes. This estimate does not include the time needed to complete and submit an application within the SAP Portal. All efforts related to SAP Portal applications occur prior to and separate from SAMHSA's effort to collect information related to data security requirements.

The expected number of applications in the SAP Portal that receive a positive determination from SAMHSA in a given year may vary. Overall, per year, SAMHSA estimates it will collect data security information for 15 application submissions that received a positive determination within the SAP Portal. SAMHSA estimates that the total burden for the collection of information for data security requirements over the course of the three-year OMB clearance will be about 30 hours and, as a result, an average annual burden of 10 hours.

Comments: As required by 5 CFR 1320.8(d), comments on the information collection activities as part of this study were solicited through the publication of a 60-Day Notice in the **Federal Register** at [insert FR citation]. SAMHSA received [number] comments, to which we here respond.

Updates: This section is needed if there have been any major changes since the first FRN was published, for example, if estimates of burden (in terms of hours or respondents), scope, sampling, etc. were changed. Outline what the initial FRN specified, the new information, and the reason(s) why it changed.

Carlos Graham,

Reports Clearance Officer.

[FR Doc. 2023–17176 Filed 8–9–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0019]

Agency Information Collection Activities: ReadySetCyber Initiative Questionnaire

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 60-Day notice and request for comments on a new collection.

SUMMARY: CISA will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance.

DATES: Comments are encouraged and will be accepted until October 10, 2023.

ADDRESSES: You may submit comments, identified by docket number Docket # CISA–2023–0019, at:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number Docket # CISA–2023–0019. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

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

SUPPLEMENTARY INFORMATION: Consistent with CISA's authorities to ''carry out comprehensive assessments of the vulnerabilities of the key resources and critical infrastructure of the United States'' at 6 U.S.C. 652(e)(1)(B) and provide federal and non-federal entities with ''operational and timely technical assistance'' at 6 U.S.C. 659(c)(6) and ''recommendation on security and resilience measures'' at 6 U.S.C. 659(c)(7), CISA's ReadySetCyber Initiative will collect information in order to provide tailored technical assistance, services and resources to critical infrastructure (CI) organizations and state, local, tribal, and territorial (SLTT) governments based on the characteristics of their respective cybersecurity programs. CISA seeks to collect this information from US CI and SLTT organizations on a voluntary and fully electronic basis so that each organization can be best supported in receiving tailored cybersecurity recommendations and services.

The overarching goal of CISA's ReadySetCyber Initiative is to help CI and SLTT organizations access information and services that are tailored to their specific cybersecurity needs. In addition, CISA expects this initiative to yield several additional benefits, including:

• Further adoption of CISA's Cybersecurity Performance Goals (CPGs) as the default approach for assessing Organizational progress and identify prioritized cybersecurity gaps;

• Collection of information about organizations' cybersecurity posture and progress, enabling more targeted engagement with sectors, regions, and individual organizations;

• More effective allocation of capacity-constrained services to specific stakeholders;

• Provision of a simplified approach to the guiding stakeholders into enrollment for, scalable services and rapidly expand uptake thereof; and

• Furthering the development of relationships between CI and SLTT organizations and CISA's regional cybersecurity personnel.

CISA's CPGs are a set of voluntary cybersecurity practices which aim to reduce the risk of cybersecurity threats to U.S. CI and SLTT organizations. CISA offers services and resources to aid CI and SLTT organizations in adopting the CPGs and seeks to make accessing appropriate services and resources as efficient as possible, especially for organizations whose cybersecurity programs operate at low levels of capability.

For example, an organization that is unsure of its ability to enumerate all of its internet-facing sites and services could leverage CISA's highly scalable automated testing services to scan its entire network range. Organizations with cybersecurity programs with more advanced characteristics who wish to evaluate their network segmentation controls are better positioned to take advantage of CISA's more resource-intensive architecture assessments. All organizations completing the questionnaire will also be connected with a CISA cybersecurity representative in their jurisdiction to provide direct support and engagement.

To measure adoption of the CPGs and assist CI and SLTT organizations in finding the most impactful services and resources for their cybersecurity programs, CISA is seeking to establish a voluntary information collection that uses respondents' answers to tailor a recommended package of services and resources most applicable to their evaluated level of program capability. Without collecting this information, CISA would be unable to tailor an appropriate suite of services, recommendations, and resources to assist the organization in protecting itself against cybersecurity threats, thereby creating burdens of inefficiency for service requesters and CISA alike.

In addition, receipt of this information is critical to CISA's ability to measure the adoption of CISA's CPGs by CI and SLTT organizations. The information to be collected will address various inquiries, such as: whether an organization keeps a regularly updated inventory of all assets with an internet Protocol address; the types of incident reporting and vulnerability disclosures required by an organizations' contracts with its vendors and suppliers; and whether the entity requires a minimum password strength required for all password-protected assets.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including via the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

Title: ReadySetCyber.

OMB Number:

Frequency: Upon each voluntary request for technical assistance, which CISA expects to occur on an annual basis.

Affected Public: Critical Infrastructure Owners & Operators seeking CISA services.

Number of Respondents: Approximately 2,000 per year.

Estimated Time per Respondent: 20 Minutes.

Total Burden Hours: 666.7 Hours.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023–17183 Filed 8–9–23; 8:45 am]

BILLING CODE 9110–09–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036326; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Oberlin College, Oberlin, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Oberlin College has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from the Hawaiian Islands, HI.

DATES: Repatriation of the human remains in this notice may occur on or after September 11, 2023.

ADDRESSES: Dr. Amy V. Margaris, Oberlin College, King Building, 10 N. Professor Street, Oberlin, OH 44074, telephone (440) 775–5173, email *amy.margaris@oberlin.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Oberlin College. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Oberlin College.

Description

Human remains representing, at minimum, one individual were removed from the Hawaiian Islands, HI. Accession #65 in the accession book of the former Oberlin College Museum records that in August of 1875, Mr. E. P. Church of Greenville, Michigan donated to the Museum one ''Skull of Hawaiian, Cave Burial Place, Hawaiian Islands.'' According to records of the Oberlin College Archives, E. P. Church was an 1863 graduate of Oberlin College who lived on O'ahu from 1865–1875. He served as Professor of Mathematics at Oahu College (now Punahou School) in Honolulu, Hawaii (1865–1871) and as President of Oahu College (1871–1875). The human remains were retained by Oberlin College after the Museum's closure in the 1950s, and they are now in the care of the Oberlin College Department of Anthropology. The human remains consist of a skull belonging to an adult of indeterminate age and sex. No associated funerary remains are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological, biological, cultural, geographical, and historical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, Oberlin College has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Hui Iwi Kuamo'o.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, Oberlin College must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. Oberlin College is responsible for sending a copy of this notice to the Native Hawaiian organization identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17132 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036328; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Indiana State Museum and Historic Sites Corporation, Indianapolis, IN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Indiana State Museum and Historic Sites Corporation (ISMHS) has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from Floyd County, IN.

DATES: Disposition of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Michele Greenan, Indiana State Museum and Historic Sites Corporation, 650 West Washington Street, Indianapolis, IN 46204, telephone (317) 473–0836, email *mgreenan@indianamuseum.org.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the ISMHS. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the ISMHS.

Description

Human remains representing, at minimum, 99 individuals were removed from Floyd County, IN. The site, identified as archeological site 12FL0073, is also referred to as the State Road 111 Slide Correction Project (the Indiana Department of Transportation (INDOT) project (DES #1592476) that resulted in the 2021–2022 removal of human remains from the site). Site 12FL0073 is a Middle–Late Archaic period site located along the Ohio River in Southern Indiana. Diagnostic artifacts associated with the site indicate a date range of approximately 4200 BCE through 1000 BCE, with limited evidence that it may extend earlier to 6000 BCE. Two radiocarbon dates taken from the site, 5350+/- 130 BP (3350 BCE) and 4950 +/-40 BP (2950 BCE), further validates a Middle-Late Archaic period association.

Site 12FL0073 was first recorded in 1998, when human remains were found eroding out of the riverbank. In 1998 and 1999, burial remains were removed under Indiana Division of Historic Preservation and Archaeology (DHPA) accidental discovery number AD 980013 (March 1998) and accidental discovery AD 990032 (July 1999). Between 2001 and 2002, an archeological project was carried out through the University of Kentucky (UK) at the site. Researchers from the University of Indianapolis (UINDY) were asked to assist with burial features and human remains found during these projects. Following these projects, the human remains and associated funerary objects were housed at UINDY and UK. In 2015, the Indiana Department of Transportation (INDOT) began assessing site 12FL0073 as they addressed erosion occurring along the bank of the Ohio River. This erosion was undermining State Road 111. During these assessments, the severity of the erosion was understood, and it was clear that other human remains at site 12FL0073 were in immediate danger. In November 2020, INDOT contacted the ISMHS to help facilitate NAGPRA compliance as they (working through outside contractors) removed these burials. INDOT also requested that the ISMHS include the human remains and associated funerary objects from the site that were housed at the UK and UINDY for inclusion in the inventory. The human remains and associated funerary objects housed at UK were transferred to the ISMHS in May 2021. The human remains and associated funerary objects housed at UINDY, which included the human remains removed under the 1998 and 1999 accidental discovery numbers, were transferred to ISMHS in September 2022. The human remains from the INDOT project were transferred to ISMHS in two groups, one in May of 2021 and the second in late January 2023.

The human remains consist of individual burials and single skeletal elements. The 211 associated funerary objects are 21 hafted bifaces, 21 bifaces, four scrapers, four flake tools, 16 cores, two hematite pestles, two granitic axes, one sandstone bannerstone, six cannel coal beads, two crinoid stem column beads, three sandstone pitted stones, one hematite pitted stone, two granitic or quartzite hammerstones, three granitic hammerstones, one core/tested cobble, one hematite chopper, one bone

atlatl hook/spur, one bone atlatl tubular weight, one incised bone drill, two bone pin fragments, one bone awl fragment, one polished bone fragment, one granitic cobble tool, one lot consisting of unmodified chert blocks, three lots consisting of red ochre particles, eight lots consisting of hematite fragments, five lots consisting of slate fragments, 32 lots consisting of flakes/shatter, one lot consisting of siltstone fragments, four hematite manuports, four granite manuports, one fire-cracked quartzite manuport, two rounded cobble manuports, one limestone manuport, one slate manuport, one sandstone manuport, one siltstone manuport, 25 lots consisting of non-human unburned bone fragments, nine lots consisting of non-human burned bone fragments, one lot consisting of indeterminant seeds, two lots consisting of burned nutshell, four lots consisting of unmodified shell fragments, one lot consisting of charcoal, three lots consisting of fire-cracked rocks, and three lots consisting of unmodified pebbles.

Aboriginal Land

The human remains and associated funerary objects in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission or the United States Court of Claims, a treaty, an Act of Congress, or an Executive Order.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the ISMHS has determined that:

- The human remains described in this notice represent the physical remains of 99 individuals of Native American ancestry.
- The 211 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Miami Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Shawnee Tribe; and The Osage Nation.

Requests for Disposition

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after September 11, 2023. If competing requests for disposition are received, the ISMHS must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The ISMHS is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: August 3, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17134 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036327; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: University of Georgia Laboratory of Archaeology, Athens, GA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the University of Georgia Laboratory of Archaeology has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Dade County, GA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Dr. Amanda Roberts Thompson, University of Georgia Laboratory of Archaeology, 1125 E. Whitehall Road, Athens, GA 30605, telephone (706) 542–8373, email *arobthom@uga.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the University of Georgia Laboratory of Archaeology. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the University of Georgia Laboratory of Archaeology.

Description

Ancestral remains representing, at minimum, 13 individuals were removed from 9DD25, the Tunacunnhee site, in Dade County, GA. This site is located near Trenton, GA, a few hundred yards east of Lookout Creek and several miles south of the junction of Lookout Creek and the Tennessee River. In 1973, these human remains were excavated during a University of Georgia (UGA) field school led by Joseph R. Caldwell and Richard W. Jefferies. All eight of the mounds at the Tunacunnhee site were tested during the 1973 field season, with a total surface area of 8,000 feet was excavated. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. The 304 associated funerary objects consist of indigenous ceramics, lithics, copper plates, mica, copper and silver pan pipes, copper earspools, copper pin, copper and silver fragments, woven materials, burnt clay, faunal remains, drilled bear canines, drilled shark teeth, raptor talons, and bone beads.

Ancestral remains representing, at minimum, three individuals were removed from site 9DD57, Dyar Rockshelter, in Dade County, GA, during a survey conducted by Bruce Smith in 1975. At the time the site was surveyed, a collection was made from the surface of the cave as well as from

test pits and areas just outside the cave. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. No associated funerary objects are present.

Ancestral remains representing, at minimum, one individual were removed from site 9DD35, Bone Cave, in Dade County, GA, during a survey conducted by Bruce Smith in 1975. At the time the site was surveyed, a collection was made from the surface of the site. Since being removed, the collection has been housed at the University of Georgia Laboratory of Archaeology. The human remains belong to an individual of indeterminate age and sex. No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological and geographical.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the University of Georgia Laboratory of Archaeology has determined that:

- The human remains described in this notice represent the physical remains of 17 individuals of Native American ancestry.
- The 304 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Cherokee Nation; Eastern Band of Cherokee Indians; Kialegee Tribal Town; Poarch Band of Creek Indians; Shawnee Tribe; The Muscogee (Creek) Nation; Thlopthlocco Tribal Town; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, the University of Georgia Laboratory of Archaeology must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The University of Georgia Laboratory of Archaeology is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17133 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036325; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California Department of Parks and Recreation, Sacramento, CA, and California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California Department of Parks and Recreation and California State University, Chico have completed an inventory of human remains and associated funerary objects and have determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Butte County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Leslie Hartzell, Cultural Resources Division at California State Parks 715 P Street, Suite 13, Sacramento, CA 95814, telephone (415) 831–2700, email *leslie.hartzell@parks.ca.gov* and Dawn Rewolinski, California State University, Chico, 400 W. 1st Street, Chico, CA 95929, telephone (530) 898–3090, email *drewolinski@csuchico.edu.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the California Department of Parks and Recreation and California State University, Chico. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the California Department of Parks and Recreation and California State University, Chico.

Description

CA–BUT–3820/H

Human remains representing, at minimum, two individuals were removed from Butte County, CA. In the spring of 1976, Bidwell Adobe (CA–BUT–3820/H) was excavated by M. Kowta and other archeologists affiliated with California State University, Chico. This site is part of the Bidwell Mansion State Historic Park and under the legal control of the California Department of Parks and Recreation. The human remains, funerary objects, and other items from this excavation are in the custody of California State University, Chico. The 3,822 associated funerary objects are 285 organics, 81 lots consisting of debitage, 15 modified stone fragments, two lots of projectile points, two shell fragments, 1,281 samples of charcoal, one sample of soil, 2,055 faunal elements, 72 modified faunal elements, 20 pieces of clay, three modified fragments of clay, one lot of basalt flakes, one lot of cobble core-tools, one lot of flakes, one lot of beads, and one lot of pestles.

In 1987, Bidwell Adobe (CA–BUT–3820/H) was excavated by Keith Johnson and other archeologists affiliated with California State University, Chico under agreement with the California Department of Parks and

Recreation. This site is part of the Bidwell Mansion State Historic Park and under the legal control of California Department of Parks and Recreation. The funerary objects and other items from this excavation are in the custody of the California Department of Parks and Recreation. The five associated funerary objects are one lot of basalt flakes, one lot of flake scrapers, one lot of glass beads, one lot of hammerstone, and one lot of projectiles. There were no human remains recorded.

Human remains representing, at minimum, one individual were removed from Butte County, CA. In 1990, Bidwell Adobe (CA–BUT–3820/H) was excavated by Keith Johnson and other archeologists affiliated with California State University, Chico under agreement with the California Department of Parks and Recreation. This site is part of the Bidwell Mansion State Historic Park and under the legal control of the California Department of Parks and Recreation. The funerary objects and other items from this excavation are in the custody of the California Department of Parks and Recreation. The three associated funerary objects are one lot of basalt flakes, one lot of obsidian flakes, and one lot of projectile points.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the California Department of Parks and Recreation and California State University, Chico have determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The 3,830 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Mechoopda Indian Tribe of Chico Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, the California Department of Parks and Recreation and California State University, Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The California Department of Parks and Recreation and California State University, Chico.is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17131 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036324; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Fowler Museum at University of California Los Angeles, Los Angeles, CA, and California Department of Transportation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California Department of Transportation (Caltrans) with the assistance of the Fowler Museum at University of California, Los Angeles (UCLA) and has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Los Angeles County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after September 11, 2023.

ADDRESSES: Emily Castano, California Department of Transportation, P.O. Box 942874 MS 27, Sacramento, CA 94271–0001, telephone (916) 956–0098, email *emily.castano@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Caltrans. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Caltrans.

Description

In 1997, human remains representing, at minimum, three individuals were removed from site CA–LAN–2233 in Los Angeles County, CA. Caltrans initiated an emergency effort to recover burials located in the path of a construction project to improve State Route 126. Following the recovery, human remains and one associated funerary object were sent to the University of California, Riverside (UCR) radiocarbon dating lab for dating. In August of 2021, UCR sent the human remains and the associated funerary object listed in this notice to the Fowler Museum at UCLA. The one associated funerary object is an elk antler.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes,

peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, geographical, historical, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, Caltrans has determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The one object described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after September 11, 2023. If competing requests for repatriation are received, Caltrans must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. Caltrans is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: August 2, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–17130 Filed 8–9–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Control Number 1010–NEW; Docket ID: BOEM–2023–0004]

Agency Information Collection Activities; North Atlantic Right Whale Research and Management Activities

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Bureau of Ocean Energy Management (BOEM) proposes a new information collection request (ICR).

DATES: Comments must be received by the Office of Management and Budget (OMB) no later than September 11, 2023.

ADDRESSES: Submit your written comments on this ICR to the OMB's desk officer for the Department of the Interior at *www.reginfo.gov/public/do/PRAMain.* From the *www.reginfo.gov/public/do/PRAMain* landing page, find this information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments by parcel delivery service or U.S. mail to the BOEM Information Collection Clearance Officer, Anna Atkinson, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166; or by email to *anna.atkinson@boem.gov.* Please reference OMB Control Number 1010–NEW in the subject line of your comments. You may also comment by searching the docket number ''BOEM–2023–0004'' at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Anna Atkinson by email at *anna.atkinson@boem.gov* or by telephone at 703–787–1025. 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 of 1995, BOEM provides the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps BOEM assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand BOEM's information collection requirements and provide the requested data in the desired format.

Title of Collection: ''North Atlantic Right Whale Research and Management Activities''

Abstract: BOEM is working on a project to identify and synthesize current North Atlantic right whale (NARW) research and management activities conducted by State and Federal government researchers, academic institutions, and non-governmental organizations (NGOs). This project includes identification of mitigation efforts to avoid or limit impacts on NARWs from offshore wind energy development. This information will provide essential data and stakeholder feedback so that BOEM managers and scientists are better able to predict, mitigate, and monitor any potential conflicts between NARWs and offshore wind energy development.

An important component of this project is the development of the NARW synthesis report, which will include a summary of: (1) existing sources of information related specifically to understanding presence, distribution, and density of NARWs in and around wind energy areas offshore the U.S. Atlantic coast; (2) current approaches for avoiding or limiting impacts to NARWs during construction and operation of offshore wind energy facilities; (3) a listing of mitigation measures recommended by others but not yet adopted; (4) current monitoring requirements and their implementation; and (5) an accounting of emerging technologies that may allow monitoring at project and regional scales.

In order to develop the synthesis report, BOEM seeks OMB approval for a set of standardized questions for NARW stakeholders regarding their activities to understand impacts from offshore wind energy projects on the whales and to ensure effective mitigation monitoring. The questions are designed to learn of recent and ongoing research and management strategies employed by relevant State and Federal governments, academic

institutions, and NGOs, including outcomes of prior workshops and planning bodies. BOEM has partnered with the Blue World Research Institute to implement the questionnaire. The questionnaire comprises approximately 20 questions that ask respondents about: (1) their organization; (2) information on current monitoring and research activities, such as objective, location, scope, methods, timelines, outcomes and challenges, and on contributions to NARW conservation or impact reduction; (3) related ancillary information, such as type of study, next steps, and suggestions for priority topics for future funding ; and (4) additional comments and discussion. The questionnaire avoids sensitive topics or matters that are commonly considered private. The results will be summarized as part of the NARW synthesis report.

Additionally, BOEM plans to conduct directed interviews of participants who indicate their willingness to provide additional feedback on future research priorities and management needs. This feedback will be compiled in a final report.

OMB Control Number: 1010–NEW.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: State (and Federal) government researchers, academic institutions, and NGOs.

Total Estimated Number of Annual Responses: 253 responses (213 questionnaire respondents and 40 interviewees).

Total Estimated Number of Annual Burden Hours: 111 hours (40 annual burden hours for interviews and 71 annual burden hours for questionnaire).

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: There is no non-hour cost burden associated with this collection.

A **Federal Register** notice with a 60-day public comment period on this proposed ICR was published on February 24, 2023 (88 FR 11953). BOEM received one public comment that opposed offshore wind energy projects and the use of sonar due to potential impacts on whales and dolphins. BOEM is committed to assessing and, to the extent possible, reducing the effects of potential environmental impacts on marine life and their habitats. The purpose of this strategy is to protect and promote the recovery of the NARW while responsibly developing offshore wind energy. No change in the burden was required as a result of the comment received.

BOEM is again soliciting comments on the proposed ICR. BOEM is especially interested in public comments addressing the following issues: (1) is the collection necessary to the proper functions of BOEM; (2) what can BOEM do to ensure that this information is processed and used in a timely manner; (3) is the burden estimate accurate; (4) how might BOEM enhance the quality, utility, and clarity of the information to be collected; and (5) how might BOEM minimize the burden of this collection on the respondents, including minimizing the burden through the use of information technology?

Comments submitted in response to this notice are a matter of public record and will be available for public review on *www.reginfo.gov.* You should be aware that your entire comment—including your address, phone number, email address, or other personally identifiable information included in your comment—may be made publicly available. Even if BOEM withholds your information in the context of this ICR, your comment is subject to the Freedom of Information Act (FOIA). If your comment is requested under FOIA, your information will only be withheld if BOEM determines that a FOIA exemption to disclosure applies. BOEM will make such a determination in accordance with the Department of the Interior's (DOI's) FOIA regulations and applicable law.

In order for BOEM to consider withholding from disclosure your personally identifiable information, you must identify, in a cover letter, any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequence of the disclosure of information, such as embarrassment, injury, or other harm.

BOEM protects proprietary information in accordance with FOIA (5 U.S.C. 552) and DOI's implementing regulations (43 CFR part 2).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Karen Thundiyil,

Chief, Office of Regulations, Bureau of Ocean Energy Management.

[FR Doc. 2023–17126 Filed 8–9–23; 8:45 am]

BILLING CODE 4340–98–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1243]

Importer of Controlled Substances Application: Caligor Coghlan Pharma Services

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Caligor Coghlan Pharma Services has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before September 11, 2023. Such persons may also file a written request for a hearing on the application on or before September 11, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on July 11, 2023, Caligor Coghlan Pharma Services, 1500 Business Park Drive, Unit B, Bastrop, Texas 78602, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Lysergic acid diethylamide	7315	I
5-Methoxy-N,N-dimethyltryptamine.	7431	I
Tapentadol	9780	II

The company plans to import the listed controlled substances as finished dosage units for use in clinical trials. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17138 Filed 8–9–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1242]

Bulk Manufacturer of Controlled Substances Application: Continuus Pharmaceuticals

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Continuus Pharmaceuticals has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplementary Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before October 10, 2023. Such persons may also file a written request for a hearing on the application on or before October 10, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on July 6, 2023, Continuus Pharmaceuticals, 256 West Cummings Park, Woburn, Massachusetts 01801, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Fentanyl	9801	II

The company plans to bulk manufacture the above listed controlled substance for research and development purposes only. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17136 Filed 8–9–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–1244]

Importer of Controlled Substances Application: Chattem Chemicals

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Chattem Chemicals has applied to be registered as an importer of basic class(es) of controlled substance(s). Refer to **SUPPLEMENTARY INFORMATION** listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may submit electronic comments on or objections to the issuance of the proposed registration on or before September 11, 2023. Such persons may also file a written request for a hearing on the application on or before September 11, 2023.

ADDRESSES: The Drug Enforcement Administration requires that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to *https://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon submission of your comment, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on *https://www.regulations.gov.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment. All requests for a hearing must be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on July 14, 2023, Chattem Chemicals, 3801 Saint Elmo Avenue, Chattanooga, Tennessee 37409–1237, applied to be registered as an importer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Methamphetamine	1105	II
4-Anilino-N-phenethyl-4-piperidine (ANPP).	8333	II
Phenylacetone	8501	II
Cocaine	9041	II
Poppy Straw Concentrate.	9670	II
Tapentadol	9780	II

The company plans to import the listed controlled substances to manufacture bulk controlled substances for sale to its customers. The company plans to import an intermediate of Tapentadol (9780), to bulk manufacture Tapentadol for distribution to its customers. No other activities for these drug codes are authorized for this registration.

Approval of permit applications will occur only when the registrant's business activity is consistent with what is authorized under 21 U.S.C. 952(a)(2). Authorization will not extend to the import of Food and Drug

Administration-approved or non-approved finished dosage forms for commercial sale.

Claude Redd,

Acting Deputy Assistant Administrator.

[FR Doc. 2023–17139 Filed 8–9–23; 8:45 am]

BILLING CODE P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m., Thursday, August 17, 2023.

PLACE: 1255 Union Street NE, Fifth Floor, Washington, DC 20002.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (4) permit closure of the following portion(s) of this meeting:

- **Executive Session**

Agenda

I. CALL TO ORDER
II. Sunshine Act Approval of Executive (Closed) Session
III. Executive Session: Report from CEO
IV. Executive Session: Report from CFO
V. Executive Session: GAO Workplan
VI. Executive Session: General Counsel Report
VII. Executive Session: CIO Report
VIII. Executive Session: NeighborWorks Compass Update
IX. Action Item Resolution of Recognition of Service for Chairman Gruenberg
X. Action Item Approval of Meeting Minutes
XI. Action Item FY2024 Preliminary Spend Plan
XII. Discussion Item August 3rd Special Audit Committee Report
XIII. Discussion Item Annual Ethics Review Follow Up
XIV. Discussion Item Professional Learning and Event Management Solution
XV. Discussion Item Atlanta Office Lease
XVI. Management Program Background and Updates
XVII. Adjournment

PORTIONS OPEN TO THE PUBLIC: Everything except the Executive Session.

PORTIONS CLOSED TO THE PUBLIC: Executive Session.

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2023–17215 Filed 8–8–23; 11:15 am]

BILLING CODE 7570–02–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0112]

Discontinuation of the State of New York's Sealed Source and Device Evaluation and Approval Authority

AGENCY: Nuclear Regulatory Commission.

ACTION: Discontinuation of the State of New York's regulatory authority and reassumption of U.S. Nuclear Regulatory Commission's authority.

SUMMARY: Notice is hereby given that effective August 9, 2023, the U.S. Nuclear Regulatory Commission (NRC) has assumed regulatory authority to evaluate and approve sealed source and device (SS&D) applications in the State of New York and approved the Governor of the State of New York's request to relinquish this authority.

DATES: The NRC has assumed regulatory authority for evaluating and approving SS&D applications on August 9, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0112 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–2023–0112. 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 individuals 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, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *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.

FOR FURTHER INFORMATION CONTACT: Robert Johnson, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7314, email: *Robert.Johnson@nrc.gov.*

SUPPLEMENTARY INFORMATION: Section 274b. of the Atomic Energy Act (AEA) of 1954, as amended, provides the authority for NRC to enter into agreements with States that allow the States to assume, and the NRC to discontinue, regulatory authority over specified AEA radioactive materials and activities. On October 15, 1962, New York entered a section 274b. Agreement with the Atomic Energy Commission (the predecessor regulatory agency to the NRC) to regulate source material, byproduct material, and special nuclear material in quantities not sufficient to form a critical mass. This Agreement also provides the State regulatory authority to evaluate and approve SS&D applications.

On May 9, 2023, the NRC received a letter from New York Governor Kathy Hochul (ADAMS Accession No. ML23131A254) requesting discontinuation of the State's regulatory authority to evaluate and approve SS&D applications and for reassumption of this authority by the NRC. The Commission approved the request and has notified the State of New York that effective August 9, 2023, the NRC has reassumed authority to evaluate and approve SS&D applications within the State (ADAMS Accession No. ML23138A033). The State of New York will retain authority to regulate the manufacture and use of SS&Ds within the State in accordance with its section 274b. Agreement with the NRC.

Dated: August 3, 2023.

For the Nuclear Regulatory Commission.

Brooke P. Clark,

Secretary of the Commission.

[FR Doc. 2023–16932 Filed 8–9–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–210 and CP2023–214; MC2023–211 and CP2023–215]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* August 14, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–210 and CP2023–214; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 24 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 4, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* August 14, 2023.

2. *Docket No(s).:* MC2023–211 and CP2023–215; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 15 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* August 4, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* August 14, 2023.

This Notice will be published in the **Federal Register**.

Mallory Richards,

Attorney-Advisor.

[FR Doc. 2023–17147 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice: August 10, 2023.*

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 2 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–203, CP2023–207.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17111 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 10 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–202, CP2023–206.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17116 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 2, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 14 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–208, CP2023–212.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17113 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 11 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–204, CP2023–208.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17110 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 2, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 3 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–206, CP2023–210.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17114 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* August 10, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on August 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 12 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–205, CP2023–209.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–17112 Filed 8–9–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98061; File No. SR–CboeEDGX–2023–048]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. *Purpose*

The purpose of this rule filing is to amend Rule 21.17, Additional Price Protection Mechanisms and Risk Controls, to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 21.17(a)(4). Under Rule 21.17(a)(4)(A), if a buy (sell) order enters the EDGX Options Book [3] at the conclusion of the opening auction process or would execute or post to the EDGX Options Book at the time of order entry, the System [4] executes the order up to a buffer amount (the Exchange determines the buffer amount on a class and premium basis) above (below) the offer (bid) limit of the Opening Collar or the National Best Offer (''NBO'') (National Best Bid (''NBB'')) that existed at the time of order entry, respectively (the ''drill-through price'').[5]

Current Rule 21.17(a)(4)(B) (as amended, proposed Rule 21.17(a)(4)(C)) [6] 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.[7] Specifically, the 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).[8] 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).[9] Following the end of each period, the 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'').[10] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The 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 [11] 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 above-described iterative drill-through process does not apply to market orders. Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount. For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[12] The Exchange also proposes to amend proposed Rule 21.17(a)(4)(C) [13] to clarify that limit orders with a Time-in-Force of Day, GTC, or GTD also go through the iterative drill-through process. In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, and the drill through protections described under current Rule 21.17(a)(4)(C) continue to apply only to those limit orders with a Time-in-Force of Day, GTC, or GTD, the Exchange also proposes to adopt proposed Rule 21.17(a)(4)(B) [14] to specify that the System will cancel or reject any market order with Time-in-Force of IOC (or unexecuted portion) or limit order with a Time-in-Force of IOC or FOK (or unexecuted portion) not executed pursuant to 21.17(a)(4)(A).[15] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 21.17(a)(4)(A) to more

[3] ''EDGX Book'' means the System's electronic file of orders. *See* Rule 1.5 (definition of, ''EDGX Book'').

[4] ''System'' means the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away. *See* Rule 1.5 (definition of, ''System'').

[5] *See* Rule 21.17(a)(4)(A).

[6] As part of the rule changes described herein, the Exchange proposes to renumber current subparagraph (a)(4)(B) to be proposed subparagraph (a)(4)(C), and to renumber current subparagraph (a)(4)(C) to be proposed subparagraph (a)(4)(D).

[7] The Exchange will announce to Members the buffer amount and the length of the time periods. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[8] Currently, the drill through protections described under current Rule 21.17(a)(4)(B) apply only to a limit order with a Time-in-Force of Day, Good-til-Cancel (''GTC''), or Good-til-Day (''GTD''). This rule proposal also seeks to clarify which orders are subject to the drill-through protections, as describe herein.

[9] *See* current Rule 21.17(a)(4)(B)(i) (as amended, Rule 21.17(a)(4)(C)(i)). The proposed rule change defines this time period as an ''iteration.''

[10] *See* current Rule 21.17(a)(4)(B)(ii) (as amended, Rule 21.17(a)(4)(C)(ii)).

[11] The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3. *See* Rule 1.5.

[12] *See* proposed Rule 21.17(a)(4)(C).

[13] *See* supra note 8.

[14] *See* supra note 8.

[15] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 21.17(a)(4)(A) become applicable if a buy (sell) order, to which Rule 21.17(a)(4)(A) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[16]

The Exchange also proposes to amend Rule 21.17(a)(5)(A)(ii) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 21.17(a)(5)(A)(ii), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 21.17(a)(5)(A)(ii) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 21.17(a)(4), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 21.17(a)(1) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 21.17(a)(1), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 21.17(a)(1) to exclude Stop Orders [17] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 21.17(a)(4). The Exchange also proposes a clarification to proposed Rule 21.17(a)(4)(D).[18] Currently, under Rule 21.17(a)(4)(D), if multiple Stop (Stop-Loss) or Stop-Limit [19] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under proposed Rule 21.17(a)(4)(C)(v) [20] and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50

Order 2: Sell 1 @Market, Stop Price = $6.55

Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 21.17(a)(4)(C), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.

3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 21.17(a)(4)(D), all Stop (Stop-Loss) and Stop-Limit orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 21.17(a)(4)(C)(ii),[21] to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 21.17(a)(4)(C)(iv) [22] to provide that if the System receives a market or limit

[16] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[17] A ''Stop Order'', or Stop (Stop-Loss) Order, is an order that becomes a market order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Order to sell becomes a limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 21.1(d)(11).

[18] *See* supra note 8.

[19] A ''Stop Limit Order'' is an order that becomes a limit order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the option occurs at or above, or the NBB is equal to or higher than, the specified stop price. A Stop Order to sell is elected when the consolidated last sale in the option occurs at or below, or the NBO is equal to or lower than, the specified stop price. *See* Rule 21.1(d)(12) (definition of ''Stop-Limit'' order).

[20] *See* supra note 8.

[21] *See* supra note 8.

[22] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (iv) to be proposed subparagraph (vi) and current subparagraph (v) to be proposed subparagraph (viii). *See also* supra note 8.

order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:

Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price $6.60
Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.

3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.

4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 21.17(a)(4)(C)(iv), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.

5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 21.17(a)(4)(C)(v)[23] states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 21.17(a)(4)(C)(v), the orders will go through the drill-through process as follows:

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00

2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00

3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00

4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @ Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.

2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.

3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 21.17(a)(4)(C)(vi).[24] Currently, the rule states that an order will continue through the drill-through 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 orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 21.17(a)(4)(C)(vii) to specify that the drill-through protection mechanism applies during all trading sessions and to provide clarity as to what happens to orders that are undergoing the drill-through process at the end of a trading session. Under the proposed rule change, if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of a Global Trading Hours (''GTH'')[25] session, then the drill-through process concludes and the order(s) (or unexecuted portions(s)) enters the Regular Trading Hours (''RTH'')[26] Queuing Book[27] as a market order or limit order (at its limits price) on that same trading day, subject to a User's instructions. If an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session (*i.e.,* GTH or RTH) as a market order or limit order (at its limit price).

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

[23] *Id.*

[24] *Id.*

[25] The Exchange does not currently operate a GTH session. In the event the Exchange were to operate a GTH session, it would begin at 8:30 a.m. and go until 9:15 a.m. ET on Monday through Friday.

[26] *See* Rule 1.5(y) for the definition of Regular Trading Hours.

[27] *See* Rule 21.7 for the definition of Queuing Book.

Section 6(b) of the Act.[28] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [29] 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) [30] 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 to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. 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 the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 21.17(a)(4)(D) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to clarify when an order ceases to remain a part of the drill-through process and to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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 the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

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. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

[30] *Id.*

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Members could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Members with more tools for managing risk will facilitate transactions in securities because, as noted above, Members will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[31] and subparagraph (f)(6) of Rule 19b–4 thereunder.[32]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–048 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–048. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–048 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17108 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

[31] 15 U.S.C. 78s(b)(3)(A)(iii).

[32] 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.

[33] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98058; File No. SR–MIAX–2023–22]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading, To Implement a Low Priced Stock Strike Price Interval Program

August 4, 2023.

On June 5, 2023, Miami International Securities Exchange LLC 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 amend Exchange Rule 404, Series of Option Contracts Open for Trading. The proposed rule change was published for comment in the **Federal Register** on June 22, 2023.[3] The Commission has received one comment on the proposed rule change.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97733 (June 15, 2023), 88 FR 40887.

[4] The comment is available at: *https://www.sec.gov/comments/sr-miax-2023-22/srmiax202322.htm.*

Section 19(b)(2) of the Act[5] 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 August 6, 2023. 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. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates September 20, 2023 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–MIAX–2023–22).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17105 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98057; File No. SR–ISE–2023–14]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce ISE's Options Regulatory Fee

August 4, 2023.

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 July 25, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend ISE's Pricing Schedule at Options 7, Section 9 to reduce the ISE Options Regulatory Fee or ''ORF''.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on August 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/ise/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

ISE proposes to lower its ORF from $0.0014 to $0.0013 per contract side on August 1, 2023. Previously, ISE lowered or waived its ORF in 2017, 2021 and 2022.[3] After a review of its regulatory revenues and regulatory costs, the Exchange proposes to reduce the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

Volumes in the options industry went over 900,000,000 in 2023. ISE has taken measures this year as well as in prior years to lower and waive its ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Despite those prior measures, ISE will need to reduce its ORF again to account for trading volumes in the first half of 2023 that were higher than the Exchange forecast for ORF assessment purposes, which resulted in the collection of more ORF revenues than anticipated in the first half of 2023. At this time, ISE believes that the options volume it experienced in the first half of 2023 is likely to persist. The anticipated options volume would continue to impact ISE's ORF collection which, in turn, has caused ISE to propose reducing the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs.

Collection of ORF

ISE will continue to assess its ORF for each customer option transaction that is either: (1) executed by a Member on ISE; or (2) cleared by an ISE Member at The Options Clearing Corporation (''OCC'') in the customer range,[4] even if the transaction was executed by a non-Member of ISE, regardless of the exchange on which the transaction occurs.[5] If the OCC clearing member is an ISE Member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA[6]); and (2) if the OCC clearing member is not an ISE Member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.[7]

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 81345 (August 8, 2017), 82 FR 37939 (August 14, 2017) (SR–ISE–2017–71) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Schedule of Fees With Respect to the Options Regulatory Fee); 92577 (August 5, 2021), 86 FR 44092 (August 11, 2021) (SR–ISE–2021–16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Options Regulatory Fee); and 94070 (January 26, 2022), 87 FR 5524 (February 1, 2022) (SR–ISE–2022–02)(Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce ISE's Options Regulatory Fee).

[4] Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[5] The Exchange uses reports from OCC when assessing and collecting the ORF.

[6] CMTA or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[7] By way of example, if Broker A, an ISE Member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by ISE from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than ISE, it was cleared by an ISE Member in the member's OCC clearing account in the customer range, therefore there is a regulatory nexus between ISE and the transaction. If Broker A was not an ISE Member, then no ORF should be assessed and collected because there is no nexus;

In the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. In the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. In the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. In the case where a Member executes a transaction on ISE and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on ISE and collected from the non-Member who cleared the transaction. In the case where a Member executes a transaction at an away market and a non-Member clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses were approximately 39% of the total regulatory costs for 2023. Thus, direct expenses were approximately 61% of total regulatory costs for 2023.[8]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from $0.0014 per contract side to $0.0013 per contract side. The Exchange issued an Options Trader Alert on June 30, 2023 indicating the proposed rate change for August 1, 2023.[9]

The proposed reduction is based on current levels of options volume. The below table displays monthly total volume for 2023.[10]

Month	Total volume	Customer sides
January 2023	919,299,330	802,712,235
February 2023	883,234,837	780,284,838
March 2023	1,052,984,722	915,674991
April 2023	760,808,909	67,3183,772
May 2023	944,534,205	826,490,407
June 2023[11]	909,616,267	801,688,960

Options volumes remained higher in 2023 with March 2023 exceeding 1,000,000,000 total contracts, higher than any month in 2022. With respect to customer options volume, it also remains high in 2023. There can be no assurance that the Exchange's regulatory costs for the remainder of 2023 will not differ materially from the Exchange's budgeted amount, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue that may be generated utilizing an ORF rate of $0.0014 per contract side may result in revenue which exceeds the Exchange's estimated regulatory costs for 2023 if options volumes remain at levels higher than forecasted. ISE lowered its ORF in 2022 to account for the options volume in 2022. The Exchange proposes to reduce its ORF to $0.0013 per contract side to ensure that revenue does not exceed the Exchange's estimated regulatory costs in 2023. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of $0.0014 per contract side.[12]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues may exceed or are projected to exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and

the transaction did not execute on ISE nor was it cleared by an ISE Member.

[8] These numbers are taken from the Exchange's 2023 Regulatory Budget.

[9] *See* Options Trader Alert 2023–15.

[10] Volume data in the table represents numbers of contracts; each contract has two sides.

[11] June numbers reflect volumes through June 29, 2023.

[12] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

notifying [13] its Members via an Options Trader Alert.[14]

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.[15] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee as of August 1, 2023 and the amount of the lower fee will fund a reasonable portion of the Exchange's regulatory costs. Moreover, the proposed reduction is necessary for the Exchange to avoid collecting revenue, in combination with other regulatory fees and fines, that would be in excess of its anticipated regulatory costs.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect revenue which would exceed its regulatory costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate revenues that would cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from $0.0014 to $0.0013 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at OCC.[18] The Exchange believes the ORF ensures fairness by assessing higher fees to those Members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* Member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'') [19] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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 not necessary or appropriate in furtherance of the purposes of the Act. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may

[13] The Exchange provides Members with such notice at least 30 calendar days prior to the operative date of the change. *See* Options Trader Alert 2023–15.

[14] The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with projected regulatory expenses.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] If the OCC clearing member is an ISE member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not an ISE member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

[19] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–ISE–2023–14 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–ISE–2023–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–ISE–2023–14 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

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[22] 15 U.S.C. 78s(b)(2)(B).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98064; File No. SR–NSCC–2022–802)]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of No Objection to Advance Notice Related to Certain Enhancements to the Gap Risk Measure and the VaR Charge

August 4, 2023.

I. Introduction

On December 2, 2022, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2022–802 (''Advance Notice'') pursuant to section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') [3] regarding certain enhancements to its gap risk charge and the volatility component of a member's required margin.[4] The Advance Notice was published for comment in the **Federal Register** on December 21, 2022.[5] On January 10, 2023, the Commission issued an extension of the review period for the Advance Notice.[6] On March 27, 2023, the Commission requested additional information from NSCC pursuant to section 806(e)(1)(D) of the Clearing Supervision Act, which tolled the Commission's period of review of the Advance Notice until 120 days [7] from the date the requested information was received by the Commission.[8] The Commission received NSCC's response to the Commission's request for additional information on April 28, 2023. The Commission has received comments regarding the changes proposed in the Advance Notice.[9] The Commission is hereby providing notice of no objection to the Advance Notice.

II. Background [10]

NSCC provides clearing, settlement, risk management, central counterparty services, and a guarantee of completion for virtually all broker-to-broker trades involving equity securities, corporate and municipal debt securities, and unit investment trust transactions in the U.S. markets. A key tool that NSCC uses to manage its credit exposure to its members is collecting an appropriate amount of margin (*i.e.,* collateral) from each member.[11]

A. Overview Regarding NSCC's Margin Methodology

A member's margin is designed to mitigate potential losses to NSCC associated with the liquidation of the member's portfolio in the event that

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Notice of Filing, *infra* note 5, at 87 FR 78175.

[5] Exchange Act Release No. 96513 (Dec. 15, 2022), 87 FR 78175 (Dec. 21, 2022) (File No. SR–NSCC–2022–802) (''Notice of Filing'').

[6] Exchange Act Release No. 96624 (Jan. 10, 2023), 88 FR 2707 (Jan. 17, 2023).

[7] The Commission may extend the review period for an additional 60 days (to 120 days total) for proposed changes that raise novel or complex issues. *See* 12 U.S.C. 5465(e)(1)(H).

[8] See 12 U.S.C. 5465(e)(1)(E)(ii) and (G)(ii); Memorandum from Office of Clearance and Settlement, Division of Trading and Markets, titled ''Commission's Request for Additional Information'' (dated Mar. 27, 2023), *available at https://www.sec.gov/comments/sr-nscc-2022-802/srnscc2022802-20161718-330589.pdf.*

[9] The Commission received one comment that was not relevant to the proposal in the Advance Notice. *See https://www.sec.gov/comments/sr-nscc-2022-802/srnscc2022802-320764.htm* (commenting on certain aspects of NSCC's operations that are not addressed or changed in this proposal). In addition, the Commission received one comment on the related proposed rule change filed as NSCC–2022–015. *See* Exchange Act Release No. 96511 (Dec. 15, 2022), 87 FR 78157 (Dec. 21, 2022) (''Proposed Rule Change''), with comments at *https://www.sec.gov/comments/sr-nscc-2022-015/srnscc2022015.htm.* Because the proposals contained in the Advance Notice and the Proposed Rule Change are the same, all public comments received on the proposals were considered regardless of whether the comments were submitted with respect to the Advance Notice or the Proposed Rule Change.

[10] Capitalized terms not defined herein are defined in NSCC's Rules & Procedures (''Rules''), *available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[11] Pursuant to its Rules, NSCC uses the term ''Required Fund Deposit'' to denote margin or collateral collected from its members. *See* Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters) of the Rules, *supra* note 10.

member defaults.[12] The aggregate of all members' margin deposits (together with certain other deposits required under the Rules) constitutes NSCC's clearing fund. NSCC would access its clearing fund should a defaulting member's own margin and resources at NSCC be insufficient to satisfy losses to NSCC caused by the liquidation of that member's portfolio.[13]

NSCC employs daily backtesting to determine the sufficiency of each member's margin, by simulating the liquidation gains or losses using the actual unsettled positions in the member's portfolio, and the actual historical returns for each security held in the portfolio. A backtesting deficiency would result if the liquidation losses were greater than the member's margin. NSCC investigates the causes of any backtesting deficiencies, paying particular attention to members with backtesting deficiencies that bring the results for that member below the 99 percent confidence target (*i.e.,* greater than two backtesting deficiency days in a rolling twelve-month period) to determine if there is an identifiable cause of repeat backtesting deficiencies.[14] NSCC also evaluates whether multiple members may experience backtesting deficiencies for the same underlying reason.[15]

Each member's margin consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC.[16] Each member's start of day required fund deposit is calculated overnight, based on the member's prior end-of-day net unsettled positions.[17] NSCC notifies members early the following morning, and members are required to make deposits by approximately 10:00 a.m. EST.[18]

Generally, the largest portion of a member's margin is the volatility component. The volatility component is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99th percentile level of confidence. This component represents the amount assumed necessary to absorb losses while liquidating the member's portfolio.

NSCC's methodology for calculating the volatility component of a member's required fund deposit depends on the type of security and whether the security has sufficient pricing or trading history for NSCC to robustly estimate the volatility component using statistical techniques. Generally, for most securities (*e.g.,* equity securities), NSCC calculates the volatility component using, among other things, a parametric Value at Risk (''VaR'') model, which results in a ''VaR Charge.'' [19] The VaR Charge usually comprises the largest portion of a member's required fund deposit.

B. Current Treatment of Gap Risk in NSCC's Margin Methodology

Under NSCC's current Rules, one of the potential methods of calculating the VaR Charge relies on a measure of gap risk. It does not accrue for all portfolios, but instead only serves as the VaR Charge if it is the largest of three potential calculations.[20]

Gap risk events have been generally understood as idiosyncratic issuer events (for example, earning reports, management changes, merger announcements, insolvency, or other unexpected, issuer-specific events) that cause a rapid shift in price volatility levels. The gap risk charge was designed to address the risk presented by a portfolio that is more susceptible to the effects of gap risk events, *i.e.,* those portfolios holding positions that represent more than a certain percent of the entire portfolio's value, such that the event could impact the entire portfolio's value.[21]

The current gap risk charge applies only if a member's overall net unsettled non-index position with the largest absolute market value in the portfolio represents more than a certain percent of the entire portfolio's value, that is, if the net unsettled position exceeds a specified ''concentration threshold.'' The concentration threshold can be set no higher than 30 percent and is evaluated periodically based on members' backtesting results over a twelve month look-back period, and it is currently set at 5%.[22] NSCC's Rules currently calculate a gap risk charge only for ''non-index'' positions, meaning positions in the portfolio other than positions in ETFs that track diversified indices. This is because index-based ETFs that track closely to diversified indices are generally considered less prone to the effects of gap risk events.

The risk of large, unexpected price movements, particularly those caused by a gap risk event, are more likely to have a greater impact on portfolios with large net unsettled positions in securities that are susceptible to those events. Generally, index-based ETFs that track closely to diversified indices are less prone to the effects of gap risk events. Therefore, if the concentration threshold is met, NSCC currently calculates the gap risk charge for positions in the portfolio other than positions in ETFs that track diversified indices, referred to as ''non-index positions.''

To calculate the gap risk charge, NSCC multiplies the gross market value of the largest non-index net unsettled position in the portfolio by a gap risk haircut, which can be no less than 10 percent (''gap risk haircut'').[23] Currently, NSCC determines the gap risk haircut empirically as no less than the larger of the 1st and 99th percentiles of three-day returns of a set of CUSIPs that are subject to the VaR Charge pursuant to the Rules, giving equal rank to each to determine which has the highest movement over that three-day period. NSCC uses a look-back period of not less than ten years plus a one-year stress period, and if the one-year stress period overlaps with the look-back period, only the non-overlapping period would be combined with the look-back period. The resulting haircut is then rounded up to the nearest whole percentage and applied to the largest non-index net unsettled position to determine the gap risk charge.

[12] Under NSCC's Rules, a default would generally be referred to as a ''cease to act'' and could encompass a number of circumstances, such as a member's failure to make a margin payment on time. *See* Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 10.

[13] *See* Rule 4, *supra* note 10.

[14] *See* National Securities Clearing Corporation, Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at 61 (Dec. 2022), *available at https://www.dtcc.com/legal/policy-and-compliance.*

[15] *See id.*

[16] *See* Procedure XV of the Rules, *supra* note 10.

[17] *See* Procedure XV, Sections II(B) of the Rules, *supra* note 10.

[18] *See id.* The Rules provide that required deposits to the clearing fund are due within one hour of demand, unless otherwise determined by NSCC. *Id.*

[19] *See* Sections I(A)(1)(a)(i) and I(A)(2)(a)(i) of Procedure XV of the Rules, *supra* note 10.

[20] Specifically, the VaR Charge is the greatest of (1) the larger of two separate calculations based on different underlying estimates that utilize a parametric VaR model, which addresses the market risk of a member's portfolio (referred to as the core parametric estimation), (2) the gap risk calculation, and (3) a portfolio margin floor calculation based on the market values of the long and short positions in the portfolio, which addresses risks that might not be adequately addressed with the other volatility component calculations.

[21] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10. *See also* Exchange Act Release Nos. 82780 (Feb. 26, 2018), 83 FR 9035 (Mar. 2, 2018) (SR–NSCC–2017–808); 82781 (Feb. 26, 2018), 83 FR 9042 (Mar. 2, 2018) (SR–NSCC–2017–020) (''Initial Filing'').

[22] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10; *see* Important Notice a9055 (Sept. 27, 2021), at *https://www.dtcc.com/-/media/Files/pdf/2021/9/27/a9055.pdf* (notifying members that the concentration threshold had been changed from 10% to 5%).

[23] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10.

III. The Advance Notice

NSCC is proposing to make the following changes to the gap risk charge: (1) make the gap risk charge an additive component of the member's total VaR Charge when it is applicable, rather than being applied as the applicable VaR Charge only when it is the largest of three separate calculations, (2) adjusting the gap risk charge to be based on the two largest positions in a portfolio, rather than based on the single largest position, (3) changing the floor of the gap risk haircut from 10 percent to 5 percent for the largest position, adding a floor of the gap risk haircut of 2.5 percent for the second largest position, and providing that gap risk haircuts would be determined based on backtesting and impact analysis, and (4) amending which ETF positions are excluded from the gap risk charge to more precisely include ETFs that are more prone to gap risk, *i.e.,* are non-diversified.

First, NSCC is proposing to make the result of the gap risk charge calculation an additive component of a member's total VaR Charge, rather than applicable as the VaR Charge only when it is the highest result of three calculations. Under the proposal, the VaR Charge would be equal to the sum of (1) the greater of either the core parametric estimation or the portfolio margin floor calculation, neither of which is changing in this proposal,[24] and (2) the gap risk charge calculation. Rather than being applied only when the gap risk charge exceeds the other two calculations, the gap risk charge calculation would apply every time the top two positions exceed the concentration threshold and would always be a portion of the overall VaR Charge in such circumstances. NSCC states that making this charge additive could improve its ability to mitigate idiosyncratic risks that it could face through the collection of the VaR Charge.[25] Based on impact studies, NSCC believes this broader application together with the other proposed changes outlined below would better protect against more idiosyncratic risk scenarios than the current methodology.[26]

Second, NSCC is proposing to make the gap risk charge rely upon the absolute values of the two largest non-diversified net unsettled positions, as opposed to using the absolute value of only the single largest non-diversified net unsettled position. Therefore, the gap risk charge would be calculated by first multiplying each of the two largest non-diversified net unsettled positions with a gap risk haircut, and then adding the sum of the resulting products. The gap risk charge would be applicable if that sum of the resulting products exceeded the concentration threshold.[27] NSCC states that applying the gap risk charge to the two largest non-diversified positions in the portfolio would cover concurrent gap moves involving more than one concentrated position, adding more flexibility and coverage.[28]

Third, NSCC proposes to revise the calculation of the gap risk haircut in response to making the proposal an additive component of a member's VaR Charge. Currently, the gap risk haircut is determined by selecting the largest of the 1st and 99th percentiles of three-day returns of a composite set of equities, using a look-back period of not less than 10 years plus a one year stress period.[29] NSCC believes that this methodology results in implicit overlapping of the risk covered by the core parametric VaR and the gap risk charge.[30] Because the proposal would make the gap risk charge an additive component to the VaR Charge rather than a substitutive component, NSCC does not believe that the current methodology for the gap risk haircut would result in an appropriate level of margin.[31] Under the proposal, NSCC would determine and calibrate the concentration threshold and the gap risk haircut periodically based on backtesting and impact analysis. NSCC states that the concentration threshold and the gap risk haircuts would be selected from various combinations of concentration thresholds and gap risk haircuts based on backtesting and impact analysis across all member portfolios, initially using a five year look-back period.[32] NSCC believes that this would provide more flexibility to set the parameters from time to time to provide improved backtesting performance, broader coverage for idiosyncratic risk scenarios and flexibility for model tuning to balance performance and cost considerations.[33]

In addition, NSCC proposes to revise the determination of the gap risk haircut in response to the proposal's inclusion of the two largest non-diversified net unsettled positions, as opposed to only the one, and to its additive nature. Currently, the percent that is applied to the largest non-index net unsettled position in the portfolio is no less than 10 percent.[34] Because of the proposal's shift to including the two largest positions, NSCC believes it is appropriate to set a lower floor for the gap risk haircut that applies to the largest of those two positions.[35] Moreover, because the gap risk charge would now be additive and would apply more frequently, NSCC believes that the flexibility to set a lower floor for the largest position would be appropriate.[36]

Specifically, NSCC is proposing to lower the gap risk haircut that would be applied to the largest non-diversified net unsettled position to be a percent that is no less than 5 percent. The gap risk haircut that would be applied to the second largest non-diversified net unsettled position in the portfolio would be no larger than the gap risk haircut that would be applied to the largest non-diversified net unsettled position and would be subject to a floor of 2.5 percent. NSCC states that, upon implementation of the proposed rule change, NSCC would set the concentration threshold at 10%, apply a gap risk haircut on the largest non-diversified net unsettled position of 10% and a gap risk haircut on the second largest non-diversified net unsettled position of 5%.[37] NSCC would set the concentration threshold and the gap risk haircuts based on backtesting and impact analysis in accordance with NSCC's model risk management practices and governance set forth in the Model Risk Management Framework.[38] NSCC would provide

[24] *See* note 20 *supra.*

[25] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[26] *Id.*

[27] As noted in Section II.B above, the concentration threshold is currently set at 5%, and the Rules define the concentration threshold as no more than 30 percent of the value of the entire portfolio. *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 20. The proposed changes would clarify that the concentration threshold is not fixed at 30 percent by defining concentration threshold as a percentage designated by NSCC of the value of the entire portfolio and determined by NSCC from time to time, and that shall be no more than 30 percent. NSCC believes this proposed change will help clarify that the concentration threshold could change from time to time but could not be set to be more than 30 percent. *See* Notice of Filing, *supra* note 5, 87 FR at 78179.

[28] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[29] *Id.*

[30] *See id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 78178–79.

[36] *Id.* at 78179.

[37] *Id.*

[38] *See* Exchange Act Release Nos. 81485 (Aug. 25, 2017), 82 FR 41433 (Aug. 31, 2017) (File No. SR–NSCC–2017–008); 84458 (Oct. 19, 2018), 83 FR 53925 (Oct. 25, 2018) (File No. SR–NSCC–2018–009); 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (File No. SR–NSCC–2020–008); 92381 (July 13, 2021), 86 FR 38163 (July 19, 2021) (File No. SR–NSCC–2021–008); and 94272 (Feb. 17, 2022), 87 FR 10419 (Feb. 24, 2022) (File No. SR–NSCC–2022–001). NSCC's model risk management governance

Continued

notice to members by important notice of the concentration threshold and gap risk haircuts that it would be applying.

Fourth, NSCC is proposing to amend what positions are excluded from the gap risk charge calculation. Currently, only ''non-index'' positions and index-based exchange-traded products that track a narrow market index are included in the gap risk charge.[39] Under the proposal, this would be revised to refer to ''non-diversified'' positions instead of non-index positions. The rule text would specify that NSCC would exclude ETF positions from the calculation (that is, it would consider them diversified) if the positions have characteristics that indicate that they are less prone to the effects of gap risk events, including whether the ETF positions track to an index that is linked to a broad based market index, contain a diversified underlying basket, are unleveraged or track to an asset class that is less prone to gap risk. NSCC states that the proposed change would result in certain non-index based ETFs being excluded from the gap risk charge whereas they are currently included, such as unleveraged U.S. dollar based ETFs.[40] NSCC also states that this proposed change would provide greater transparency to members regarding which positions are excluded from this calculation.[41]

NSCC states that certain ETFs, both index based and non-index based, are less prone to the effects of gap risk events as a result of having certain characteristics and, therefore, are less likely to pose idiosyncratic risks that the gap risk charge is designed to mitigate.[42] By contrast, based on the proposed methodology, NSCC would include certain commodity ETFs in the gap risk charge that track to an index that is not a broad-based diversified commodity index; such ETFs are not currently subject to the gap risk charge, but would be subject going forward.

III. Commission Findings and Notice of No Objection

Although the Clearing Supervision Act does not specify a standard of review for an advance notice, the stated purpose of the Clearing Supervision Act is instructive: to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities (''SIFMUs'') and strengthening the liquidity of SIFMUs.[43]

Section 805(a)(2) of the Clearing Supervision Act authorizes the Commission to prescribe regulations containing risk management standards for the payment, clearing, and settlement activities of designated clearing entities engaged in designated activities for which the Commission is the supervisory agency.[44] section 805(b) of the Clearing Supervision Act provides the following objectives and principles for the Commission's risk management standards prescribed under section 805(a) :[45]

- to promote robust risk management;
- to promote safety and soundness;
- to reduce systemic risks; and
- to support the stability of the broader financial system.

Section 805(c) provides, in addition, that the Commission's risk management standards may address such areas as risk management and default policies and procedures, among other areas.[46]

The Commission has adopted risk management standards under section 805(a)(2) of the Clearing Supervision Act and section 17A of the Exchange Act (the ''Clearing Agency Rules'').[47] The Clearing Agency Rules require, among other things, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for its operations and risk management practices on an ongoing basis.[48] As such, it is appropriate for the Commission to review advance notices against the Clearing Agency Rules and the objectives and principles of these risk management standards as described in section 805(b) of the Clearing Supervision Act. As discussed below, the Commission believes the changes proposed in the Advance Notice are consistent with the objectives and principles described in section 805(b) of the Clearing Supervision Act,[49] and in the Clearing Agency Rules, in particular Rule 17Ad–22(e)(4)(i) and (e)(6)(i).[50]

A. Consistency With Section 805(b) of the Clearing Supervision Act

The Commission believes that the proposal contained in NSCC's Advance Notice is consistent with the stated objectives and principles of section 805(b) of the Clearing Supervision Act. Specifically, as discussed below, the Commission believes that the changes proposed in the Advance Notice are consistent with promoting robust risk management, promoting safety and soundness, reducing systemic risks, and supporting the stability of the broader financial system.[51]

The Commission believes that the Advance Notice is consistent with promoting robust risk management as well as safety and soundness because, based on the confidential information provided by NSCC and reviewed by the Commission, including the impact study demonstrating the collective impact of the proposed changes on the margin collected both at the overall clearing agency level and on a member-by-member basis and on NSCC's backtesting performance, the proposed changes with respect to the calculation of the gap risk charge provide better margin coverage than the current methodology. The Commission believes that the changes described in the Advance Notice should enable NSCC to better manage its exposure to portfolios with identified concentration risk, which should, in turn, limit its exposure to members in the event of a member default, which is consistent with promoting robust risk management.

The Commission believes that making the gap risk charge an additive component, as opposed to a potential substitutive option applicable only if it exceeds other methodologies for determining the VaR Charge, should help NSCC better protect against more idiosyncratic risk scenarios in concentrated portfolios than the current methodology. In addition, adjusting the gap risk calculation to take into account the two largest positions, as well as to apply two separate haircuts based on backtesting and impact analysis with floors set forth in the Rules, should allow NSCC to cover concurrent gap moves involving more than one concentrated position. Moreover, modifying the criteria for ETF positions subject to the gap risk charge based on

procedures include daily backtesting of model performance, periodic sensitivity analyses of models and annual validation of models. They would also provide for review of the concentration threshold and the gap risk haircuts at least annually.

[39] *See* Section I(A)(1)(a)(i)II and I(A)(2)(a)(i)II of Procedure XV of the Rules, *supra* note 10. *See also* Initial Filing, *supra* note 21.

[40] *See* Notice of Filing, *supra* note 5, 87 FR at 78178.

[41] *Id.* NSCC states that it uses a third-party provider to identify ETFs that meet its criteria of being diversified. *See id.*

[42] *Id.*

[43] *See* 12 U.S.C. 5461(b).

[44] 12 U.S.C. 5464(a)(2).

[45] 12 U.S.C. 5464(b).

[46] 12 U.S.C. 5464(c).

[47] 17 CFR 240.17Ad–22. *See* Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220 (Nov. 2, 2012) (S7–08–11). *See also* Covered Clearing Agency Standards Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786 (Oct. 13, 2016). NSCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5).

[48] 17 CFR 240.17Ad–22.

[49] 12 U.S.C. 5464(b).

[50] 17 CFR 240.17Ad–22(e)(4)(i) and (e)(6)(i).

[51] 12 U.S.C. 5464(b).

whether they are non-diversified rather than whether they are non-index would allow NSCC to more accurately determine which ETFs should be included and excluded from the gap risk charge based on characteristics that indicate that such ETFs are more or less prone to the effects of gap risk events, thereby providing more accurate coverage of the potential exposure arising from such positions.

Further, the Commission believes that, to the extent the proposed changes are consistent with promoting NSCC's safety and soundness, they are also consistent with reducing systemic risk and supporting the stability of the broader financial system. NSCC has been designated as a SIFMU, in part, because its failure or disruption could increase the risk of significant liquidity or credit problems spreading among financial institutions or markets.[52] The Commission believes that the proposed changes would support NSCC's ability to continue providing services to the markets it serves by addressing losses and shortfalls arising out of a member default. NSCC's continued operations would, in turn, help reduce systemic risk and support the stability of the financial system by reducing the risk of significant liquidity or credit problems spreading among market participants that rely on NSCC's central role in the market.

Accordingly, and for the reasons stated above, the Commission believes the changes proposed in the Advance Notice are consistent with section 805(b) of the Clearing Supervision Act.[53]

B. Consistency With Rule 17Ad–22(e)(4)(i) Under the Exchange Act

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[54]

Based on its review of the record, the Commission believes NSCC's proposal to broaden the scope of the gap risk charge and the related adjustments to its calculation could help improve NSCC's backtesting performance, provide broader coverage for idiosyncratic risk scenarios, and could help address the potential increased risks NSCC may face related to its ability to liquidate a portfolio that is susceptible to such risks in the event of a member default. Specifically, the Commission has reviewed and analyzed NSCC's analysis of the improvements in its backtesting coverage,[55] and agrees that the analysis demonstrates that the proposal would result in better backtesting coverage and, therefore, less credit exposure to its members.

Accordingly, the Commission believes that the proposal would enable NSCC to better manage its credit risks by allowing it to respond regularly and more effectively to any material deterioration of backtesting performances, market events, market structure changes, or model validation findings, thereby helping to ensure that NSCC can take steps to collect sufficient margin to maintain sufficient financial resources to cover its exposure to its members. Therefore, the Commission believes the changes proposed in the Advance Notice are consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

C. Consistency With Rule 17Ad–22(e)(6)(i) Under the Exchange Act

Rule 17Ad–22(e)(6)(i) under the Exchange Act requires that each covered clearing agency that provides central counterparty services establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[56]

The Commission understands that, as described above, the proposal as a whole is designed to enable NSCC to more effectively address the risks presented by members' concentrated positions in securities more prone to gap risk events and to produce margin levels that are more commensurate with the particular risk attributes of these concentrated holdings, including the market price risk of liquidating large positions in securities that are more prone to gap risk events. The Commission believes that the proposal would improve NSCC's ability to consider, and produce margin levels commensurate with, the risks and particular attributes presented by a portfolio that meets the concentration threshold and, therefore, is more susceptible to the impacts of idiosyncratic risks.

First, the Commission believes that broadening the gap risk charge to an additive feature of the VaR Charge and using the two largest non-diversified positions would help NSCC to more effectively manage the idiosyncratic risks of portfolios with concentrated holdings. Specifically, the proposed changes should result in an overall increase of margin for members that have positions subject to the gap risk charge.[57]

[52] Financial Stability Oversight Council, 2012 Annual Report, Appendix A, *https://home.treasury.gov/system/files/261/2012-Annual-Report.pdf.*

[53] 12 U.S.C. 5464(b).

[54] 17 CFR 240.17Ad–22(e)(4)(i).

[55] NSCC submitted more detailed results of the impact study as confidential Exhibit 3 to the Advance Notice. NSCC requested confidential treatment of Exhibit 3 pursuant to 5 U.S.C. 552(b)(4) and 552(b)(8) and 17 CFR. 200.80(b)(4) and 200.80(b)(8). A commenter raised a concern regarding redacted portions of the filing, which consisted of certain supporting exhibits filed confidentially as Exhibit 3 to the filing. *See https://www.sec.gov/comments/sr-nscc-2022-015/srnscc2022015-320658.htm.* NSCC asserted that this exhibit to the filing was entitled to confidential treatment because it contains: (i) trade secrets and commercial information that is privileged or confidential and which, if disclosed, would be accessible to the DTCC Companies' competitors and could result in substantial competitive injury to the DTCC Companies; and (ii) non-public, confidential information prepared for use by Commission staff. Under section 23(a)(3) of the Exchange Act, the Commission is not required to make public statements filed with the Commission in connection with a proposed rule change of a self-regulatory organization if the Commission could withhold the statements from the public in accordance with the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. 15 U.S.C. 78w(a)(3). The Commission has reviewed the documents for which NSCC requests confidential treatment and concludes that they could be withheld from the public under the FOIA. FOIA Exemption 4 protects confidential commercial or financial information. 5 U.S.C. 552(b)(4). Under Exemption 4, information is confidential if it ''is both customarily and actually treated as private by its owner and provided to government under an assurance of privacy.'' *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356, 2366 (2019). Based on its review of the materials submitted, the Commission believes that the information is the type that would not customarily be disclosed to the public. Specifically, this information consists of an impact study analyzing the effect that the changes to NSCC's margin methodology would have on each member's individual margin requirement to NSCC; information regarding NSCC's analysis and development of the particular changes to the margin methodology, including its consideration of potential alternative haircuts and thresholds; and excerpts from NSCC's non-public detailed margin methodology. In addition, by requesting confidential treatment, NSCC had an assurance of privacy because the Commission generally protects information that can be withheld under Exemption 4. Thus, the Commission has determined to accord confidential treatment to the confidential exhibits.

[56] 17 CFR 240.17Ad–22(e)(6)(i).

[57] The impact study indicated that the proposed changes would have resulted in a 10.88% increase for the daily total VaR Charge on average and would have resulted in a 4.89% increase in the daily total clearing fund on average during that period. *See* Notice of Filing, *supra* note 5, 87 FR at 78176. In addition, the Commission reviewed confidential

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Second, given the proposed additive nature of the gap risk charge, the Commission believes the adjustments to the gap risk charge calculation (*i.e.,* establishing floors for the gap risk haircuts applicable to the two largest positions) are reasonably designed to cover NSCC's exposure to members arising from gap risks. The Commission believes the adjustments to the gap risk charge calculation are reasonable because the record shows the proposal should improve NSCC's ability to mitigate against idiosyncratic risks that NSCC may face when liquidating a portfolio that contains a concentration of positions, while balancing NSCC's consideration of the potential costs to members that may be subject to the gap risk charge.[58] The Commission believes that the established floors for the two haircuts should also help ensure that the gap risk charge collects margin sufficient to cover the potential exposure in a gap risk event.

Third, by providing additional specific objective criteria to determine which positions would be subject to the gap risk charge, the Commission believes that NSCC should be able to better identify those securities that may be more prone to idiosyncratic risks. Specifically, the proposal should ensure that ETFs identified as non-diversified (whether index-based or not) and therefore more prone to idiosyncratic risks will be subject to the gap risk charge.

Taken together, the Commission believes that the proposal should permit NSCC to calculate a gap risk charge that is more appropriately designed to address the gap risks presented by concentrated positions in portfolios. Accordingly, the Commission believes the proposal is consistent with Rule 17Ad–22(e)(6)(i) under the Exchange Act because it is designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of portfolios with identified concentration risks.[59]

IV. Conclusion

It is therefore noticed, pursuant to section 806(e)(1)(I) of the Clearing Supervision Act, that the Commission DOES NOT OBJECT to Advance Notice (SR–NSCC–2022–802) and that NSCC is AUTHORIZED to implement the proposal as of the date of this notice, or the date of an order by the Commission approving proposed rule change SR–NSCC–2022–015, whichever is later.

By the Commission.

J. Matthew DeLesDernier,

Deputy Secretary.

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materials submitted to the Commission, which included more granular information, at a member level, of the impacts of this proposal as compared to the current methodology. *See* note 55 *supra.*

[58] As part of the confidential materials submitted to the Commission, NSCC provided analysis of alternative potential haircuts and thresholds that it considered when developing the proposal. *See* note 55 *supra.* The Commission's review of those materials further supports its belief as to the reasonableness of this aspect of the proposal.

[59] 17 CFR 240.17Ad–22(e)(6)(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98055; File No. SR–ICC–2023–007]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan

August 4, 2023.

I. Introduction

On June 5, 2023, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Recovery Plan and Wind-Down Plan. The proposed rule change was published for comment in the **Federal Register** on June 22, 2023.[3] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

ICC is registered with the Commission as a clearing agency for the purpose of clearing CDS contracts.[4] The proposed rule change would amend both the Recovery Plan and the Wind-Down Plan, which serve as plans for the recovery and orderly wind-down of ICC, respectively, if such recovery or wind-down is necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses incurred by ICC. The Recovery Plan is designed to establish ICC's actions to maintain its viability as a going concern by addressing any uncovered credit loss, liquidity shortfall, capital inadequacy, or business, operational or other structural weakness that threatens ICC's viability as a going concern. The Wind-Down Plan is designed to establish how ICC could be wound down in an orderly manner in the event that it cannot continue as a going concern.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Proposed Rule Change Relating to the ICC Recovery Plan and the ICC Wind-Down Plan; Exchange Act Release No. 97734 (June 15, 2023), 88 FR 40874 (June 22, 2023) (File No. SR–ICC–2023–007) (''Notice'').

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in ICC's Clearing Rules.

B. Recovery Plan

ICC proposes general updates and edits to its Recovery Plan to promote clarity and to ensure that the information in it is current. The proposed amendments to the Recovery Plan reflect and relate to changes that impacted ICC in the past year. To that end, the current Recovery Plan includes in the introduction a disclaimer that, unless otherwise specified, all information provided in the plan is current as of December 31, 2021. The proposed rule change would update that date to December 31, 2022. The proposed amendments to the Recovery Plan also would include changes to the coverage amount under the ICC clearing participant (''CP'') default insurance policy (''CP Default Insurance Policy''), and the addition of ICC-specific procedures for financial resource calculations.

Section IV covers key recovery elements. Within this section, the proposed rule change would amend clearing participation (IV.B), management and governance (IV.C), and key performance metrics (IV.D). In Section IV.B, ICC would create a reference to a membership category, Associate Clearing Participant. In Section IV.C, ICC would make a correction to the Management/Governance chart to indicate that the business continuity plan (''BCP'') and disaster recovery (''DR'') Oversight Committee is not a sub-committee of the ICC Audit Committee. In Section IV.C, ICC would update the description of ICE Holding Board Chairman Vincent Tese, who is currently listed as an independent director of both ICE Holding and ICE Inc. The proposed rule change would amend the description to remove his listing as an independent director of Ice Inc. In Section IV.D, ICC would update its revenues, volumes, and expenses for years 2021 and 2022.

The proposed rule change also would amend Section VI of the Recovery Plan, which covers interconnections and interdependencies. Specifically, ICC proposes to amend Sections VI.A

(Operational), VI.B (Financial), and VI.C (Contractual Agreements). The proposed updates to Section VI.A would reflect changes in the last year and would update the descriptions of ICC's personnel and facilities, as well as its in-house systems. Section VI.B currently includes a ''Counterparty Chart'' that lists all of ICC's various counterparties and indicates which function(s) each counterparty performs (*i.e.,* Clearing Participant, Custodian, Depository, etc.) would update the roles in its counterparty chart. The proposed changes to Section VI.B would update that chart to reflect changes to the functions performed by certain counterparties. The only proposed update to Section VI.C would be to the chart of counterparty contractual agreements in that section. Specifically, ICC would remove the reference to a service no longer received from a specific external service provider (*i.e.,* receipt of market data to value FX positions and collateral).

The proposed rule change would make several updates to Section VIII of the Recovery Plan, which addresses ICC's recovery tools, primarily in Section VIII.B. First, the proposed rule change would update the name of the carrier for ICC's CP Default Insurance Policy, which is maintained at the ICE Group level and may be used as a recovery tool in a CP default scenario pursuant to ICC's Rules, provided certain conditions are met. Second, it would amend the amount of coverage to reflect that the Policy coverage amount has increased to $75 million (from $50 million, as reflected in the current Recovery Plan); third, it would update the points of contact for ICC's Default Insurance Policy; and fourth, it would update the coverage amount under the Professional Liability/Cyber (E&O) Insurance Policy from $110 million to $120 million to reflect that coverage amount under that policy has increased since the last update to the Recovery Plan. Fifth, in Section VIII.B.1.iii (Direct Infusion of Cash to ICC from Parent/ICE Group), ICC would update the current description of ICC's, ICE Inc's, and ICE Group's respective year-end cash balances to reflect their most current consolidated balance sheets. Finally, the proposed rule change would add a footnote in Section VIII.B that references and describes ICC's Risk Appetite Statements and Metrics, which define the thresholds ICC has established with respect to regulatory capital requirements and provide for alerts in the event that ICC is nearing a breach of these amounts (*i.e.,* the current alert is triggered if ICC maintains 110% or less of its required regulatory capital). The reference to and description of ICC's Risk Appetite Statements and Metrics is intended to provide further details on how decreases in ICC's regulatory capital will trigger escalation within ICC, which in turn may lead to potential remedial actions, including whether ICC should initiate its plan to raise additional equity.

Section X of the Recovery Plan identifies ICC's Financial Resources for Recovery. The proposed rule change would add details regarding the calculation of ICC's financial resources available for recovery to reflect new ICC-specific Financial Resource Calculation Procedures that ICC has added since the last update to the Recovery Plan. Specifically, the Recovery Plan would specify that ICC completes a voluntary annual calculation of regulatory requirements under European Market Infrastructure Regulation (''EMIR'') guidelines. It would note that ICC's calculation approximates the EMIR requirements and is calculated by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements, as well as a discussion of future expectations with the ICC Treasury Director, and specify that the EMIR Estimate includes four elements relating to: winding down/restructuring; operational and legal risks; credit and counterparty risk/market risk; and business risks. The proposed update would also include a reference to the Financial Resource Calculation Procedures and note that the procedures include additional details regarding the calculation of regulatory capital requirements under EMIR guidelines. The proposed rule change also would amend Section X to update the expected costs of recovery and wind-down, including expenses related to legal services, consulting, operations, regulatory capital requirements, and other wind down costs.

Section XI of the Recovery Plan (Financial Information) provides the balance sheet and income statement for ICC and the consolidated balance sheet and income statement for ICE Inc. and its subsidiaries. The proposed rule change would update the financial information in this section to reflect the most current financial statements for both entities.

The proposed rule change would make minor edits to Section XIII, Appendix G, which covers form default insurance proof of loss, by updating the carrier and policy number for ICC's CP Default Insurance Policy. In Section XIV, which contains the index of exhibits, the proposed rule change would update the index of exhibits with the current versions of policies and procedures, consistent with updated footnote references. Finally, the proposed rule change would make non-substantive typographical fixes in the ICC Recovery Plan, as well as conforming changes in the ICC Wind-Down Plan, including updates to entity names, and grammatical and formatting changes.

C. Wind-Down Plan

ICC proposes updates and edits to promote clarity and to ensure that the information provided in the Wind-Down Plan is current. The proposed rule change reflects and relates to changes that have impacted ICC in the past year, including the addition of ICC-specific procedures for financial resource calculations. The current Wind-Down Plan includes in the introduction a disclaimer that, unless otherwise specified, all information provided in the plan is current as of December 31, 2021. The proposed rule change would update that date to December 31, 2022.

Section II of the Wind-Down Plan is an overview of the structure of ICC. Section II.A addresses ownership of ICC. The proposed rule change would add additional language for the headquarter location for ICC. Section IV addresses membership and ICC governance. The proposed rule change would amend the Management and Governance chart in Section IV.B because the previous chart incorrectly indicated that the BCP and DR Oversight Committee are sub-committees of the ICC Audit Committee. Additionally, the proposed rule change would update the description of Vincent Tese in Section IV.B, so that he is listed as just an independent director of ICC, but is no longer listed as an independent director of ICE Inc.

In the beginning of Section VII, which addresses interconnections and interdependencies, the proposed rule change would update ICC revenue. Later in VII.C.2, the proposed rule change would update the number of personnel and facilities. In Section VII.C, which addresses operational services, the proposed rule change would update a list of in-house systems. Section VII.D addresses financial services and the proposed rule change would update the roles on its counterparty chart.

Section IX addresses financial resources to support wind-down. In this section, the proposed rule change would include additional details regarding the calculation of ICC's financial resources available for wind-down to reflect the new ICC-specific Financial Resource

Calculation Procedures. The proposed rule change would add details regarding the calculation of regulatory capital requirements under EMIR guidelines. Similar to the proposed changes in the Recovery Plan, the proposed rule change would specify that calculations are performed by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements and include a discussion of future expectations with the ICC Treasury Director. Similar to the proposed changes in the Recovery Plan, the proposed rule change would note that ICC's calculation approximates the EMIR requirements and is calculated by ICE Treasury on an annual basis upon the finalization of ICC's statutory audit and financial statements, as well as a discussion of future expectations with the ICC Treasury Director, and specify that the EMIR Estimate includes four elements relating to: winding down/restructuring; operational and legal risks; credit and counterparty risk/market risk; and business risks. The proposed update would also include a reference to the Financial Resource Calculation Procedures and note that the procedures include additional details regarding the calculation of regulatory capital requirements under EMIR guidelines.

The proposed rule change would update and edit to promote clarity and consistency in the ICC Wind-Down Plan. In the counterparty contractual agreements chart in Section VIII, the proposed rule change would remove the reference to a service no longer received from a specific external service provider (*i.e.,* receipt of market data to value FX positions and collateral). In Section XII, the proposed rule change would update the index of exhibits with the current versions of policies and procedures, consistent with updated footnote references.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[5] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[6] and Rule 17Ad–22(e)(3)(ii).[7]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICC be designed, to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, as well as to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible.[8]

As noted above, the proposed rule change primarily would update the Recovery Plan and Wind-Down Plan with current information about ICC's facilities, finances, operations, and Board. The Commission believes that by providing the most current information for ICC's revenues, volumes, and expenses, the proposed rule change will support ICC's ability to monitor its finances and compare its regulatory capital to its estimated recovery and wind-down costs. This in turn will help ensure ICC has the financial resources to promptly and accurately clear and settle transactions during recovery and, if necessary, conduct an orderly wind-down.

Further, the Commission believes that updating the Counterparty Chart to reflect current roles and changes to the functions performed by certain counterparties will generally support those utilizing the Plans by providing users of the Plans a correct overview of ICC's counterparties. Similarly, the Commission believes that updating the description of ICC's Default Insurance Policy and Professional Liability/Cyber (E&O) Insurance Policy to reflect increase coverage amounts and current points of contact will generally support those utilizing the Plans by providing users of the Plans a correct overview of these insurance policies. The Commission believes that these proposed changes would strengthen both plans by ensuring those utilizing them have information necessary to carry out recovery or an orderly wind-down, which in turn should help ICC to promptly and accurately clear and settle transactions during recovery and, if necessary, conduct an orderly wind-down.

ICC also proposed to include a reference to the thresholds for regulatory capital requirements that would trigger alerts for ICC nearing a capital requirement breach. This may lead to potential remedial actions, including whether ICC should initiate its plan to raise additional equity. The Commission believes that these proposed changes would strengthen the plans by ensuring those utilizing them have all of the information necessary to carry out recovery or an orderly wind-down, which in turn will help ensure ICC can promptly and accurately clear and settle trades and safeguard of securities and funds which are in its custody or control at these times.

For the reasons stated above, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act.[9]

B. Consistency With Rule 17Ad–22(e)(3)(ii)

Rule 17Ad–22(e)(3)(ii) requires ICC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICC, which includes plans for the recovery and orderly wind-down of ICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[10]

The Commission believes the proposed changes described above that would add current financial, personnel, and board information support ICC's maintenance of plans for the recovery and orderly wind-down of ICC with updated accurate information. The proposed rule change also would addi details regarding the calculation of ICC's financial resources available for wind-down to reflect the new ICC Financial Resource Calculation Procedures. Additionally, ICC adds a reference to its thresholds for regulatory capital requirements that would trigger alerts for when ICC is nearing a capital requirement breach. The Commission believes that current financial information provides relevant information to those using the Plans to understand the resources available for recovery or an orderly wind-down.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(3)(ii).[11]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of

[5] 15 U.S.C. 78s(b)(2)(C).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 17 CFR 240.17Ad–22(e)(3)(ii).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(3)(ii).

[11] 17 CFR 240.17Ad–22(e)(3)(ii).

Section 17A(b)(3)(F) of the Act[12] and Rule 17Ad–22(e)(3)(ii).[13]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[14] that the proposed rule change (SR–ICC–2023–007), be, and hereby is, approved.[15]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17102 Filed 8–9–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98063; File No. SR–IEX–2023–08]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Pursuant to IEX Rule 15.110 To Amend IEX's Fee Schedule

August 4, 2023.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on July 25, 2023, Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of section 19(b)(1) under the Act,[4] and Rule 19b–4 thereunder,[5] IEX is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members[6] (the ''Fee Schedule'') pursuant to IEX Rule 15.110(a) and (c), to modify the fees applicable to executions of and with displayed orders for securities priced at or above $1.00 per share. Changes to the Fee Schedule pursuant to this proposal are effective upon filing,[7] and will be operative on September 1, 2023.

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 modify its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c), to modify the fees applicable to executions of and with displayed orders with an execution price at or above $1.00 per share. The Exchange currently does not charge Members a fee for an execution at or above $1.00 per share that provides displayed liquidity and charges Members $0.0009 per share for an execution at or above $1.00 per share that removes displayed liquidity.[8]

As proposed, for executions at or above $1.00 per share, Members that enter displayed orders that provide liquidity will receive a rebate of $0.0004 per share and Members that enter orders that remove displayed liquidity will be charged a fee of $0.0010 per share, unless a lower fee applies.[9] The proposed fee change would also apply to executions when the adding and removing orders originated from the same Member.

The Exchange provides the following Fee Codes on execution reports to Members for executions of and with displayed liquidity: ''ML'' for orders that provide displayed liquidity, ''MLS'' for orders that provide displayed liquidity that executes against an order that originated from the same Member, ''TL'' for orders that remove displayed liquidity, and ''TLS'' for orders that remove displayed liquidity added by the same Member.[10] These existing Fee Codes will continue to apply.

Specifically, the Exchange is proposing to make the following changes to its Fee Schedule:

- Replace the words ''Effective January 2, 2023'' at the top of the Fee Schedule with the words ''Effective July 25, 2023'' and on the line immediately after, add ''New underlined text and deletions in brackets will be operative on September 1, 2023'' (to indicate the date the fees in this proposal will be operative).
- Modify the first bullet point under the ''Transaction Fees'' header to specify that all fees identify the cost ''or rebate'' per share executed. And add a sentence stating that ''Rebates are indicated by parentheses ().''
- In the ''Base Rates'' table, change the fee for executions at or above $1.00 per share for Fee Code ML from ''FREE'' to ''($0.0004)''.
- In the ''Base Rates'' table, change the fee for executions at or above $1.00 per share for Fee Code TL from ''$0.0009'' to ''$0.0010''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code ML from ''FREE'' to ''($0.0004)''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code TL from ''$0.0009'' to ''$0.0010''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code MLS from ''FREE'' to ''($0.0004)''.
- In the ''Fee Code Combinations and Associated Fees'' table, change the fee for executions at or above $1.00 per share for Fee Code TLS from ''$0.0009'' to ''$0.0010''.

The Exchange is not proposing to change the fees applicable to executions of and with displayed orders with an execution price below $1.00 per share, which would remain free for such orders that provide displayed liquidity and 0.09% of the total dollar volume of the execution for orders that take displayed liquidity. IEX is also not proposing to make any changes to the fees applicable to the execution of

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] 17 CFR 240.17Ad–22(e)(3)(ii).

[14] 15 U.S.C. 78s(b)(2).

[15] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.19b–4.

[6] *See* IEX Rule 1.160(s).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] *See* Investors Exchange Fee Schedule, available at *https://www.iexexchange.io/resources/trading/fee-schedule.*

[9] As discussed *infra,* if a Retail order removes displayed liquidity, the Retail order would not be charged a fee.

[10] *See supra* note 8.

Retail [11] orders that remove displayed liquidity, which will continue to execute for free.

The current fees for orders that provide or take displayed liquidity were adopted in 2021 and designed to attract displayed order flow to the Exchange by offering a fee-based incentive to provide displayed liquidity.[12] The Exchange periodically assesses its fee structure and based upon a recent assessment, the Exchange believes that the proposed pricing change would further incentivize Members to submit displayed orders in securities priced at or above $1.00 per share. The proposed fee change is designed to incentivize posting displayed liquidity on IEX in securities priced at or above $1.00 per share in order to address competitive factors (as discussed more thoroughly in the Statutory Basis section) and facilitate price discovery and price formation, which the Exchange believes benefits all Members and market participants.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of section 6(b) [13] of the Act in general, and furthers the objectives of sections 6(b)(4) [14] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange believes that the proposed fee change is reasonable, fair and equitable, and non-discriminatory. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed fee structure will attract and incentivize displayed order flow as well as order flow seeking to trade with displayed order flow. Moreover, increases in displayed liquidity would contribute to the public price discovery process which would benefit all market participants and protect investors and the public interest.

The Exchange believes that the proposed fee structure for providing and removing displayed liquidity is reasonable and consistent with the Act. Specifically, the Exchange believes that for securities that trade at or above $1.00 per share, it is reasonable to provide a $0.0004 per share rebate for providing displayed liquidity and to modestly increase the fee for removing displayed liquidity to $0.0010 per share. As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Within that context, charging $0.0010 per share for orders that remove displayed liquidity (coupled with a $0.0004 per share rebate for orders that add displayed liquidity) is designed to keep IEX's displayed trading prices competitive with those of other exchanges. In this regard, IEX notes that while many competing exchanges pay rebates to provide displayed liquidity that are substantially higher than those proposed, others charge fees to provide displayed liquidity for securities that trade at or above $1.00 per share.[15] Further, IEX notes that for securities that trade at or above $1.00 per share, many competing exchanges charge substantially higher fees to remove displayed liquidity than those charged by IEX.[16] Consequently, IEX believes that the proposed fee structure for providing and removing displayed liquidity is within the range charged by competing exchanges and does not raise any new or novel issues not already considered by the Commission in the context of other exchanges' fees.

In addition, IEX believes that it is reasonable and consistent with the Act to apply the proposed fees to executions when the adding and removing order originated from the same Member. IEX believes that the same factors that support the proposed fees overall, are also applicable to such executions.

Specifically, IEX believes that the incentives to send displayed orders to IEX (and orders seeking to execute against displayed orders) will similarly provide an incentive to Members to send orders to IEX that might otherwise be internalized off-exchange, which may increase order interaction on IEX. Internalization on IEX is not guaranteed, and the additional orders that do not internalize are available to trade by all Members.

The Exchange also believes that it is reasonable and consistent with the Act not to modify its displayed fees for sub-dollar executions to synchronize those fees with the proposed fees for executions at or above $1.00 per share. The Exchange believes that the existing fee structure for such executions continues to be reasonably designed to incentivize displayed order flow (and orders seeking to trade with displayed order flow) in such securities.

Further, IEX believes that it is reasonable and consistent with the Act not to change the fees applicable to the execution of Retail orders that remove liquidity, which will continue to execute for free. In this regard, the Exchange believes that the existing fee structure continues to be reasonably designed to incentivize the entry of Retail orders, and notes that the Commission, in approving IEX's Retail Price Improvement Program, acknowledged the value of exchanges' offering incentives to attract both retail investor orders and orders specifically designated to execute only with retail orders.[17]

The Exchange further believes that the proposed fee change is consistent with the Act's requirement that the Exchange provide for an equitable allocation of fees that is also not unfairly discriminatory.

First, the fees for adding and removing displayed liquidity will apply on a per share basis in an equal and nondiscriminatory manner to all Members, without regard to the volume of orders submitted by a Member or other factors.

Second, because the fees would apply on a flat, per share basis—like IEX's existing fees—they will continue to be fully deterministic, in that a Member will be able to determine the Exchange fees for each execution. IEX believes this aspect of its fee proposal will assist all Members in making decisions about routing of orders without the uncertainties associated with volume tiers or other requirements that cannot

[11] *See* IEX Rule 11.190(b)(15).

[12] *See* Securities Exchange Act Release No. 91443 (March 30, 2021), 86 FR 17654 (April 5, 2021) (SR–IEX–2021–05).

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] *See e.g.,* Nasdaq BX Equity 7 Section 118(a) (up to $0.0030 fee per share to add displayed liquidity), available at *https://listingcenter.nasdaq.com/rulebook/bx/rules/BX%20Equity%207;* Cboe BYX Equities Fee Schedule (up to $0.0020 fee per share to add displayed liquidity, available at *https://www.cboe.com/us/equities/membership/fee_schedule/byx/;* Cboe EDGA Equities Fee Schedule (up to $0.0030 fee per share to add displayed liquidity, available at *https://www.cboe.com/us/equities/membership/fee_schedule/edga/.*

[16] *See e.g.,* Cboe BZX Equities Fee Schedule (up to $0.0030 fee per share to remove displayed liquidity), available at *https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/;* MIAX Pearl Equities Exchange Fee Schedule (up to $0.00295 fee per share for liquidity removing executions), available at *https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Equities_Fee_Schedule_07112023.pdf;* MEMX Fee Schedule (up to $0.0030 fee per share for liquidity removing executions), available at *https://info.memxtrading.com/fee-schedule/;* Nasdaq Equity 7 Section 118(a) (up to $0.0030 fee per share for any liquidity removing executions), available at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-equity-7;* New York Stock Exchange Price List 2023 (up to $0.0030 per share for liquidity removing executions), available at *https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.*

[17] *See* Securities Exchange Act Release No. 86619 (August 9, 2019), 84 FR 41769, 41771 (August 15, 2019) (SR–IEX–2019–05).

be determined at the time of the trade. IEX notes that applying fees in this way is consistent with the purpose of the Commission's proposal to require that exchange fees be set in a manner such that the amount of a fee or rebate related to each trade is determinable at the time of the trade.[18]

Additionally, the Exchange believes that it is reasonable to modify the first bullet under ''Transaction Fees'' to include a reference to rebates and to specify that rebates are indicated by parentheses. Updating this bullet point will avoid any potential confusion as to the applicable fees and rebates for each execution.

Finally, to the extent the proposed change is successful in incentivizing the entry and execution of displayed orders on IEX, such greater liquidity will benefit all market participants by increasing price discovery and price formation as well as market quality and execution opportunities.

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The 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. The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if fee schedules at other venues are viewed as more favorable. Consequently, the Exchange believes that the degree to which IEX fees could impose any burden on competition is extremely limited, and does not believe that such fees would burden competition between Members or competing venues. Moreover, as noted in the Statutory Basis section, the Exchange does not believe that the proposed changes raise any new or novel issues not already considered by the Commission.

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, while different fees are assessed in some circumstances, these different fees are not based on the type of Member entering the orders that match or on the volume of orders submitted by a Member but on the type of order entered, and all Members can submit any type of order and will be subject to the same fee for that type of order. IEX believes that applying a flat, per share fee or rebate for each type of order avoids imposing a burden on competition by ensuring that individual Members do not gain a competitive advantage over other Members based solely on their size or volume of orders they are able to submit to the Exchange. Further, the proposed fee changes continue to be intended to encourage market participants to bring increased order flow to the Exchange, which benefits all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to section 19(b)(3)(A)[19] of the Act and subparagraph (f)(2) of Rule 19b–4[20] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under section 19(b)(2)(B)[21] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–IEX–2023–08 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–IEX–2023–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–IEX–2023–08 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17109 Filed 8–9–23; 8:45 am]

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[18] *See* Securities Exchange Act Release No. 96494 (December 14, 2022), 87 FR 80266, 80292–93 (December 29, 2022) (File No. S7–30–22).

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98060; File No. SR–C2–2023–017]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''C2'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to amend Rule 5.34(a), Order and Quote Price Protection Mechanisms and Risk Controls (Simple Orders), to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 5.34(a)(4)(A). Under Rule 5.34(a)(4)(A), if a buy (sell) order enters the Book[3] at the conclusion of the opening auction process or would execute or post to the Book at the time of order entry, the System[4] executes the order up to a buffer amount (the Exchange determines the buffer amount 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'').[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.[7] Specifically, for a limit order (or unexecuted portion) with a Time-in-Force of Day, Good-til-Cancelled (''GTC''), or Good-til-Date (''GTD''), the System enters the order 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).[8] Following the end of each period, the 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'').[9] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The 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[10] 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 above-described iterative drill-through process does not apply to market orders.[11] Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount.[12] For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[13] In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book

[3] ''Book'' means the electronic book of simple orders and quotes maintained by the System, which single book is used during both the regular trading hours and global trading hours trading sessions. *See* Rule 1.1 (definition of, ''Book'').

[4] ''System'' means the Exchange's hybrid trading platform that integrates electronic and open outcry trading of option contracts on the Exchange and includes any connectivity to the foregoing trading platform that is administered by or on behalf of the Exchange, such as a communications hub. *See* Rule 1.1 (definition of, ''System'').

[5] *See* Rule 5.31(a) for the definition of Opening Collar.

[6] *See* Rule 5.34(a)(4)(A).

[7] The Exchange will announce to Trading Permit Holders the buffer amount and the length of the time periods in accordance with Rule 1.5. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[8] *See* Rule 5.34(a)(4)(C). The proposed rule change defines this time period as an ''iteration.''

[9] *See* Rule 5.34(a)(4)(C).

[10] The term ''User'' shall mean any Trading Privilege Holder (TPH) or Sponsored User who is authorized to obtain access to the System pursuant to Rule 5.5.

[11] Rule 5.34(a)(4)(A) and (B).

[12] *Id.*

[13] *See* proposed Rule 5.34(a)(4)(C). The proposed rule change also adds ''a'' prior to the term ''Time-in-Force'' in that provision, which was inadvertently omitted; this is a nonsubstantive grammatical change that conforms the language to that in subparagraph (B).

at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, the Exchange also proposes to amend Rule 5.34(a)(4)(B) to specify that the System will reject any market order with a Time-in-Force of IOC (or unexecuted portion) not executed pursuant to Rule 5.34(a)(4)(A).[14] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 5.34(a)(4)(A) to more generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 5.34(a)(4)(A) become applicable if a buy (sell) order, to which Rule 5.34(a)(4) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[15]

The Exchange also proposes to amend Rule 5.34(a)(1)(A)(ii) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 5.34(a)(1)(A)(ii), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 5.34(a)(1)(A)(ii) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 5.34(a)(4), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 5.34(a)(2) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 5.34(a)(2), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 5.34(a)(2) to exclude Stop (Stop-Loss)[16] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 5.34(a)(4). The Exchange also proposes a clarification to Rule 5.34(a)(4)(E). Currently, under Rule 5.34(a)(4)(E), if multiple Stop (Stop-Loss) or Stop-Limit[17] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under subparagraph (C)(v) of Rule 5.34(a)(4) and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50

Order 2: Sell 1 @Market, Stop Price = $6.55

Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 5.34(a)(4)(C), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.

2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.

3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 5.34(a)(4)(E), all Stop (Stop-Loss) and Stop-Limit

[14] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

[15] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[16] A ''Stop (Stop-Loss)'' order is an order to buy (sell) that becomes a market order when the consolidated last sale price (excluding prices from complex order trades if outside of the NBBO) or NBB (NBO) for a particular option contract is equal to or above (below) the stop price specified by the User. Users may not designate a Stop Order as All Sessions. Users may not designate bulk messages as Stop Orders. *See* Rule 5.6(c) (definition of ''Stop (Stop-Loss)'' order).

[17] A ''Stop-Limit'' order is an order to buy (sell) that becomes a limit order when the consolidated last sale price (excluding prices from complex order trades if outside the NBBO) or NBB (NBO) for a particular option contract is equal to or above (below) the stop price specified by the User. A User may not designate a Stop-Limit Order as All Sessions. Users may not designate bulk messages as Stop-Limit Orders. A User may not designate a bulk orders as Stop Limit orders. *See* Rule 5.6(c) (definition of ''Stop-Limit'' order).

orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 5.34(a)(4)(c)(ii), to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 5.34(a)(4)(C)(iv) [18] to provide that if the System receives a market or limit order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:

Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price $6.60
Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.
3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.
4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 5.34(a)(4)(C)(iv), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.
5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 5.34(a)(4)(C)(v) states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 5.34(a)(4)(C)(v), the orders will go through the drill-through process as follows:

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00
2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00
3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00
4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.
2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.
3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 5.34(a)(4)(C)(vi).[19] Currently, the rule states that an order will continue through the drill-through 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 orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 5.34(a)(4)(C)(vii) to specify that the drill-through protection mechanism applies during all trading sessions and to provide clarity as to what happens to orders that are undergoing the drill-through process at the end of a trading session. Under the proposed rule change, if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of a Global Trading Hours (''GTH'') [20] session, then

[18] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (iv) to be proposed subparagraph (vi).

[19] *Id.*

[20] The Exchange does not currently operate a GTH session. In the event the Exchange were to operate

the drill-through process concludes and the order(s) (or unexecuted portions(s)) enters the Regular Trading Hours (''RTH'') [21] Queuing Book [22] as a market order or limit order (at its limits price) on that same trading day, subject to a User's instructions. If an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session (*i.e.,* GTH or RTH) as a market order or limit order (at its limit price).

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.[23] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [24] 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) [25] 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 to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. 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 the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 5.34(a)(4)(E) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to clarify when an order ceases to remain a part of the drill-through process and to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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a GTH session, it would begin at 8:30 a.m. and go until 9:15 a.m. ET on Monday through Friday.

[21] RTH for transactions in equity options (including options on individual stocks, ETFs, ETNs, and other securities) are the normal business days and hours set forth in the rules of the primary market currently trading the securities underlying the options, except for options on ETFs, ETNs, Index Portfolio Shares, Index Portfolio Receipts, and Trust Issued Receipts the Exchange designates to remain open for trading beyond 4:00 p.m. Eastern Time (ET) but in no case later than 4:15 p.m. ET. RTH for transactions in index options are from 9:30 a.m. to 4:15 p.m. ET, subject to certain exceptions.

[22] *See* Rule 5.31 for the definition of Queuing Book.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] *Id.*

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 the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

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. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Trading Permit Holders could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Trading Permit Holders to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Trading Permit Holders to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Trading Permit Holders with more tools for managing risk will facilitate transactions in securities because, as noted above, Trading Permit Holders will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[26] and subparagraph (f)(6) of Rule 19b–4 thereunder.[27]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[26] 15 U.S.C. 78s(b)(3)(A)(iii).

[27] 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.

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–C2–2023–017 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–C2–2023–017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–C2–2023–017 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17107 Filed 8–9–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98056; File No. SR–GEMX–2023–09]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee

August 4, 2023.

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 July 25, 2023, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend GEMX's Pricing Schedule at Options 7, Section 5 to reduce the GEMX Options Regulatory Fee or ''ORF.''

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on August 1, 2023.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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

GEMX proposes to lower its ORF from $0.0013 to $0.0012 per contract side on August 1, 2023. Previously, GEMX lowered or waived its ORF in 2019, 2021, 2022 and 2023.[3] After a review of its regulatory revenues and regulatory costs, the Exchange proposes to reduce the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

Volumes in the options industry went over 900,000,000 in 2023. GEMX has taken measures this year as well as in prior years to lower and waive its ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Despite those prior measures, GEMX will need to reduce its ORF again to account for trading volumes in the first half of 2023 that were higher than the Exchange forecast for ORF assessment purposes, which resulted in the collection of more ORF revenues than anticipated in the first half of 2023. At this time, GEMX believes that the options volume it experienced in the first half of 2023 is likely to persist. The anticipated options volume would continue to impact GEMX's ORF collection which, in turn, has caused GEMX to propose reducing the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs.

Collection of ORF

GEMX will continue to assess its ORF for each customer option transaction that is either: (1) executed by a Member on GEMX; or (2) cleared by an GEMX Member at The Options Clearing Corporation (''OCC'') in the customer range,[4] even if the transaction was executed by a non-Member of GEMX, regardless of the exchange on which the transaction occurs.[5] If the OCC clearing member is a GEMX Member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA [6]); and (2) if the OCC clearing member is not a GEMX Member, ORF is collected only on the cleared customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.[7]

In the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. In the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. In the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. In the case where a Member executes a transaction on GEMX and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on GEMX and collected from the non-Member who cleared the transaction. In the case where a Member executes a transaction at an away market and a non-Member clears the transaction, the ORF will not be

[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 85140 (February 14, 2019), 84 FR 5511 (February 21, 2019) (SR–GEMX–2019–01) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Options Regulatory Fee); 92698 (August 18, 2021), 86 FR 47355 (August 24, 2021) (SR–GEMX–2021–08) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend GEMX's Options Regulatory Fee); 94069 (January 26, 2022), 87 FR 5545 (February 1, 2022) (SR–GEMX–2022–03) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee); and 96598 (January 3, 2023), 88 FR 1308 (January 9, 2023) (SR–GEMX–2022–14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce GEMX's Options Regulatory Fee).

[4] Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

[5] The Exchange uses reports from OCC when assessing and collecting the ORF.

[6] CMTA or Clearing Member Trade Assignment is a form of ''give-up'' whereby the position will be assigned to a specific clearing firm at OCC.

[7] By way of example, if Broker A, a GEMX Member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by GEMX from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than GEMX, it was cleared by a GEMX Member in the member's OCC clearing account in the customer range, therefore there is a regulatory nexus between GEMX and the transaction. If Broker A was not a GEMX Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on GEMX nor was it cleared by a GEMX Member.

assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses were approximately 39% of the total regulatory costs for 2023. Thus, direct expenses were approximately 61% of total regulatory costs for 2023.[8]

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from $0.0013 per contract side to $0.0012 per contract side. The Exchange issued an Options Trader Alert on June 30, 2023 indicating the proposed rate change for August 1, 2023.[9]

The proposed reduction is based on current levels of options volume. The below table displays monthly total volume for 2023.[10]

Month	Total volume	Customer sides
January 2023	919,299,330	802,712,235
February 2023	883,234,837	780,284,838
March 2023	1,052,984,722	915,674991
April 2023	760,808,909	673,183,772
May 2023	944,534,205	826,490,407
June 2023[11]	909,616,267	801,688,960

Options volumes remained higher in 2023 with March 2023 exceeding 1,000,000,000 total contracts, higher than any month in 2022. With respect to customer options volume, it also remains high in 2023. There can be no assurance that the Exchange's regulatory costs for the remainder of 2023 will not differ materially from the Exchange's budgeted amount, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue that may be generated utilizing an ORF rate of $0.0013 per contract side may result in revenue which exceeds the Exchange's estimated regulatory costs for 2023 if options volumes remain at levels higher than forecasted.

GEMX lowered its ORF in the beginning of 2023 to account for options volume in 2022. The Exchange proposes to reduce its ORF to $0.0012 per contract side to ensure that revenue does not exceed the Exchange's estimated regulatory costs in 2023. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of $0.0013 per contract side.[12]

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues may exceed or are projected to exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying[13] its Members via an Options Trader Alert.[14] The Exchange is also deleting obsolete text in the Exhibit 5 regarding prior ORF rates.

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.[15] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its

[8] These numbers are taken from the Exchange's 2023 Regulatory Budget.

[9] *See* Options Trader Alert 2023–15.

[10] Volume data in the table represents numbers of contracts; each contract has two sides.

[11] June numbers reflect volumes through June 29, 2023.

[12] The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

[13] The Exchange provides Members with such notice at least 30 calendar days prior to the operative date of the change. *See* Options Trader Alert 2023–15.

[14] The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with projected regulatory expenses.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee as of August 1, 2023 and the amount of the lower fee will fund a reasonable portion of the Exchange's regulatory costs. Moreover, the proposed reduction is necessary for the Exchange to avoid collecting revenue, in combination with other regulatory fees and fines, that would be in excess of its anticipated regulatory costs.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect revenue which would exceed its regulatory costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate revenues that would cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from $0.0013 to $0.0012 per contract side on August 1, 2023.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at OCC.[18] The Exchange believes the ORF ensures fairness by assessing higher fees to those Members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (*e.g.,* Member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'') [19] the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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 not necessary or appropriate in furtherance of the purposes of the Act. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[17] 15 U.S.C. 78f(b)(5).

[18] If the OCC clearing member is a GEMX member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a GEMX member, ORF is collected only on the cleared customer contracts executed at GEMX, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

[19] ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

[22] 15 U.S.C. 78s(b)(2)(B).

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–GEMX–2023–09 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–GEMX–2023–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–GEMX–2023–09 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

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[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98059; File No. SR–CboeBZX–2023–053]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance Its Drill-Through Protection Processes for Simple Orders and Make Other Clarifying Changes

August 4, 2023.

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 July 24, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to enhance its drill-through protection processes for simple orders and make other clarifying changes. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to amend Rule 21.17, Additional Price Protection Mechanisms and Risk Controls, to enhance the drill-through protection process for simple orders and make other clarifying changes.

Drill-through price protection is currently described in Exchange Rule 21.17(d). Under Rule 21.17(d)(1), if a buy (sell) order enters the BZX Options Book[3] (''Book'') at the conclusion of the opening auction process or would execute or post to the Book at the time of order entry, the System[4] executes the order up to a buffer amount (the Exchange determines the buffer amount 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'').[6]

Current Rule 21.17(d)(2) (as amended, proposed Rule 21.17(d)(3))[7] 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.[8] Specifically, the 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).[9] 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

[3] ''BZX Book'' means the System's electronic file of orders. *See* Rule 1.5 (e).

[4] ''System'' means the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away. *See* Rule 1.5 (aa).

[5] *See* Rule 21.7(a) for the definition of Opening Collar.

[6] *See* Rule 21.17(d)(1).

[7] As part of the rule changes described herein, the Exchange proposes to renumber current subparagraph (d)(2) to be proposed subparagraph (d)(3), and to renumber current subparagraph (d)(3) to be proposed subparagraph (d)(4).

[8] The Exchange will announce to Members the buffer amount and the length of the time periods. The Exchange notes that each time period will be the same length (as designated by the Exchange), and the buffer amount applied for each time period will be the same.

[9] Currently, the drill-through protections described under current Rule 21.17(d)(2) apply only to a limit order with a Time-in-Force of Day, Good-til-Cancel (''GTC''), or Good-til-Day (''GTD''). This rule proposal also seeks to clarify which orders are subject to the drill-through protections, as described herein.

length of the time period in milliseconds, which may not exceed three seconds).[10] Following the end of each period, the 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'').[11] The order (or unexecuted portion) rests in the Book at that new drill-through price for the duration of the subsequent period. The 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[12] 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 above-described iterative drill-through process does not apply to market orders. Specifically, if a buy (sell) market order would execute at the time of order entry, the System executes the order up to the Exchange-determined buffer amount above (below) the NBO (NBB) at the time of order entry and then rejects any remaining amount. For example, suppose a market order to buy two contracts enters the System; assume that the drill-through price buffer for a certain option series is $0.90 and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. One contract in the market order will execute against the 7.00 offer quote. The remaining one contract of the market order is cancelled, because the next best offer of 8.00 is 1.00 above the NBO, which is more than the 0.90 buffer amount.

The Exchange proposes for market orders with a Time-in-Force of Day to go through the iterative drill-through process described above.[13] The Exchange also proposes to amend current Rule 21.17(d)(2) (as amended, proposed Rule 21.17(d)(3)) to clarify that limit orders with a Time-in-Force of Day, GTC, or GTD also go through the iterative drill-through process. In the above example, rather than cancel the remaining one contract, the System would rest the one contract in the Book at the drill-through price of 7.90 (*i.e.* the NBO plus the buffer amount) for the Exchange-determined time period. At the end of that time period, assuming the market has not changed, the remaining one contract would execute against the 8.00 offer, which is within a buffer amount of the subsequent drill-through price of 8.80. As a result, like super-aggressive limit orders (except for those with Time-in-Force of Immediate-or-Cancel (''IOC'') or Fill-or-Kill (''FOK'')) do today, market orders (except for those with Time-in-Force of IOC) will have additional execution opportunities pursuant to the drill-through process. As the proposed rule change only applies to market orders with a Time-in-Force of Day, and the drill through protections described under current Rule 21.17(d)(2) continue to apply only to limit orders with a Time-in-Force of Day, GTC, or GTD, the Exchange also proposes to adopt proposed Rule 21.17(d)(2)[14] to specify that the System will cancel or reject any market order with Time-in-Force of IOC (or unexecuted portion) or limit order with a Time-in-Force of IOC or FOK (or unexecuted portion) not executed pursuant to 21.17(d)(1).[15] The Exchange believes it is appropriate to not have a market order with a Time-in-Force of IOC to go through the iteration process, because the iteration process would be inconsistent with the IOC instruction (and thus the user's intent). Further, the Exchange proposes to amend Rule 21.17(d)(1) to more generally describe when applicable order types may become subject to drill-through protection. Specifically, the Exchange proposes to specify that the protections described in Rule 21.17(d)(1) become applicable if a buy (sell) order, to which Rule 21.17(d)(1) would apply, (i) enters the Book at the conclusion of opening auction process, or (ii) would execute or post to the Book when it enters the Book.[16]

The Exchange also proposes to amend Rule 21.17(e)(1)(B) to exclude from the current protections for market orders in no-bid series certain orders that would be otherwise subject to the drill-through protection under the proposed rule changes. Currently, under Rule 21.17(e)(1)(B), if the System receives a sell market order in a series after it is open for trading with an NBB of zero, and the NBO in the series is greater than $0.50, the System cancels or rejects the market order. The Exchange proposes amending this protection in the event a drill-through process is in progress. Specifically, the Exchange proposes to amend Rule 21.17(e)(1)(B) to note that in the event the System receives a sell market order in a series after it is open for trading with an NBB of zero and the NBO in the series is greater than $0.50, if the drill-through process is in progress for sell orders and the sell market order would be subject to drill-through protection, then the order would join the on-going drill-through process in the then-current iteration and at the then-current drill-through price, regardless of NBBO. The Exchange believes it is not optimal for these orders to be immediately booked at the minimum tick increment, as under the proposed rule change, such orders would instead, be subject to the drill-through protection mechanism described under Rule 21.17(d), which may allow opportunity for execution at a more beneficial price level than the minimum tick increment.

Further, the Exchange proposes to amend Rule 21.17(a) to specifically exclude orders that would be subject to drill-through protection from the market order NBBO width protections described therein. Currently, under Rule 21.17(a), if a User submits a market order to the System when the NBBO width is greater than x% of the midpoint of the NBBO, subject to a minimum and maximum dollar amount (as determined by the Exchange on a class-by-class basis), the System cancels or rejects the market order. The Exchange proposes amending Rule 21.17(a) to exclude Stop Orders[17] and Market-on-Close orders from this protection. Such orders may intentionally be further away from the NBBO at the time the order is entered, and the protection may cause the orders to be inadvertently rejected pursuant to this check. The Exchange believes it is not optimal for these orders to be subject to the market order NBBO width protection, as the check may

[10] *See* current Rule 21.17(d)(2)(A) (as amended, Rule 21.17(d)(3)(A)). The proposed rule change defines this time period as an ''iteration.''

[11] *See* current Rule 21.17(d)(2)(B) (as amended, Rule 21.17(d)(3)(B)).

[12] The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3. *See* Rule 1.5(cc).

[13] *See* proposed Rule 21.17(d)(3).

[14] *See* supra note 9.

[15] There is no change to the handling of market orders with a Time-in-Force of GTC or GTD as a result of this rule change; such orders will continue to be rejected by the Exchange.

[16] This includes, for example, when a Stop (Stop-Loss) or Stop-Limit order is elected.

[17] A ''Stop Order'', or Stop (Stop-Loss) Order, is an order that becomes a BZX market order when the stop price is elected. A Stop Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Order to sell becomes a limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 11.9(c)(16).

inadvertently cause rejections for orders that may otherwise not have an opportunity to execute if they are immediately cancelled due to market width. Under the proposed rule change, such orders would instead, upon entry into the Book (when elected in accordance with their definitions), be subject to the drill-through protection mechanism described under Rule 21.17(d). The Exchange also proposes a clarification to proposed Rule 21.17(d)(4).[18] Currently, under Rule 21.17(d)(4), if multiple Stop (Stop-Loss) or Stop-Limit[19] orders to buy (sell) have the same stop price and are thus triggered by the same trade price or NBBO, and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange proposes to remove the conditional language noting that such Stop (Stop-Loss) or Stop-Limit orders to buy (sell) must have the same stop price, as it is possible that orders with different stop prices may be triggered by the same trade price or NBBO. Further, the Exchange proposes to add language stating that, where multiple orders are simultaneously re-priced, the orders will be prioritized under proposed Rule 21.17(d)(3)(E)[20] and will be sequenced based on the original time each order was entered into the Book.

For example, assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. Additionally, the following Stop orders are being held in the System when Quote 2 is updated to 2 @4.00 × 1 @6.50 (the System received these stop orders in the below sequence):

Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price = $6.60

Each of orders 1, 2 and 3 have a stop price less than the NBO, and will therefore be triggered by the 6.50 quote and enter the Book for execution or posting. A drill-through price for all three orders is set at the contra-side NBB of 5.00. Per proposed Rule 21.17(d)(3), the orders will go through the drill-through process as follows:

1. Order 1 will execute against Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell at $4.10 for the Exchange-determined time period.
3. Drill-through process continues for orders 2 and 3 until they are canceled or executed.

As amended, under Rule 21.17(d)(4), all Stop (Stop-Loss) and Stop-Limit orders elected as a result of the same election trigger (NBBO update or last sale price) will continue to use the same reference price for drill-through (even though they may have different stop prices).

The Exchange proposes to amend Rule 21.17(d)(3)(B),[21] to specify that if at any time during the drill-through process, the NBO (NBB) changes to be below (above) the current drill-through price, such NBO (NBB) will become the new drill-through price and a new drill-through will immediately begin. As a result, any improvements to the market that occur while the drill-through is in process will be incorporated, thereby providing Users with further opportunity to be priced within the market while still being protected. Under the proposed rule change, any limit order with a price that is less aggressive than the new drill-through price would be entered in the Book at its limit price.

The Exchange also proposes to add Rule 21.17(d)(3)(D)[22] to provide that if the System receives a market or limit order that would be subject to the drill-through process while a drill-through is in progress in the same series, the order joins the ongoing drill-through process in the then-current iteration and at the then-current drill-through price. Under the proposed rule, orders that come in while a drill-through is in process receive the benefit of joining the drill-through at the NBBO at the time of entry, as opposed to immediately executing or being displayed at a more aggressive price than the drill-through price. By way of illustration, consider the following example:

Assume that the drill-through price buffer for a certain option series is $0.90, and that the following quotes are in the Book: Quote 1 (NBBO): 1 @5.00 × 1 @7.00; Quote 2: 2 @4.00 × 1 @8.00. The System receives the following orders in the below sequence:
Order 1: Sell 1 @Market, Stop Price = $6.50
Order 2: Sell 1 @Market, Stop Price = $6.55
Order 3: Sell 1 @$3.95, Stop Price $6.60
Order 4: Sell 2 @Market, Stop Price = $4.50

During this time, Quote 2 is updated to: 2 @4.00 × 1 @6.50. Orders 1, 2, and 3 are elected, and the drill-through reference price for all three orders is set to contra-side NBB of 5.00.

1. Order 1 executes Quote 1 @$5.00.
2. Orders 2 and 3 are posted to sell @ $4.10 (drill-through price) for the Exchange-determined time period.
3. Order 4 is elected due to updated best offer of $4.10, and joins Orders 2 and 3 at the iterative drill-through price of $4.10. The offer is updated to 4 @ $4.10.
4. Order 5 (Sell 10 @Market (Day)) and Order 6 (Sell 1 @$4.05 Limit (Day)) enter the Book. Per proposed Rule 21.17(d)(3)(D), Orders 5 and 6 join the drill-through iteration at the drill-through reference price of $4.10, and the best offer is updated to 15 @$4.10.
5. The drill-through process continues for orders 2, 3, 4, 5, and 6 until the contracts are canceled or executed.

Because the proposed rule change may result in multiple orders going through the drill-through process at the same price and at the same time, the proposed rule change also describes how these orders will be prioritized and allocated when executing against resting interest or incoming interest. Specifically, proposed Rule 21.17(d)(3)(E)[23] states the System prioritizes orders that are part of the same drill-through iteration (A) based on the time the System enters or reprices them in the Book (*i.e.,* in time priority) when, after an iteration, the new drill-through price makes the order(s) marketable against resting orders and (B) in accordance with the applicable base allocation algorithm when executing against any incoming interest. The Exchange believes this is appropriate because incoming marketable orders would ultimately execute in time priority today. Additionally, having multiple orders execute in accordance with the applicable base allocation algorithm when executing against incoming interest is consistent with how resting orders execute against incoming interest.

Continuing from the above example, assume the drill-through process iterates to the next drill-through price, which would be $3.20. In doing so, Order 6 posts at its limit price of $4.05, and the rest of the orders are eligible to execute in time sequence against the resting $4.00 bid. Per proposed Rule 21.17(d)(3)(E), the orders will go through the drill-through process as follows:

[18] *See* supra note 9.

[19] A ''Stop-Limit'' order is an order that becomes a limit order when the stop price is elected. A Stop Limit Order to buy is elected when the consolidated last sale in the security occurs at, or above, the specified stop price. A Stop Limit Order to sell becomes a sell limit order when the consolidated last sale in the security occurs at, or below, the specified stop price. *See* Rule 11.9(c)(17).

[20] *See* supra note 9.

[21] *See* supra note 9.

[22] As a result of the additional provisions described herein, the proposed rule change renumbers current subparagraph (D) to be proposed subparagraph (F) and current subparagraph (E) to be proposed subparagraph (H). *See also* supra note 9.

[23] *Id.*

1. Order 2 (Sell 1 @Market) will execute against Quote 2 @$4.00.

2. Order 3 (Sell 1 @$3.95) will execute against Quote 2 @$4.00.

3. The Quote 2 is exhausted, and the next best bid is Quote 1 for 5 @$3.00.

4. Remaining drill-through is Order 4 (Sell 2 @Market) and Order 5 (Sell 10 @ Market). Market is now 5 @$3.00 × 12 @$3.20, and the drill-through process continues until these contracts are executed or cancelled.

If, prior to the next drill-through iteration, Order 7 (buy 5 @$3.25) is entered and executes against Orders 4 and 5 at $3.20, the allocation will depend on the allocation algorithm for the relevant class, under the amended Rule.

1. If pro-rata, Order 7 trades 1 contract against Order 4 and 4 contracts against Order 5.

2. If price-time, Order 7 trades 2 contracts against Order 4 and 3 contracts against Order 5.

3. Remaining size on Order 4 (if applicable) and Order 5 will continue to drill-through as described in previous examples.

The Exchange also proposes to amend Rule 21.17(d)(3)(F).[24] Currently, the rule states that an order will continue through the drill-through 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 orders rests in the Book at its limit price, subject to a User's instruction. The Exchange proposes to amend part (c) to remove reference to when the order's limit price equals the drill-through price, since under the drill-through process, if a buy (sell) order's limit price equals the drill-through price during the application of the drill-through mechanism it will remain part of the drill-through process, until the order's limit price is less (greater) than the drill-through price, at which point it will rest in the Book at its limit price. The Exchange also proposes to remove reference to a User's instruction, as there is no additional instruction that would allow a User to choose a different order handling option once the buy (sell) order limit price is less (greater) than the drill-through price.

Finally, the Exchange proposes to add Rule 21.17(d)(3)(G) to specify that if an order(s) (or unexecuted portion(s)) is undergoing the drill-through process at the end of its last eligible trading session for that trading day (*i.e.,* RTH), the drill-through process concludes. Any order (or unexecuted portion) with a Time-in-Force of (i) Day is canceled, and (ii) GTC or GTD enters the Queuing Book for the next eligible trading session as a market order or limit order (at its limit price).

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.[25] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[26] 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)[27] 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 to enhance drill-through protections for simple orders and to make certain market orders eligible for drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide these orders with additional and consistent execution opportunities and protections. 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 the proposed rule change is consistent with this purpose, because Users who submit market orders with a Time-in-Force of Day will receive the same level of drill-through price protection against execution at potentially erroneous prices that is currently afforded to supermarketable limit orders while receiving the same additional execution opportunities. Supermarketable limit orders currently go through the drill-through process, and market orders with a Time-in-Force of Day are functionally similar to supermarketable limit orders. Therefore, the Exchange believes it is appropriate to provide both types of orders with the same price protection.

Further, the proposed rule change to provide that any new market and limit orders that would be subject to drill-through protection will join any in-progress drill-through iterations and display at the then-current drill-through price (and the corresponding changes regarding allocation and prioritization) allows new orders to receive the same level of price protection as other orders undergoing the drill-through process. The proposed rule change will allow all orders additional execution opportunities while continuing to protect them against execution at potentially erroneous prices. Similarly, the Exchange believes the proposed change to consider changes to the NBO (NBB) during drill-through and to update the drill-through price to such NBO (NBB) should it be lower (higher) than the drill-through price will further provide opportunity for execution at reasonable prices by capturing any market moves that may result in more aggressive prices.

The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders.

Additionally, the Exchange believes changes to specifically exclude from market order NBBO width and market order in no-bid series protections certain orders that would be subject to drill-through protection will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. Specifically, the Exchange believes the changes to exclude certain orders that would be subject to drill-through protection from market order NBBO width protections may reduce inadvertent rejection of such orders which may be purposely priced far away from the NBBO at the time of entry and may otherwise miss an opportunity for execution if immediately cancelled. The Exchange also believes the changes to exclude

[24] *Id.*

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] *Id.*

certain orders that would be subject to drill-through protection from market order in no-bid series protections may allow opportunity for execution at a more beneficial price level than if they were immediately booked at the minimum tick increment. This proposed rule change may increase execution opportunities for Users that submit such Stop (Stop-Loss) and Market-on-Close orders (in the case of market order NBBO width protections) and sell market orders with an NBB of zero when the NBO in the series is greater than $0.50 (in the case of market orders in no-bid series protections).

The Exchange believes the proposed change to Rule 21.17(d)(4) will protect investors because it clarifies that if multiple Stop (Stop-Loss) and Stop-Limit orders are triggered by the same trade price or NBBO (even if the orders have different stop prices), and would execute or post to the Book, the System uses the contra-side NBBO that existed at the time the first order in sequence was entered into the Book as the drill-through price for all orders. The Exchange believes that the proposed rule change will bring greater transparency and clarity to the rulebook, thus benefitting investors.

Finally, the Exchange believes the proposed changes to specify what happens to orders undergoing drill-through at the end of a trading session will protect investors by adding transparency to the rules regarding the drill-through functionality and provide greater certainty as to the application of the drill-through process.

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 the enhanced drill-through protection will apply to all marketable orders in the same manner. Additionally, it will provide the same price protection and execution opportunities to relevant market orders that are currently provided to supermarketable limit orders, which function in a similar manner.

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. The proposed enhancement to the drill-through protection is consistent with the current protection and provides relevant market orders with improved protection against execution at potentially erroneous prices through drill-through price protection in accordance with User instructions. Additionally, the proposed rule change relates specifically to a price protection offered on the Exchange and how the System handles orders as part of this price protection mechanism.

The Exchange believes the proposed rule change would ultimately provide all market participants with additional execution opportunities when appropriate while providing protection from erroneous execution. The Exchange believes the proposal will enhance risk protections, the individual firm benefits of which flow downstream to counterparties both at the Exchange and at other options exchanges, which increases systemic protections as well. The Exchange believes enhancing risk protections will allow Users to enter orders and quotes with further reduced fear of inadvertent exposure to excessive risk, which will benefit investors through increased exposure to liquidity for the execution of their orders. Without adequate risk management tools, Members could reduce the amount of order flow and liquidity they provide. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. Accordingly, the proposed rule change is designed to encourage Members to submit additional order flow and liquidity to the Exchange. The proposed flexibility may similarly provide additional execution opportunities, which further benefits liquidity in potentially volatile markets. In addition, providing Members with more tools for managing risk will facilitate transactions in securities because, as noted above, Members will have more confidence protections are in place that reduce the risks from potential system errors and market events.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather codify current functionality to add transparency to the Rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[28] and subparagraph (f)(6) of Rule 19b–4 thereunder.[29]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–053 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–053. 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/*

[28] 15 U.S.C. 78s(b)(3)(A)(iii).

[29] 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.

rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–053 and should be submitted on or before August 31, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–17106 Filed 8–9–23; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2023–0017]

Notice of Verification Transaction Fee Increase for Consent Based Social Security Number Verification Service

AGENCY: Social Security Administration.

ACTION: Notice of fee increase.

SUMMARY: The Social Security Administration (SSA) is announcing a fee increase for the Consent Based Social Security Number (SSN) Verification (CBSV) service. We provide a fee-based SSN verification service to enrolled private businesses and government agencies who obtain a valid, signed consent form from the Social Security number holder.

DATES: *Applicability date for fee increase:* The verification transaction fee increase will go into effect on October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Vivian Adebayo, Branch Chief, Office of Data Exchange, Policy Publications, and International Negotiations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (866) 395–8801, email *CBSV@ssa.gov.*

For information on eligibility or filing for benefits, call SSA's national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit SSA's internet site, Social Security Online, at *https://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: Based on the consent forms, we verify the number holders' SSNs for the requesting party. The Privacy Act of 1974 (5 U.S.C. 552a(b)), section 1106 of the Social Security Act (42 U.S.C. 1306) and our regulation at 20 CFR 401.100, establish the legal authority for us to provide SSN verifications to third party requesters based on the written consent of the subject of the record. The CBSV process provides the business community and other government entities with consent-based SSN verifications in high volume. We developed CBSV as a user-friendly, internet-based application with safeguards that will protect the public's information. In addition to the benefit of providing high volume, centralized SSN verification services to the business community in a secure manner, CBSV provides us with cost and workload management benefits.

New Information: Currently, to use CBSV, interested parties must pay a one-time non-refundable enrollment fee of $5,000 and pay a fee of $1.00 per SSN verification transaction in advance of services. This $1.00 fee has been in place since fiscal year (FY) 2017. We calculate our costs periodically for providing CBSV services and adjust the fees as needed. We will notify our customers who currently use the service and allow them to cancel or continue using the service at the new transaction fee. Based on the most recent cost and transaction analysis, we will adjust the FY 2024 fee to $2.25 per SSN verification transaction in advance of services. New customers will still be responsible for the one-time $5,000 enrollment fee.

The primary reason for the fee increase is the declining volume in CBSV services. CBSV transactional volumes have decreased from 3.1 million transactions in FY 2021 to 2.1 million transactions in FY 2022. For FY 2023, we are projecting less than 1 million transactions based on current usage. Due to the significant decline in transactions, the per transaction costs are increasing. We will reevaluate transactional volumes in FY 2024. If the transaction volumes continue to decline, we will issue a subsequent notice to increase the CBSV fees again during FY 2024. We note that any unused advances and any fees collected in excess of our actual costs per transactions each year for CBSV services are refunded after the end of the fiscal year.

Stephen Evangelista,

Acting Deputy Commissioner, Office of Retirement and Disability Policy, Social Security Administration.

[FR Doc. 2023–17146 Filed 8–9–23; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0007]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Bureau of the Fiscal Service (Fiscal Service), Department of the Treasury (Treasury). Under this matching program, Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for Supplemental Security Income (SSI) applicants and recipients SSA will also use the data to determine the correct benefit amount for recipients and deemors who either did not report or who incorrectly reported their ownership of savings securities.

DATES: The deadline to submit comments on the proposed matching program is September 11, 2023. The matching program will be applicable on December 26, 2023, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2023–0007 so that we may associate your comments with the correct regulation. Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social

[30] 17 CFR 200.30–3(a)(12).

Security numbers (SSNs) or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *https://www.regulations.gov.* Use the *Search* function to find docket number SSA–2023–0007 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (833) 410–1631.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *https://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to *Cynthia.Scott@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

Participating Agencies: SSA and Fiscal Service, Treasury.

Authority for Conducting the Matching Program: This matching agreement is executed in compliance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and the regulations and guidance promulgated thereunder.

Legal authority for the disclosure under this agreement for SSA to conduct this matching activity is contained in section 1631(e)(1)(B) and (f) of the Social Security Act (42 U.S.C. 1383(e)(1)(B) and (f)).

Purpose(s): This matching agreement sets forth the terms, conditions, safeguards, and procedures under which Fiscal Service, Treasury will disclose savings security data to SSA. SSA will use the data to determine continued eligibility for SSI applicants and recipients, or the correct benefit amount for recipients and deemors who either did not report or who incorrectly reported their ownership of savings securities.

Categories of Individuals: The individuals whose information is involved in this matching program are SSI applicants, recipients, and deemors who either did not report or incorrectly reported ownership of savings securities.

Categories of Records: The finder file SSA provides to Fiscal Service will contain approximately 10 million records of individuals for whom SSA requests data for the administration of the SSI program. Fiscal Service will use files that contain approximately 185 million SSNs, with registration indexes, to match SSA records. Fiscal Service will provide a response record providing matched results to SSA, which will contain approximately 1 million records.

System(s) of Records: The relevant SSA system of records (SOR) is ''Supplemental Security Income Record and Special Veterans Benefits,'' 60–0103. The SOR Notice (SORN) was fully published on January 11, 2006 at 71 FR 1830 and updated on December 10, 2007 at 72 FR 69723; July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969). The relevant Fiscal Service SOR is Fiscal Service SORN .014 (United States Securities and Access). The SORN was last published on February 27, 2020 at 85 FR 11776.

[FR Doc. 2023–17157 Filed 8–9–23; 8:45 am]

BILLING CODE 4191–02–P

TENNESSEE VALLEY AUTHORITY

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Tennessee Valley Authority (TVA).

ACTION: 60-Day notice of submission of information collection approval and request for comments.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. The Tennessee Valley Authority is soliciting public comments on this proposed collection.

DATES: Comments should be sent to the Public Information Collection Clearance Officer no later than October 10, 2023.

ADDRESSES: Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Public Information Collection Clearance Officer: Jennifer A. Wilds, Specialist, Records Compliance, Tennessee Valley Authority, 400 W Summit Hill Dr., CLK–320, Knoxville, Tennessee 37902–1401.

FOR FURTHER INFORMATION CONTACT: Jennifer A. Wilds, Telephone (865) 632–6580 or by email at *pra@tva.gov.*

SUPPLEMENTARY INFORMATION:

Type of Request: New collection.

Title of Information Collection: TVA CUI Program Challenge Request Form.

Frequency of Use: On occasion.

Type of Affected Public: Authorized holders, including any individual or organization who has been provided with CUI and has a lawful government purpose to possess CUI.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 455.

Estimated Number of Annual Responses: 12.

Estimated Total Annual Burden Hours: 18.

Estimated Average Burden Hours per Response: 1.5.

Need For and Use of Information: The TVA CUI Program Challenge Request Process, also referred to as the ''CUI Challenge Request Process'' in this document, provides the process used for TVA Controlled Unclassified Information (CUI) authorized holders to challenge the designation of information that has been marked as CUI as improperly or incorrectly designated government purpose to possess the information. Any authorized holder who believes that the designation of specific information as CUI is improper or incorrect, or who believes they have received unmarked CUI, may use this process to formally notify TVA CUI Senior Agency Official (SAO). The process also allows for TVA CUI SAO and CUI Program Manager to process such requests and to issue a Final Decision from the CUI SAO.

The CUI Challenge Request Process is not intended to be used to address all disagreements regarding the proper designation of CUI. Authorized holders are encouraged to seek or utilize less formal means when resolving internal good faith disputes over the proper designation of information as CUI, such as discussion with the creator or designator of the information in dispute. Where resolution cannot be achieved through less formal means, the CUI challenge request process is available.

The CUI Challenge Request Process does not supersede any obligations under law or TVA policy to report information spills.

Rebecca L. Coffey,

Agency Records Officer.

[FR Doc. 2023–17091 Filed 8–9–23; 8:45 am]

BILLING CODE 8120–08–P

TENNESSEE VALLEY AUTHORITY

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Tennessee Valley Authority (TVA).

ACTION: 30-Day notice of submission of information collection renewal approval with minor modifications and request to OMB.

SUMMARY: Tennessee Valley Authority (TVA) provides notice of submission of this information clearance request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The general public and other federal agencies are invited to comment. TVA previously published a 60-day notice of the proposed information collection reinstatement for public review June 5, 2023 and no comments were received.

DATES: The OMB will consider all written comments received on or before September 11, 2023.

ADDRESSES: Written comments for the proposed information collection reinstatement 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.

SUPPLEMENTARY INFORMATION:

Type of Request: Reinstatement, with minor modification, of a previously approved information collection for which approval has expired.

Title of Information Collection: Generic Clearance for the Collection of Qualitative Feedback and Input on Agency Services and Program Delivery and Registration.

OMB Control Number: 3316–0114.

Current Expiration Date: July 31, 2023.

Frequency of Use: On occasion.

Type of Affected Public: Individuals and Households, Businesses and Organizations, State, Local and Tribal Governments.

Small Businesses or Organizations Affected: Yes.

Federal Budget Functional Category Code: 455.

Estimated Number of Annual Responses: 10,000.

Estimated Total Annual Burden Hours: 5000.

Estimated Average Burden Hours per Response: 0.50

Need For and Use of Information: Renewal of this information collection will enable TVA to obtain qualitative customer and stakeholder feedback and input in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery and enable the public to register for public forums, events, and other opportunities. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback and input will provide TVA with insights into customer or stakeholder perceptions, experiences, and expectations; help TVA quickly identify actual or potential problems with how the agency provides services to the public; or focus attention on areas where communication, training, or changes in operations might improve TVA's delivery of its products or services; and engage the public on community needs and concerns to guide the direction of new products and services. These collections will allow for ongoing, collaborative, and actionable communications between TVA and its customers and stakeholders. It will also allow feedback and input to contribute directly to the improvement of program management. TVA will solicit feedback and input in areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, resolution of issues with service delivery, impacts of events, community needs and concerns, and interest in new programs and services. TVA will use the responses to plan and inform its efforts to improve or maintain the quality of service and programs offered to the public and chart the direction of new programs and offerings. TVA will use the registration information for logistical planning for public events, required access control to government property, and connection to service and program offerings. If this information is not collected, TVA will not have access to vital feedback and input from customers and stakeholders about the agency's services and programs and the public will not have access to TVA-sponsored events, programs, or services. TVA will only submit an information collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- The collections are targeted to the solicitation of feedback and input from respondents who have experience with the program or who may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and will not be retained beyond the immediate need;
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, TVA will indicate the qualitative nature of the information);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information, and the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study. Feedback collected under this generic clearance provides useful information, but will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Rebecca L. Coffey,

Agency Records Officer.

[FR Doc. 2023–17093 Filed 8–9–23; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2023–0088]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Airman Knowledge Test Registration Collection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval of a renewed collection. The collection involves the voluntary submission of information for registration of an Airman Knowledge Test as part of the FAA Airman Certification Process. The information collected is necessary to ensure compliance and proper registration of an individual for the necessary knowledge test for the certification or rating pursued by the individual.

DATES: Written comments should be submitted by September 11, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ryan C. Smith by email at: *Ryan.C.Smith@faa.gov*, Phone: 405–651–5400.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0792.

Title: Airman Knowledge Test Registration Collection.

Form Numbers: There are no forms associated with this collection.

Type of Review: Renewed information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on January, 17, 2023 (88 FR 2752). Individuals pursuing an FAA certificate or rating to operate in the National Airspace System (NAS) must meet the standards established in the FAA regulations specific to the certificate sought by the individual. FAA certification requires that an individual must successfully pass an Airman Knowledge Test as part of the requirements to obtain an FAA certificate or rating. The FAA develops and administers 90 different knowledge tests in many different areas that are required as part of the overall airman certification process.

Airman Knowledge Tests are administered at approved Knowledge Testing Centers by an approved test proctor who is required to administer the appropriate Airman Knowledge Test to the individual pursuing FAA certification. Individuals taking an FAA Airman Knowledge Test must provide the following information to be collected in order to complete the registration process before the administration of the Airman Knowledge Test: Name, FAA Tracking Number (FTN), physical address, Date of Birth, email address, photo identification, phone number, test authorization (credentials of the individual such as an instructor endorsement), and previous number of test attempts.

The information provided by the individual is collected and stored electronically in the application used for test registration and delivery. This information is used to determine the identify and eligibility of the individual for compliance of FAA certification requirements.

Respondents: 224,474 annually.

Frequency: n/a.

Estimated Average Burden per Response: 2 minutes.

Estimated Total Annual Burden: 7,482 hours annually.

224,474 respondents × 2 minutes each = 448,948 minutes,

448,948 minutes/60 minutes in an hour = 7,482 hours annually.

Issued in Oklahoma City, OK, on August 7, 2023.

Ryan C. Smith,

Airman Knowledge Testing Program Manager, Airman Testing Standards Branch (AFS–630).

[FR Doc. 2023–17180 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Action on the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project in Colorado

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final. This final agency actions relate to a proposed trail project on and adjacent to the Rocky Flats National Wildlife Refuge (NWR) in Jefferson County, Colorado. The FHWA's Finding of No Significant Impact (FONSI) provides details on the proposed action.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project will be barred unless the claim is filed on or before January 8, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Tomasz Kubicz, Project Manager, Federal Highway Administration, Central Federal Lands Highway Division, 12300 W Dakota Avenue, Suite 380, Lakewood, Colorado 80228; telephone: (720) 963–3498, email: *tomasz.kubicz@dot.gov.* Regular office hours are Monday through Friday, 8:00 a.m. to 5:00 p.m. (Mountain Time).

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken a final agency action by issuing a FONSI and approving the Rocky Flats NWR Trails and Rocky Mountain Greenway Connections Project in Jefferson County, Colorado.

The project includes the construction of trails and two trail bridges on the Rocky Flats NWR and two road crossings with connecting trails adjacent to the Refuge. The U.S. Fish and Wildlife Service will construct the on-Refuge trails, which will be part of the regional Rocky Mountain Greenway trail system. The FHWA will construct the two trail bridges on the Refuge and the two road crossings and trails off the Refuge. The two road crossings consist of an underpass (concrete box culvert) at

State Highway 128 and a pedestrian bridge across Indiana Street with about 0.6 mile total of connecting trails.

The FHWA's action, related actions by other Federal agencies, and the laws under which such actions were taken, are described in the U.S. Fish and Wildlife Service's Environmental Assessment for Improved Visitor Access at Rocky Flats NWR, published in August 2020; the Service's FONSI, dated November 2020; FHWA's FONSI, dated August 2023; and other documents in the project file. The Service's EA and FONSI are available for download at *https://www.fws.gov/refuge/rocky-flats/library.* The FHWA FONSI is available for download at *https://highways.dot.gov/federal-lands/projects/co/rocky-flats* or can be requested by contacting FHWA at the address provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including by not limited to:

1. *General:* National Environmental Policy Act [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 139].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996].

7. *Wetlands and Water Resources:* Clean Water Act (Sections 401, 402, and 404) [33 U.S.C. 1251–1377]; Safe Drinking Water Act [42 U.S.C. 300(f)–300(j)(6)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986; Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Authority: 23 U.S.C. 139 (*l*)(1).

Issued on: August 4, 2023.

Marcus Wilner,

Division Director, Federal Highway Administration, Lakewood, Colorado.

[FR Doc. 2023–17151 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0049]

North County Transit District's Request for Approval To Begin Field Testing on Its Positive Train Control Network

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that on July 25, 2023, North County Transit District (NCTD) submitted a request to field test its new Crash Energy Management (CEM) Bi-Level cab cars that have been equipped with NCTD's Interoperable Electronic Train Management System (I–ETMS) technology. FRA is publishing this notice and inviting public comment on NCTD's request to test its positive train control (PTC) system.

DATES: FRA will consider comments received by August 30, 2023. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2010–0049. For convenience, all active PTC documents are hyperlinked on FRA's website at *https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. On September 21, 2018, FRA certified NCTD's I–ETMS PTC system under 49 CFR 236.1015 and 49 U.S.C. 20157(h). Pursuant to 49 CFR 236.1035, a railroad must obtain FRA's approval before field testing an uncertified PTC system, or a product of an uncertified PTC system, or any regression testing of a certified PTC system on the general rail system. *See* 49 CFR 236.1035(a). NCTD's test request, including a complete description of NCTD's Concept of Operations and its specific test procedures, including the measures that will be taken to ensure safety during testing, are available for review online at *https://www.regulations.gov* in Docket No. FRA–2010–0049.

Interested parties are invited to comment on NCTD's Test Request by submitting written comments or data. During its review of the test request, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying testing of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1035. FRA, however, may elect not to respond to any particular comment, and under 49 CFR 236.1035, FRA maintains the authority to approve, approve with conditions, or deny the test request at its sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the

commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.* To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2023–17101 Filed 8–9–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Actions on Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on special permit applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
SPECIAL PERMITS DATA—Granted			
15721–M	Probe Technology Services, Inc.	173.304(a)	To modify the special permit to authorize an additional packaging.
15848–M	Ambri Inc	173.222(c)(1)	To modify the special permit to update the design terminology.
16279–M	Stericycle, Inc	173.196(a)	To modify the special permit to authorize the transportation in commerce of the Marburg virus.
20493–M	Tesla, Inc	172.101(j)	To modify the special permit to authorize additional lithium ion batteries and additional cell type.
21235–M	United States Dept. of Energy	173.413, 173.416	To modify the special permit to authorize return shipments and higher payload containers.
21360–M	ABG Bag, Inc	173.12(b)(2)(ii)(C), 178.707(d)	To modify the special permit to authorize Division 5.2 hazardous materials.
21490–N	Myers Industries, Inc	173.28(b)(2), 178.509(b)(7), 178.601(h).	To authorize the manufacture, mark, sale, and use of jerricans manufactured to a specification not meeting all the requirements for UN 3H1 specification jerricans.
21517–N	Bayerische Motoren Werke Aktiengesellschaft.	172.101(j)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.
21518–N	Bedrock Ocean Exploration, Pbc.	172.101(j)	To authorize the transportation in commerce of prototype lithium batteries exceeding 35 kg via cargo-only aircraft.
21528–N	Honeywell Intellectual Properties Inc.	173.302a(a)(1)	To authorize the manufacture, mark, sale, and use of non-DOT specification welded cylinder that is comparable to DOT specification 3HT cylinder for the transportation in commerce of the hazardous materials authorized by this special permit.
21536–N	WAE Technologies Limited	172.101(j), 173.185(b)(6)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.
21563–N	LG Energy Solution, Ltd	172.102(a), 172.102(b), 172.102(c).	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg net weight aboard cargo-only aircraft.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
SPECIAL PERMITS DATA—Denied			
21553–N	Pacific Scientific Energetic Materials Company (california) Llc.	173.21(b), 173.51(a), 173.54, 173.54(a), 173.56(b).	To authorize the one-way transportation in commerce of unapproved explosives originating from Pacific Scientific Energetic Materials Company LLC, and transported to Clean Harbors Waste Facility in Colfax, LA for final disposal by motor vehicle transport only.
SPECIAL PERMITS DATA—Withdrawn			
21569–N	National Air Cargo Group, Inc	172.204(c)(3), 172.101(j), 173.27(b)(2), 173.27(b)(3), 175.30(a)(1).	To authorize the transportation in commerce of certain Class 1 and Division 2.3 materials that are forbidden for transport via cargo-only aircraft by cargo-only aircraft.
21576–N	Neponset Valley Engineering Company, Inc.	173.301(a)(6)	To authorize the transportation in commerce of one DOT 4BA–240 cylinder that is suspected of being overdue for periodic requalification prior to being filled with a hazardous material.
21577–N	Factorial Inc	173.185	To authorize the shipment and receival of damaged, defective or recalled lithium cells/batteries under UN3090.
21583–N	Sidney Lee Welding Supply, Inc.	180.209(b)(1)	To authorize a 10-year requalification interval for certain DOT Specification 3A and 3AA cylinders used for the transportation in commerce of certain Division 2.1 and Division 2.2 gases in bundles.

[FR Doc. 2023–17096 Filed 8–9–23; 8:45 am]
BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Modification to Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before August 25, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://regulations.gov*.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
12135–M	Daicel Safety Systems Inc	173.301(a)(1), 173.302a, 178.65(c)(3).	To modify the special permit to authorize the use of the cylinders up to 15 years after the date of manufacture. (modes 1, 2, 3, 4).
13102–M	Siemens Large Drives LLC	173.306(a), 173.306(a)(1), 173.322, 173.150(b), 173.222(c).	To change Siemens Large Drives LLC company name to Innomotics LLC. (modes 1, 2, 4).
13211–M	Copperhead Chemical Company, Inc.	172.102(c)(5)	To modify the package in paragraph 7 of the special permit to be 4GV/X11.3/S/**/USA/+CN1216, stock number UN111. (modes 1, 3, 4).
14152–M	Entegris, Inc	173.27(f)	To modify the special permit to authorize an additional hazardous material. (modes 1, 3, 4).
14992–M	VIP Transport, Inc	173.196(a), 173.196(b), 173.199, 178.609.	To modify the special permit to authorize smaller inner packagings. (mode 1).

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
15882–M	Ryan Air, Inc	172.101, 173.27, 173.243	To add a C–208 to carry bulk fuel in a 476-galon BATT Tank. (mode 4).
15999–M	Lockheed Martin Corporation ..	172.300, 172.400, 173.1	To modify the special permit to authorize an alternative transportation route. (modes 1, 3).
20352–M	Schlumberger Technology Corp.	173.301(f), 173.302(a), 173.304(a).	To modify the special permit to authorize an additional packaging. (modes 1, 2, 3, 4).
20796–M	Sodastream USA Inc	172.400, 172.200, 172.300, 171.2(k), 172.700(a), 172.500.	To modify the special permit to authorize additional outer packagings. (modes 1, 2, 3).
20936–M	CO2 Exchange LLC	171.2(k), 172.200, 172.300, 172.700(a), 172.400, 172.500.	To modify the special permit to authorize cylinders to be packaged within an outer fiberboard box with or without a dispensing machine. (modes 1, 2).
21290–M	Orion Engineered Carbons LLC.	171.23(a)(1), 171.23(b)(10), 173.314.	To modify the special permit to authorize an increase in the annual number of shipments. (modes 1, 3).
21297–M	Luxfer Canada Limited	173.301(i), 178.75	To modify the special permit to authorize mounting of a cylinder within a structural frame during transportation. (modes 1, 2, 3, 4).
21307–M	Packaging and Crating Technologies, LLC.	172.200, 172.300, 172.400, 172.700(a), 172.600, 172.500, 172.102(c)(1), 173.185(d).	To modify the special permit to authorize a higher Wh rating battery. (modes 1, 2).
21460–M	Amerex Corporation	173.309(c)	To modify the special permit to authorize an additional extinguisher model.

[FR Doc. 2023–17097 Filed 8–9–23; 8:45 am]
BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for New Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before September 11, 2023.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Safety General Approvals and Permits Branch, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

Copies of the applications are available for inspection in the Records Center, East Building, PHH–13, 1200 New Jersey Avenue Southeast, Washington, DC.

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on July 28, 2023.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21582–N	ABG Bag, Inc	172.102, 173.36(b)(2), 173.241(e)(1).	To authorize the manufacture, mark, sale, and use of UN 51H large packagings for the purpose of transporting polychlorinated biphenyls by motor vehicle. (mode 1)
21584–N	National Air Cargo Group, Inc	172.204(c)(3), 172.101(j), 173.27(b)(2), 173.27(b)(3), 175.30(a)(1).	To authorize the transportation in commerce by cargo-only aircraft of Class 1 explosives which are forbidden or exceed the quantities authorized in 172.101 Column 9B. (mode 4)
21586–N	OEC Freight (NY) Inc	173.241	To authorize the transportation in commerce of a hazardous substance (ethylene glycol) in alternative packaging. (mode 1)

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
21588–N	Ford Motor Company	173.185(h)	To authorize the transportation in commerce of lithium ion batteries exceeding 35 kg aboard cargo-only aircraft. (mode 4)
21589–N	Department of Energy	172.400(b), 173.302a(a)(1), 173.56(b).	To authorize the transportation in commerce of certain hazardous materials in non-DOT specification pressure vessels that are equipped with a valve with a Class 1 component that has not be classified in accordance with 49 CFR 173.56(b). (mode 1)
21593–N	Livent USA Corp	Parts 172, 173	To authorize the transportation in commerce of certain hazardous materials between applicant facilities (distances of less than one mile) without being subject to Parts 172 and 173 of the Hazardous Materials Regulations. (mode 1)
21598–N	ME Logistic Services GmbH & Co.KG.	173.185(e)	To authorize the shipment of low production batteries exceeding the quantity limitation. (modes 1, 4)
21601–N	Air Liquide Electronics U.S. LP	173.3(e)(1)	To authorize the transportation in commerce of specification DOT 3A480 cylinders with valve assemblies that have been repaired using an alternate method. (mode 1)
21602–N	Sharpsville Container Corporation.	178.601(k)(1)(i)	To authorize the manufacture, mark, sale, and use of UN specification steel drums, other than stainless steel drums, that have been tested in the same manner as stainless steel drums. (mode 1)
21605–N	The United States Department of Air Force.	172.101	To authorize the transportation of batteries containing acid or alkali, battery acid fluid, non-spillable wet batteries, and lithium ion batteries (including those packed with or in equipment) on the same vehicle, without being subject to certain requirements of the Hazardous Materials Regulations. (mode 4)
21608–N	Columbiana Boiler Company, LLC.	178.274(b), 178.275(a), 178.276(b)(1), 180.605(d).	To authorize the transportation in commerce of non-DOT specification portable tanks for the transportation in commerce of certain toxic or corrosive hazardous materials. (modes 1, 4)
21609–N	Polaris Industries Inc	172.101(j)	To authorize the transportation in commerce of lithium batteries exceeding 35 kg by cargo-only aircraft. (mode 4)
21611–N	Cenergy Solutions Inc	172.101(a), 173.302	To authorize the transportation in commerce of methane contained in MC–331 cargo tanks via highway. (mode 1)

[FR Doc. 2023–17099 Filed 8–9–23; 8:45 am]
BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Form 114, Report of Foreign Bank and Financial Accounts

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

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comment on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). This request for comments is made pursuant to the Paperwork Reduction Act of 1995 (PRA).

DATES: Written comments are welcome and must be received on or before October 10, 2023

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2023–0008 and the Office of Management and Budget (OMB) control number 1506–0009.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2023–0008 and OMB control number 1506–0009.

Please submit comments by one method only. Comments will be reviewed consistent with the PRA [1] and applicable OMB regulations and guidance. All comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: FinCEN's Regulatory Support Section (RSS) at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Foreign Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107–56 (October 26, 2001), and other legislation, including the Anti-Money Laundering Act of 2020 (AML Act).[2] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1960, and 31 U.S.C. 5311–5314 and 5316–5336, and notes

[1] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[2] The AML Act was enacted as Division F, sections 6001–6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 stat. 3388 (2021).

thereto, with implementing regulations at 31 CFR chapter X.

The BSA authorizes the Secretary of the Treasury (the ''Secretary''), *inter alia,* to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, or regulatory matters, risk assessments or proceedings, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement AML programs and compliance procedures.[3] Regulations implementing the BSA appear at 31 CFR chapter X. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[4]

Under 31 U.S.C. 5314, the Secretary ''shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to . . . keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.'' The term ''foreign financial agency'' encompasses the activities found in the statutory definition of ''financial agency,'' [5] notably, ''a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.'' [6] The Secretary is also authorized to prescribe exemptions to the reporting requirement and to prescribe other matters the Secretary considers necessary to carry out 31 U.S.C. 5314.

The regulations implementing 31 U.S.C. 5314 appear at 31 CFR 1010.350, 1010.306, and 1010.420. Section 1010.350 generally requires each U.S. person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country to report such relationship to the Commissioner of Internal Revenue for each year such relationship exists, and to provide and report such information specified in a reporting form prescribed under 31 U.S.C. 5314. The FBAR is used to file the information required by this section and must be filed electronically with FinCEN.[7] 31 CFR 1010.306(c) requires the FBAR to be filed for foreign financial accounts exceeding $10,000 maintained during the previous calendar year. No FBAR is required to be filed if the aggregate value of foreign financial accounts did not exceed $10,000 at any time during the previous calendar year.

The FBAR must be filed on or before April 15 of each calendar year for accounts maintained during the previous calendar year.[8]

31 CFR 1010.420 outlines the recordkeeping requirements associated with foreign financial accounts required to be reported under section 1010.350. Specifically, filers must retain records of such accounts, to include type of account, account number, name of foreign financial institution maintaining the account, address of the foreign financial institution, and maximum value of the account during the calendar year, for a period of five years and make the records available for inspection as authorized by law.

II. Paperwork Reduction Act of 1995

Title: Reports of foreign financial accounts (31 CFR 1010.350), records to be made and retained by persons having financial interests in foreign financial accounts (31 CFR 1010.420), filing of reports (31 CFR 1010.306(c)), and FinCEN Form 114—FBAR.

OMB Control Number: 1506–0009.

Form Number: FinCEN Form 114—FBAR.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the FBAR regulations and form.

Affected Public: Individuals, businesses or other for-profit institutions, and non-profit institutions that qualify as U.S. persons.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: Annual.

Estimated Number of Respondents: 1,503,807 FBAR filers.[9]

Estimated Reporting and Recordkeeping Burden:

The estimated average burden associated with the FBAR reporting and recordkeeping requirements will vary depending on the number of reportable foreign financial accounts and the applicability of special rules provided in the regulations which provide some relief from the full scope of the reporting obligations.[10]

The information required to be reported on the FBAR is basic information U.S. persons will have received on account statements from the foreign financial institutions where the accounts are opened and maintained. Those statements will provide a U.S. person with the information needed to complete and file the FBAR. No special accounting or legal skills are necessary to transfer the basic information required to be reported, such as the name of the foreign financial institution, the type of account, and the account number, to the FBAR.

The special rules located at 31 CFR 1010.350(g) provide a variety of relief to FBAR filers by (1) limiting the information reported in the FBAR to the number of accounts and certain other basic identifying information, if the filer has a financial interest in, or signature or other authority over, 25 or more reportable accounts; (2) allowing for entities to file consolidated FBARs on their own behalf and on behalf of entities for which they have a direct or indirect ownership interest of over 50 percent; and (3) exempting reporting of foreign financial interest in accounts involving certain trust and retirement plans. However, filers reporting financial interest in, or signature authority over, 25 or more foreign financial accounts are required to maintain a record of the detailed account information on each of their foreign financial accounts, including the account number, the name of the foreign financial institution that holds the account, the address of the foreign financial institution, the maximum value of the account during the calendar year, and the type of account.[11]

[3] Section 358 of the USA PATRIOT Act expanded the purpose of the BSA by including a reference to reports and records ''that have a high degree of usefulness in intelligence or counterintelligence activities to protect against international terrorism.'' Section 6101 of the AML Act further expanded the purpose of the BSA to cover such matters as preventing money laundering, tracking illicit funds, assessing risk, and establishing appropriate frameworks for information sharing.

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

[5] 31 U.S.C. 5312(b)(2).

[6] *See* 31 U.S.C. 5312(a)(1), which exempts from the definition of financial agency a person acting for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member.

[7] Formerly Form TD–F 90–22.1. FinCEN Form 114 can be completed by accessing FinCEN's BSA E-Filing System website at *http://bsaefiling.fincen.treas.gov/main.html.*

[8] In accordance with section 2006(b)(11) of Public Law 114–41, the filing due date for the report is April 15 effective as of the 2016 reporting year. The statute permits the Secretary to extend the filing due date for up to six months. Filers who submit complete and accurate reports to FinCEN no later than October 15 of the year the report is due will be deemed to have timely filed. FinCEN issued a statement on its website in 2016 noting the FBAR date change as a result of the statutory change. FinCEN intends to revise the FBAR regulations at 31 CFR 1010.306(c) to reflect the statutory date change.

[9] The total number of FBARs filed in 2022 for foreign financial accounts held during calendar year 2021 is 1,503,807. Multiple foreign financial accounts may be reported on a single FBAR.

[10] 31 CFR 1010.350(g).

[11] Filers availing themselves of special rules under 31 CFR 1010.350(g)(1) and (2) involving 25 or more reportable foreign financial accounts are

For the reasons noted above, FinCEN estimates that the approximate FBAR reporting burden will vary depending on the number of reportable foreign financial accounts and will range from approximately 20 minutes to 90 minutes. FinCEN estimates the average reporting burden per FBAR filer will be 55 minutes.

Past estimates of the FBAR recordkeeping requirement took into account time to store paper copies of the FBAR form and estimated that the approximate recordkeeping burden was 30 minutes. Since 2011, FBARs have been filed electronically. Electronically filing the FBAR allows a filer to save an electronic copy of the report, which satisfies the recordkeeping part of the requirement. FinCEN estimates it would take a filer five minutes to save an electronic copy of the FBAR. In addition to maintaining a copy of the form, those filers who take advantage of the special rules related to financial interests in or signature authority over 25 or more accounts would be required to respond to requests for detailed information on those accounts. However, FinCEN believes that in most cases, such information would be maintained by filers in the ordinary course of business in the form of periodic account statements and other business records which would be maintained mostly electronically. There is no requirement in the FBAR regulations to maintain such information in any particular format.

For these reasons, FinCEN estimates that the FBAR recordkeeping burden will be approximately five minutes.

FinCEN estimates the total annual reporting and recordkeeping burden per FBAR filer will be one hour (55 minutes for FBAR reporting, and five minutes for FBAR recordkeeping).

Estimated Total Annual Reporting and Recordkeeping Burden: The estimated total annual PRA burden is 1,503,807 hours (1,503,807 [12] FBARs multiplied by one hour).

Estimated Total Annual Reporting and Recordkeeping Cost: Of the 1,503,807 FBARs filed in calendar year 2022, 1,434,362 were filed by individuals, and 69,445 were filed by entities. FinCEN cannot quantify the cost to individuals who file FBARs on their own behalf. For entities, FinCEN estimates the following annual burden cost: 69,445 hours × $52.55 [13] per hour = $3,649,334.75.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Records required to be retained under the BSA must be retained for five years.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (i) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) the accuracy of the agency's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; (iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2023–17092 Filed 8–9–23; 8:45 am]

BILLING CODE 4810–02–P

required to maintain and provide detailed account information for each foreign financial account, if requested by the Secretary or their delegate.

[12] FinCEN received 1,503,807 FBARs in calendar year 2022.

[13] The average hourly wage rate is calculated from the May 2022 U.S. Bureau of Labor Statistics average hourly wage for ''13–1041 Compliance Officer'' of $37.01, plus an additional 42% for benefits to produce a fully-loaded rate of $52.55. The ratio between benefits and wages for private industry workers is $11.86 (hourly benefits)/$28.37 (hourly wages) = 0.42, as of March 2023. The benefit factor is 1 plus the benefit/wages ratio, or 1.42. $37.01 multiplied by 1.42 equals $52.55. See U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation: Private Industry dataset* (March 2023), available at *https://www.bls.gov/web/ecec/ecec-private-dataset.xlsx.*

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Alcohol and Tobacco Tax and Trade Bureau Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before September 11, 2023 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202)–622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. OMB Control No. 1513–0041

Title: Distilled Spirits Plants—Records and Monthly Reports of Processing Operations.

TTB Form Number: TTB F 5110.28.

TTB REC Number: TTB REC 5110/03.

Abstract: In general, the Internal Revenue Code of 1986, as amended (IRC), at 26 U.S.C. 5001, imposes a Federal excise tax on distilled spirits produced or imported into the United States. Additionally, the IRC at 26 U.S.C. 5207 requires that distilled spirits plant (DSP) proprietors keep records and submit reports regarding their production, storage, denaturation, and processing operations in such form and manner as the Secretary of the Treasury (the Secretary) by regulation prescribes. Under that IRC authority, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations in 27 CFR part 19 require DSP proprietors to keep records regarding their processing operations, as well as any wholesale liquor dealer or taxpaid storeroom operations they conduct. The part 19 regulations also require DSP proprietors to submit monthly reports based on those records, using form TTB F 5110.28. TTB uses the collected information to ensure proper tax collection. TTB also aggregates the collected information to produce generalized distilled spirits statistical reports for public release.

Current Actions: There are no program changes to this information

collection, and TTB is submitting for extension purposes only. As for adjustments, due to a change in agency estimates resulting from continued growth in the number of DSPs in the United States, TTB is increasing the estimated number of annual respondents, total responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits; State and local governments.

Number of Respondents: 4,900.

Average Responses per Respondent: 12 (once per month).

Number of Responses: 58,800.

Average Per-Response Burden: 2 hours (1 hour recordkeeping and 1 hour reporting).

Total Burden: 117,600 hours.

2. OMB Control No. 1513–0058

Title: Usual and Customary Business Records Maintained by Brewers.

TTB Recordkeeping Number: TTB REC 5130/1.

Abstract: The IRC at 26 U.S.C. 5415 requires brewers to keep records in such form and containing such information as the Secretary prescribes by regulation as necessary to protect the revenue. In addition, the IRC at 26 U.S.C. 5555 requires any person liable for Federal excise tax on alcohol beverages, including beer, to keep records, render statements, make returns, and comply with rules and regulations as prescribed by the Secretary. Under those IRC authorities, the TTB regulations in 27 CFR part 25 require brewers to keep usual and customary business records that allow TTB to verify various brewery activities. These activities include, for example, the quantities of raw materials received at a brewery, the quantity of beer and cereal beverages produced at and removed from a brewery taxpaid or without payment of tax, and the quantity of beer previously removed subject to tax returned to the brewery.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents and responses to this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 14,100.

Average Responses per Respondent: 1 (one) per year.

Number of Responses: 14,100.

Average Per-Response and Total Burden: This information collection consists of usual and customary records kept by respondents during the normal course of business, regardless of any regulatory requirement to do so. As such, under 5 CFR 1320.3(b)(2), this information collection imposes no additional burden on respondents.

3. OMB Control No. 1513–0071

Title: Tobacco Products Importer or Manufacturer—Record of Large Cigar Wholesale Prices.

TTB Recordkeeping Number: TTB REC 5230/1.

Abstract: In general, the IRC at 26 U.S.C. 5701 imposes Federal excise taxes on tobacco products and cigarette papers and tubes, and, as described at 26 U.S.C. 5701(a)(2), the excise tax on large cigars is based on a percentage of the price at which such cigars are sold by the manufacturer or importer. The IRC at 26 U.S.C. 5741 also requires every manufacturer and importer of tobacco products to keep records in such manner as the Secretary shall by regulation prescribe. Under those IRC authorities, the TTB regulations at 27 CFR 40.187 and 41.181 require that manufacturers and importers of large cigars maintain certain records regarding the price for which those cigars are sold. The required records are necessary as they provide a basis upon which to verify that the appropriate amount of Federal excise tax is paid on large cigars.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Number of Respondents: 300.

Average Responses per Respondent: 1 (one) per year.

Number of Responses: 300.

Average Per-Response Burden: 2.33 hours.

Total Burden: 699 hours.

Authority: 44 U.S.C. 3501 et seq.

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–17166 Filed 8–9–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nominations for the Appointment to the Advisory Committee on Tribal and Indian Affairs

ACTION: Notice; amended.

SUMMARY: The Department of Veterans Affairs (VA), Office of Public and Intergovernmental Affairs (OPIA), Office of Tribal Government Relations (OTGR), is seeking nominations of qualified candidates to be considered for appointment as a member of the Advisory Committee on Tribal and Indian Affairs (''the Committee'') to represent the following Indian Health Service (IHS) Areas: Bemidji; California; Great Plains; Nashville; Navajo; Tucson.

DATES: Nominations for membership on the Committee must be received no later than 5 p.m. EST on August 21, 2023.

ADDRESSES: All nomination packages (Application, should be mailed to the Office of Tribal Government Relations, 810 Vermont Ave. NW, Suite 915H (075), Washington, DC 20420 or emailed to: *tribalgovernmentconsultation@va.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Stephanie Birdwell and/or Mr. Peter Vicaire, Office of Tribal Government Relations, 810 Vermont Ave. NW, Ste 915H (075), Washington, DC 20420. A copy of the Committee charter can be obtained by contacting *Peter.Vicaire@va.gov* (612–558–7744) or by accessing the website managed by OTGR at: *https://www.va.gov/TRIBALGOVERNMENT/index.asp.*

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Committee responsibilities include, but are not limited to:

(1) Identify for the Department evolving issues of relevance to Indian Tribes, Tribal organizations and Native American Veterans relating to programs and services of the Department;

(2) Propose clarifications, recommendations and solutions to address issues raised at Tribal, regional and national levels, especially regarding any Tribal consultation reports;

(3) Provide a forum for Indian Tribes, Tribal organizations, urban Indian organizations, Native Hawaiian organizations and the Department to discuss issues and proposals for changes to Department regulations, policies and procedures;

(4) Identify priorities and provide advice on appropriate strategies for Tribal consultation and urban Indian organizations conferring on issues at the Tribal, regional, or national levels;

(5) Ensure that pertinent issues are brought to the attention of Indian Tribes, Tribal organizations, urban Indian organizations and Native Hawaiian organizations in a timely manner, so that feedback can be obtained;

(6) Encourage the Secretary to work with other Federal agencies and Congress so that Native American Veterans are not denied the full benefit of their status as both Native Americans and Veterans;

(7) Highlight contributions of Native American Veterans in the Armed Forces;

(8) Make recommendations on the consultation policy of the Department on Tribal matters;

(9) Support a process to develop an urban Indian organization confer policy to ensure the Secretary confers, to the maximum extent practicable, with urban Indian organizations; and

(10) With the Secretary's written approval, conduct other duties as recommended by the Committee.

Authority: The Committee was established in accordance with section 7002 of Public Law 116–315 (H.R. 7105—Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020). In accordance with Public Law 116–315, the Committee provides advice and guidance to the Secretary of Veterans Affairs on all matters relating to Indian Tribes, Tribal organizations, Native Hawaiian organizations and Native American Veterans. The Committee serves in an advisory capacity, makes recommendations to the Secretary on ways the Department can improve the programs and services of the Department to better serve Native American Veterans.

Membership Criteria: OTGR is requesting nominations for the current vacancies on the Committee. The Committee is composed of 15 members. As required by statute, the members of the Committee are appointed by the Secretary from the general public, including:

(1) At least one member of each of the 12 IHS service areas is represented in the membership of the Committee nominated by Indian Tribes or Tribal organization.

(2) At least one member of the Committee represents the Native Hawaiian Veteran community nominated by a Native Hawaiian Organization.

(3) At least one member of the Committee represents urban Indian organizations nominated by a national urban Indian organization.

(4) Not fewer than half of the members are Veterans, unless the Secretary determines that an insufficient number of qualified Veterans were nominated.

(5) No member of the Committee may be an employee of the Federal Government.

In accordance with Public Law 116–315, the Secretary determines the number and terms of service for members of the Committee, which are appointed by the Secretary, except that a term of service of any such member may not exceed a term of two years. Additionally, a member may be reappointed for one additional term at the Secretary's discretion.

Professional Qualifications: In addition to the criteria above, VA seeks—

(1) Diversity in professional and personal qualifications;

(2) Experience in military service and military deployments (please identify your Branch of Service and Rank);

(3) Current work with Veterans;

(4) Committee subject matter expertise; and

(5) Experience working in large and complex organizations.

Requirements for Nomination Submission:

Nominations should be typewritten (one nomination per nominator). Nomination package should include: (1) a letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity), and a statement from the nominee indicating a willingness to serve as a member of the Committee; (2) the nominee's contact information, including name, mailing address, telephone number(s), and email address; (3) the nominee's curriculum vitae or resume, *not to exceed five pages* and (4) a summary of the nominee's experience and qualification relative to the *professional qualifications* criteria listed above.

The individual selected for appointment to the Committee shall be invited to serve a two-year term. All members will receive travel expenses and a per diem allowance in accordance with the Federal Travel Regulations for any travel made in connection with their duties as members of the Committee.

The Department makes every effort to ensure that the membership of its Federal advisory committees is balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that a broad representation of geographic areas, males & females, racial and ethnic minority groups, and Veterans with disabilities are given consideration for membership. Appointment to this Committee shall be made without discrimination because of a person's race, color, religion, sex (including gender identity, transgender status, sexual orientation, and pregnancy), national origin, age, disability, or genetic information. Nominations must state that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee.

Dated: August 7, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–17182 Filed 8–9–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0215]

Agency Information Collection Activity: Request for Information To Make Direct Payment to Child Reaching Majority

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veteran's Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 10, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy Kessinger, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0215'' 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 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0059'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Title 38 U.S.C. 1310, 1313, 1542, and 101(4).

Title: Request for Information to Make Direct Payment to Child Reaching Majority (VA Form Letter 21P–863).

OMB Control Number: 2900–0215.

Type of Review: Extension of a currently approved collection.

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services established by law for veterans, service personnel, and their dependents and/or beneficiaries.

Title 38 U.S.C. 1310, 1313, 1542, and 101(4) provide for payment of death pension or dependency and indemnity compensation (DIC) to an eligible veteran's child when there is not an eligible surviving spouse and the child is between the ages of 18 and 23 and attending school. Until the child reaches the age of majority, payment is made to a custodian or fiduciary on behalf of the child. An unmarried schoolchild who is not incompetent is entitled to begin receiving direct payment on the age of majority. Regulatory authority is found in 38 CFR 3.403, 3.667, and 3.854.

Form Letter 21P–863 is used to gather the necessary information to determine a schoolchild's continued eligibility to VA death benefits and eligibility to direct payment at the age of majority. If the collection were not conducted, VA would have no means of determining a child's current address, marital status, and school attendance. Without this information, continued entitlement to death benefits and eligibility for direct payment at the age of majority could not be determined, and proper payment would not be made. This is an extension only with no substantive changes and the respondent burden has not changed.

Affected Public: Individuals and households.

Estimated Annual Burden: 3 Hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 20.

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. 2023–17125 Filed 8–9–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Former Prisoners of War, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10., that the Advisory Committee on Former Prisoners of War (ACFPOW) will conduct a hybrid meeting (in-person and virtual) on August 30, 2023 and August 31, 2023 at various times and multiple locations in Washington, DC. The meeting sessions will begin and end as follows:

Public participation will commence as follows:

Date	Time	Location	Open session
August 30, 2023	8:00 a.m.–4:00 p.m.—Eastern Standard Time (EST).	810 Vermont Avenue NW, Sonny Montgomery Room 230, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.
August 31, 2023	9:00 a.m.–10:30 a.m. (EDT)	Washington VA Medical Center, 50 Irving Street NW, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.
August 31, 2023	11:00 a.m.–1:00 p.m. (EDT)	Washington VA Medical Center, 50 Irving Street NW, Washington, DC 20420.	No.
August 31, 2023	1:00 p.m.–5:00 p.m. (EDT)	810 Vermont Avenue NW, Sonny Montgomery Room 230, Washington, DC 20420/Webex Link and Call-in Information Below.	Yes.

Sessions are open to the public, except when the Committee is conducting a tour of VA facilities. Tours of VA facilities are closed, to protect Veterans' privacy and personal information, by 5 U.S.C. 552b(c)(6).

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of benefits under title 38 U.S.C., for Veterans who are Former Prisoners of War (FPOW), and to make recommendations on the needs of such Veterans for compensation, health care and rehabilitation.

On Wednesday, August 30th, the Committee will assemble in open session from 8:00 a.m. to 4:00 p.m. for discussion and briefings from senior leadership with Veterans Affairs Central Office, Veterans Benefits Administration and Veterans Health Administration officials.

On Thursday, August 31st, the Committee will assemble in open session from 9:00 a.m. to 10:30 a.m. for discussion and briefings from VA Washington DC Healthcare and the Baltimore Regional Office officials. The Committee will then convene a closed session from 11:00 a.m.–1:00 p.m. to tour the Washington DC VA Medical Center in conjunction with lunch.

Any member of the public wishing to attend the meeting or seeking additional information should contact, Designated Federal Officer, Department of Veterans Affairs, Advisory Committee on Former

Prisoners of War at *Julian.Wright2@va.gov.*

Any member of the public who wishes to participate in the virtual meeting may use the following Cisco Webex Meeting Links:

Join On Your Computer or Mobile App

Day 1

https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=mbf66ee71738417c8894f48c3f32d4a48
Webinar Number: 2760 144 0627

Dial *27601440627@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your webinar number.

Join by phone

14043971596 USA Toll Number
Access code 2760 144 0627

Day 2

https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=mbe296f038ca41d484fdc4a8989ff627f
Webinar Number: 2764 210 3612

Dial *27642103612@veteransaffairs.webex.com*
You can also dial 207.182.190.20 and enter your webinar number.

Join by phone

14043971596 USA Toll Number
Access code 2764 210 3612

Dated: August 7, 2023.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–17148 Filed 8–9–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

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Part II

Library of Congress

Copyright Royalty Board

37 CFR Part 385

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III); Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 16–CRB–0003–PR (2018–2022) (Remand)]

Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their final determination after remand of the rates and terms for making and distributing phonorecords for the period beginning January 1, 2018, and ending on December 31, 2022.

DATES:

Effective date: August 10, 2023.

Applicability date: The regulations apply to the license period beginning January 1, 2018, and ending December 31, 2022.

ADDRESSES: The final determination after remand is posted in eCRB at *https://app.crb.gov/.* For access to the docket to read the final determination after remand and submitted background documents, go to eCRB and search for docket number 16–CRB–0003–PR (2018–2022) (Remand).

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Assistant, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

Final Determination After Remand

On October 26, 2020, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued its mandate vacating and remanding in part the original Determination [1] issued by the Copyright Royalty Judges (Judges) in the captioned proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363 (D.C. Cir. 2020). In its ruling on appeal, the D.C. Circuit found that in the original Determination, the Judges (1) failed to give adequate notice to participants of their overhaul of the royalty rate structure combined with significantly increased and uncapped rates for section 115 licenses; (2) failed to explain why they rejected a benchmark based on a past settlement agreement [2] in lieu of overhauling of the rate structure and significantly increasing rates; and (3) failed to identify their legal authority to redefine a material term after they promulgated a definition of that term in the original Initial Determination circulated to the participants. *See Johnson,* 969 F.3d at 367, 381; Initial Determination, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

After receipt of the D.C. Circuit's ruling and mandate, the Judges consulted with the parties to the appeal and established procedures for the remand proceeding. *See* Order Adopting Schedule for . . . Remand (Dec. 23, 2020).[3] Each side offered opening submissions, responsive submissions, additional evidentiary filings, and further supplemental briefing requested by the Judges. The parties' submissions included legal briefing and incorporated evidence from the original proceeding as well as evidence newly developed for the remand proceeding. After preliminary deliberations, the Judges asked for supplemental briefing from the parties responsive to a proposed alternative rate structure. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9, 2021). With respect to redefinition of the material term Bundled Revenue, the Judges also sought legal analysis from the parties relating to the D.C. Circuit's directive that the Judges either provide ''a fuller explanation of the agency's reasoning at the time . . .'' or take ''new agency action accompanied by the appropriate procedures.'' *See Johnson,* 969 F.3d at 392 (citing *Department of Homeland Security* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1908). On February 9, 2022, the Judges invited additional briefing on the Bundled Revenue definition issue, specifically permitting the parties to offer additional analysis of possible characterization of the Copyright Owners' motion for clarification following the Determination as a motion for rehearing under the Copyright Act, title 17, United States Code at sec. 803(c)(2). *See Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2022).

At the request of the parties, the Judges agreed to forego live testimony. On March 8, 2022, all parties were afforded an opportunity to present oral argument on all remand issues.[4] On July 1, 2022, the Judges issued an Initial Ruling and Order after Remand (Initial Ruling) [5]—applying *Johnson* and considering the entire record developed pre-remand and post-remand.

In the Initial Ruling, the Judges directed the parties to attempt to submit jointly agreed-upon regulatory provisions implementing the Initial Ruling for the Judges to consider. The Judges further ruled that, if the parties could not agree on all the regulatory language, they should make separate submissions regarding regulatory provisions in dispute. *See* Initial Ruling at 114.

The parties agreed to many regulatory provisions but disagreed as to several such provisions. Accordingly, they filed separate submissions and respective replies regarding the regulatory provisions. Services' Joint Submission of Regulatory Provisions (July 18, 2022); Copyright Owners' Submission of Regulatory Provisions to Implement the Initial Ruling (July 18, 2022); Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions (Aug. 5, 2022); Copyright Owners' Response to Judges' July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (Aug. 5, 2022).

The Judges considered those submissions and entered an order addressing the disputed regulatory provisions. *See* Corrected Order regarding Regulatory Provisions

[1] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Feb. 5, 2019) (final rule and order) (original Determination); *see also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018). The original Determination was issued by two of the Judges (Majority) and was accompanied by a dissenting opinion (Dissent) authored by the third Judge. The Dissent is appended to and part of the same document as the original Determination.

[2] The referenced settlement agreement formed the basis for regulatory terms relating to section 115 musical works royalties and was adopted as a final rule in *Adjustment [or] Determination of Compulsory License Rates for Mechanical and Digital Phonorecords,* Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013). *See also* Technical Amendment at 78 FR 76987 (Dec. 20, 2013).

[3] Following the original remand scheduling order, the Judges amended the remand proceeding schedule by, *e.g.,* permitting additional briefing, changing due dates, and seeking additional input with regard to specific issues. *See, e.g.,* Order . . . Modifying Scheduling Orders (Dec. 13, 2021) (eCRB no. 25973).

[4] Copyright Owners and Services divided the time for oral argument. George Johnson dba GEO Music Group waived oral argument.

[5] The Initial Ruling (eCRB no. 26938) is included in Related Rulings and Orders as section A. The findings and conclusions in the Initial Ruling were adopted by a majority of the Judges, but two Judges filed separate opinions. *See* Initial Ruling at 2 n.5. One Judge, former Chief Judge Suzanne Barnett, dissented from the Majority's conclusion in the Initial Ruling regarding the *Phonorecords II* rate structure (section II of the Initial Ruling), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. *See* Dissent in Part re Benchmark (July 1, 2022) (eCRB no. 26943). The other opinion was issued by Judge Strickler, who dissented from the *reasoning* relating to the adoption of the definition of Service Revenue (section V), but concurred in the *adoption* of that definition. *See* Dissent in Part as to Section IV of the Initial Ruling and Order after Remand . . . (July 1, 2022) (eCRB no. 26965).

Following Initial Ruling and Order (after Remand) (Nov. 10, 2022) (November 10th Order).[6]

On November 30, 2022, the parties filed a Joint Submission in which they provided joint regulatory language no longer in dispute that applied the binding rulings of the Judges and the D.C. Circuit.[7] However, the parties identified the single issue in dispute that relates to the ''Total Content Cost'' (''TCC'') rates for nine offerings made by interactive streaming services. Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) (Nov. 30, 2022) (Joint Submission) (eCRB no. 27337).

Having considered the parties' submissions (including the Joint Submission), the Initial Ruling, and all other pertinent material, the Judges adopted the several TCC rates set forth in the Phonorecords II-based benchmark as proposed by the Services. *See* Order 43 on Phonorecords III Regulatory Provisions (eCRB no. 28210).[8]

Based on the entirety of the record, the Judges adopt *in toto*[9] the Initial Ruling and the Order 43 on Phonorecords III Regulatory Provisions which are set out in this document. Accordingly, those two documents are adopted by reference in this Final Determination After Remand. Additionally, the regulatory terms that will codify this Final Determination After Remand are set out in this document.[10]

On the basis of the foregoing, the Judges propound the rates and terms described in this Final Determination After Remand for the period January 1, 2018, through December 31, 2022.[11] No participant having filed a timely petition for rehearing, the Judges have made no substantive alterations to the body of the Initial Determination After Remand. The Register of Copyrights reviewed the Judges' Final Determination After Remand for legal error in resolving a material issue of substantive law under title 17, United States Code, and has closed her review. Non-substantive typos have been corrected and non-substantive formatting changes have been made to the version reviewed by the Register in order to accommodate the **Federal Register**'s formatting standards. The Librarian shall cause the Judges' Final Determination After Remand, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the Register's 60-day review period.

Related Rulings and Orders

*A. Initial Ruling and Order After Remand (Redacted Version With **Federal Register** Naming and Formatting Conventions)*

On October 26, 2020, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) issued its mandate vacating and remanding in part the Determination[12] issued by the Copyright Royalty Judges (Judges) in the captioned proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363 (D.C. Cir. 2020). In its ruling on appeal, the D.C. Circuit found that in the Determination, the Judges (1) failed to give adequate notice to participants of their overhaul of the royalty rate structure combined with significantly increased and uncapped rates for section 115 licenses; (2) failed to explain why they rejected a benchmark based on a past settlement agreement[13] in lieu of overhauling of the rate structure and significantly increasing rates; and (3) failed to identify their legal authority to redefine a material term after they promulgated a definition of that term in the Initial Determination circulated to the participants. *See Johnson,* 969 F.3d at 367, 381; Initial Determination, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

After receipt of the D.C. Circuit's ruling and mandate, the Judges consulted with the parties to the appeal and established procedures for the remand proceeding. *See* Order Adopting Schedule for . . . Remand (Dec. 23, 2020).[14] Each side offered opening submissions, responsive submissions, additional evidentiary filings and further supplemental briefing requested by the Judges. The parties' submissions included legal briefing and incorporated evidence from the original proceeding as well as evidence newly developed for the remand proceeding. After preliminary deliberations, the Judges asked for supplemental briefing from the parties responsive to a proposed alternative rate structure. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9 Order). The Judges also sought legal analysis from the parties relating to the D.C. Circuit's directive that the Judges either provide ''a fuller explanation of the agency's reasoning at the time . . .'' or take ''new agency action accompanied by the appropriate procedures.'' *See Johnson,* 969 F.3d at 392 (citing *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1908 (*Regents*)). On February 9, the Judges invited additional briefing on

[6] The November 10th Order corrected an otherwise substantively identical order issued two days earlier, on November 8, 2022, which had inadvertently included a small amount of text. *See* November 10th Order at 1 (eCRB no. 27312).

[7] The Judges largely adopt the regulations in the Joint Submission, which reflect the substance of the Judges' post-remand rulings, the substance and formatting that the Judges had adopted in the pre-remand Final Determination that were not raised as issues on appeal, and updates to references to subparagraphs of Section 115 to conform to statutory amendments made pursuant to the Music Modernization Act in 2018. Any differences in language or style are made for ease of reference, consistent with the parties' post-remand joint filings.

[8] The Judges also found good cause to adopt a joint proposal for modified language regarding late fees, in 37 CFR 385.3. Order 43 on Phonorecords III Regulatory Provisions at 9.

[9] *But see* Judge Strickler's Dissent, cited at n.5 *supra,* in which—although he agrees with the Majority as to the definition of a Service Revenue Bundle—he disagrees as to the legal reasoning supporting that conclusion.

[10] The documents are: Initial Ruling and Order After Remand, designated as Related Rulings and Orders, section A; Order 43 on Phonorecords III Regulatory Provisions, designated as Related Rulings and Orders, section B; Dissent in Part as to Section IV of the Initial Ruling and Order after Remand by Judge David R. Strickler, designated as Related Rulings and Orders, section C; and Dissent in Part re Benchmark, designated as Related Rulings and Orders, section D.

[11] The regulations applicable to the period 2018 through 2022, as set forth following this **SUPPLEMENTARY INFORMATION** section, will appear in the CFR as appendix A to the current regulations. Although these Phonorecords III regulations adopt the substance of the Phonorecords II-based benchmark where the Judges so require, in §§ 385.21 and 385.22, these Phonorecords III regulations are structured, consistent with the parties' Joint Submission, in the same consolidated manner as set forth in the pre-remand Phonorecords III regulations (a structure as to which no party appealed). See Exhibit A to the Joint Submission at 16, n. 47; see also Exhibit B to the Joint Submission at n.17 (red-lined version of Exhibit A, supra).

[12] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (''Determination''); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018) (citations to the Determination and to the Dissent in this Initial Ruling and Order after Remand (Initial Ruling) are found in this document). The Determination was issued by two of the Judges (Majority) and was accompanied by a dissenting opinion (Dissent) authored by the third Judge. The Dissent is appended to and part of the same document as the Determination.

[13] The referenced settlement agreement formed the basis for regulatory terms relating to section 115 musical works royalties and was adopted as a final rule in *Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords,* Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013), Technical Amendment at 78 FR 76987 (Dec. 20, 2013). In this Initial Ruling, references to *Phonorecords II,* PR II, and PR II-based benchmark are references to this final rule.

[14] Following the original remand scheduling order, at the request of parties or on their own motion, the Judges amended the remand proceeding schedule by, *e.g.,* permitting additional briefing, changing due dates, and seeking additional input with regard to specific issues. *See, e.g.,* Order . . . Modifying Scheduling Orders (Dec. 13, 2021).

the service bundle definition issue, specifically permitting the parties to offer additional analysis of possible characterization of the Copyright Owners' motion for clarification following the Determination as a motion for rehearing under the Copyright Act, title 17, United States Code (Act) at sec. 803(c)(2).

At the request of the parties, the Judges agreed to forego live testimony. On March 8, 2022, all parties were afforded an opportunity to present oral argument on all remand issues.[15] Following oral argument, the Judges deliberated and now issue this Initial Ruling after Remand.

After due consideration of all of the evidence and oral argument of counsel, the Judges[16] determine:[17]

(1) With regard to the applicable rates and rate structure, the percent-of-revenue all-in headline royalty rate for the mechanical license shall be set at 15.1%, phased-in, as set forth below:

2018–2022 ALL-IN HEADLINE ROYALTY RATES

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%

In all other respects, the rates and rate structure of the *Phonorecords II*-based benchmark proposed by the Services (as that benchmark is defined herein) shall constitute the rates and rate structure for the *Phonorecords III* period.[18]

To be clear: the 15.1% headline percentage rate substitutes for the headline percentage rates in subparts B and C of the Services *Phonorecords II*-based benchmark, and the definition of ''Service Revenue'' for bundles shall be the definition contained in 37 CFR 385.11 (paragraph (5) for the ''Service Revenue'' definition) as proposed in the Services' *Phonorecords II*-based benchmark.

(2) The Services' *Phonorecords II*-based benchmark is the better of the benchmarks proposed by the parties and satisfies the requirements of 17 U.S.C. 801(b)(1) in all respects. However, as noted *supra,* to be consistent with this statutory section and the decision in *Johnson,* the royalty rate of 10.5% in that benchmark shall be replaced with the 15.1% rate set forth in paragraph (1) above.

(3) To reiterate for clarity, consistent with the adoption of the *Phonorecords II*-based benchmark, and for the reasons more fully developed herein, the Judges adopt the definition of ''Service Revenue for Bundled Services'' as it appeared in the Initial Determination in the underlying proceeding. Following are the Judges' analysis and ruling after remand.

I. Preliminary Issue: Burden of Proof

As a preliminary matter, the Judges address the issue of burden of proof raised by both parties. Pursuant to the Administrative Procedure Act (APA), ''the proponent of a rule or order has the burden of proof.'' 5 U.S.C. 556(d). *See also* Initial Remand Submission of Copyright Owners at 48 (Apr. 1, 2021) (''CO Initial Submission'') (citing section 556(d) of the APA as setting forth ''a basic rule of these rate-setting proceedings that a participant is required to provide evidence establishing the propriety of all aspects of its own proposed rates and terms, including all aspects of the participant's proposed rate structure.''). Accordingly, it is clear to the Judges that the Services should continue to bear the burden of proof regarding the sufficiency of their proffered Phonorecords II-based benchmark in this remand proceeding. And, in like fashion, because on remand Copyright Owners have assumed the mantle of pursuing the vacated rate structure and rates, they bear the burden of proof with regard to their proposal.

However, Copyright Owners assert that it is *the Services* who bear the burden of proof as to Copyright Owners' proposal regarding the appropriateness, *vel non,* of an uncapped TCC rate prong. According to Copyright Owners, this burden falls on the Services because ''only the Services . . . proposed TCC prongs at the hearing,'' in the form of the mix of capped and uncapped TCC prongs contained in the Services' Phonorecords II benchmark. *Id.* at 47. The Judges find that the fact that the Phonorecords II-based benchmark advanced by the Services contains this mix of capped and uncapped TCC prongs does not bear on Copyright Owners' duty, under 5 U.S.C. 556(d), to satisfy the burden of proof with regard to the rates and rate structure they are advancing on this remand. Moreover, the D.C. Circuit has already held that the fact that some of the Streaming Services' proposals contemplated continued use of an uncapped total content cost prong for some categories ''does not mean they anticipated that the [Judges] would uncap the total content cost prong *across the board* . . . [which] is quite different.'' *Johnson,* 369 F.3d at 382. The difference, according to *Johnson,* is that ''[u]ncapping the total content cost prong across all categories leaves the Streaming Services exposed to potentially large hikes in the mechanical license royalties they must pay.'' *Id.*

Accordingly, the Judges find that Copyright Owners indeed do bear the burden of proof with regard to the appropriateness of uncapped rate structure and rates they are proposing on remand and the Services bear the burden of proof with regard to the appropriateness of the Phonorecords II-based benchmark they are continuing to advance on remand.

II. Rate Structure and Rates

A. Relevant Rulings in Johnson

In establishing a royalty rate structure and the rates within it in the context of this remand proceeding, the Judges are guided by the rulings in *Johnson.*

1. Percent of Revenue Prong

The D.C. Circuit noted that the Judges found the royalties in the *Phonorecords II* period were too low and that record companies were receiving a disproportionate share of the sum of the mechanical and sound recording royalties. *Johnson,* 969 F.3d at 384–85. The D.C. Circuit acknowledged that ''[t]he Judges . . . then carefully

[15] Copyright Owners and Services divided the time for oral argument. George Johnson dba GEO Music Group waived oral argument.

[16] The findings and conclusions in this Initial Ruling are adopted by a majority of the Judges. One Judge dissents from the adoption of the entirety of the *Phonorecords II* rate structure (section II), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. One Judge dissents in part from the reasoning relating to adoption of the definition of Service Revenue (section V), but not from the adoption of that definition.

[17] As addressed *infra,* the Judges also order that the participants in this remand proceeding prepare and submit regulatory provisions consistent with this ruling. *See* Footnote 174.

[18] The Services include in their Joint Rate Proposal a chart summarizing the proposed rates for their offerings. That chart is attached as an Addendum to this Initial Ruling.

analyzed the competing testimony and drew from it rates that were grounded in the record and supported by reasoned analysis.'' *Id.* at 385. The D.C. Circuit found that the Judges acted well within their discretion and not arbitrarily, relying on substantial evidence in establishing the ''zone of reasonableness'' for the rates. *Id.* As the D.C. Circuit noted, the Judges' process was ''the type of *line-drawing and reasoned weighing of the evidence* [that] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Id.* at 385–86 (emphasis added).

2. Uncapped TCC Prong

The D.C. Circuit found fault, however, in the Judges' determination to establish an uncapped and increased percentage-based total content cost (TCC).[19] *Id.* at 380. This approach ''removed the only structural limitation on how high the [TCC] . . . can climb.'' *Id.* The D.C. Circuit reasoned that uncapping the TCC alternative rate prong across all categories of service exposed the Services to potentially large hikes in the overall mechanical royalties they must pay. *Id.* at 382. The D.C. Circuit noted: ''As the [Judges] acknowledge, sound recording rightsholders have considerable market power *vis-à-vis* interactive streaming service providers . . . . The interactive streaming services are . . . exposed to the labels' market power and record companies could, if they so chose, put those services out of business entirely . . . . [B]y virtue of their oligopoly power, the sound recording copyright holders have extracted 'inflated' royalties. . . .'' *Id.* (cleaned up).

While the Services had advocated uncapping the TCC alternative rate prong for some categories of service, that ''does not mean they anticipated that the [Judges] would uncap the total content cost prong *across the board.* That is quite different.'' *Id.* at 382. The D.C. Circuit found that the Judges ''failed to provide adequate notice of the drastically modified rate structure [they] ultimately adopted.'' *Id.* at 381. The D.C. Circuit emphasized that the failure to provide adequate notice of their intentions ''is no mere formality [because] [i]nterested parties' ability to provide evidence and argument . . . not only protects the parties' interests, it also helps ensure that the [Judges'] ultimate decision is well-reasoned and grounded in substantial evidence.'' *Id.* at 381–82.

To support their adoption of an uncapped TCC rate prong, the Judges ''predicted that the sound recording copyright owners' royalty rates would naturally decline in the course of their negotiations with interactive streaming services.'' *Id.* at 372. The Judges found persuasive the rebuttal testimony of one of Copyright Owners' economic expert witnesses, Professor Watt, that an increase in mechanical royalties payable by the Services would lead to a corresponding decrease in the Services' sound recording royalty obligations. *See* Determination at 73–74 (''[S]ound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works [and] Professor Watt's bargaining model predicts that the total of musical works and sound recordings royalties would stay ''almost the same'' in response to an increase in the statutory royalty.''). The Services painstakingly criticized this ''see-saw'' theory.

The D.C. Circuit concluded that, on remand, if and when the Judges consider the ''uncapped'' rate structure, they shall address all substantive challenges to that approach raised by the Services, including the issue of whether ''an increase in mechanical license royalties would lead to a decrease in sound recording royalties.'' *Id.* at 383.

Thus, the D.C. Circuit held, the Judges erred procedurally in adopting an uncapped TCC alternative rate prong. The D. C. Circuit therefore instructed the Judges to provide the parties with the opportunity to fully address the issues regarding the uncapped TCC prong, and for the Judges to address the ''substantive challenges'' raised by the Services.

3. Four Itemized Statutory Objectives

The statutory standard found in section 801(b)(1) instructs the Judges to set rates that are not only ''reasonable,'' but also reflective of four itemized objectives, or factors, which, as the D.C. Circuit stated, set forth ''competing priorities.'' 17 U.S.C. 801(b)(1)(A)–(D); *Johnson,* 969 F.3d at 387.[20] With regard to these four priorities, the D.C. Circuit found that the Judges properly analyzed and applied the first objective (Factor A). *Id.* at 387–88. In particular, the D.C. Circuit did not disturb the Judges' ruling that an increase in the royalty rates for mechanical licenses was necessary in order to satisfy Factor A. *Johnson,* 369 F.3d at 387–88. According to *Johnson,* in making this finding, the Judges had engaged in a ''reasonable reading of the record'' and had relied on ''substantial evidence.'' *Id.* at 388. Thus, Factor A (when considered without regard to the other three objectives) indicated that the statutory rate needed to be higher than it was during the *Phonorecords II* period.[21]

With regard to the other three objectives, *Johnson* stated that ''[t]he question whether the [Judges] adequately addressed factors B through D . . . is intertwined with the nature of the rate structure ultimately imposed by the [Judges].'' *Id.* at 389. Accordingly, the D.C. Circuit concluded that it ''need not . . . address whether the [Judges] adequately considered these remaining factors.'' *Id.*[22]

Within the parameters of the holdings in *Johnson,* the Judges consider the record facts and the arguments made in this remand proceeding, together with the pertinent facts and arguments made in the original proceeding.

B. Rate Evidence for the 33-Months From January 2018 Through September 2020

After the Determination was issued, from its effective inception on January 1, 2018, through September 30, 2020—a 33-month period—the parties operated under the rates and rate structure set forth in that ruling. In light of the D.C. Circuit's decision in *Johnson,* as of October 1, 2020, the parties reverted to the *Phonorecords II* rates. The Services have asserted in this remand proceeding that, during the 33-month period when the Majority's new and higher

[19] ''TCC'' refers to ''Total Content Cost,'' and is defined as ''a percentage of the royalties paid by the service . . . to sound recording copyright holders.'' *Johnson,* 969 F.3d at 370; *see also* Determination at 13 n.38 (''TCC'' is an industry acronym for ''Total Content Cost'', a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.'').

[20] These competing objectives are: (A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. *Id.*

[21] However, as the D.C. Circuit also noted, because the four section 801(b)(1) objectives reflect ''competing priorities, *id*'' at 387, the holding that Factor A militates toward a higher rate is not ultimately dispositive. Rather, it must be weighed with the other statutory factors.

[22] The phrase ''intertwined with the nature of the rate structure'' requires emphasis because the Majority independently considered how to weigh Factors B and C specifically as to the 15.1% revenue rate, without regard to the overall rate structure, as discussed *infra.*

Phonorecords III rates were in effect, [REDACTED]. By contrast, Copyright Owners, on remand, looking at the same data over this 33-month period, aver that they prove the existence of the seesaw theory.

1. Services' Position

According to the Services, [REDACTED]. [REDACTED]. Moreover, according to the Services, [REDACTED]. The Services further maintain that, [REDACTED].

The Services make the [REDACTED]. And, [REDACTED]. Id. ¶¶ 5, 9–13, 16–19, 22–23, 26–27.

The Services claim that [REDACTED]. More particularly, [REDACTED].

[REDACTED]. [REDACTED].

The Services' economic experts rushed to judgment upon learning of these facts, claiming that they disproved the seesaw theory. *See* Katz WDRT ¶¶ 25–27 (relying on testimonies cited *supra* and concluding that seesaw theory was disproved, based on [REDACTED]); Marx WDRT ¶¶ 48–51 (relying on same testimonies and likewise finding because [REDACTED]); Leonard WDRT ¶ 17. ([REDACTED]).

2. Copyright Owners' Position

Copyright Owners analyzed the royalty data over the same 33-month period (January 2018 through September 2020) and reach the opposite conclusion. One of their economic expert witnesses, Dr. Jeffrey Eisenach, testified that [REDACTED]. Moreover, he opined that [REDACTED]. *See* Eisenach RWRT sec. 2(A) & appx. C.

Based on this analysis, Professor Watt declares empirical vindication of his seesaw theory. Watt RWRT ¶¶ 41–42, 46 (''The [Judges'] bargaining theory insights about the relationship between royalty rates were correct. . . . [REDACTED]. . . .'').

3. Analysis and Decision Regarding Evidence of Post-Determination Rates

The Judges are perplexed by the willingness of the expert economic witnesses on both sides to opine that the rate changes from January 2018 through September 2020 can serve as confirmation of their clients' respective positions. The issue to be considered empirically was whether the sound recording rate would decrease in response to the increase in the mechanical rate. That is, if the record labels had previously set royalties at a level that would allow the Services merely to survive, would the record labels agree to lower their sound recording rate if more of the Services' surplus were acquired by Copyright Owners? To answer this question, the economists on both sides applied sophisticated bargaining models and critiques to explain the nature of the negotiations that would ensue.

In the process, the economists lost track of an obvious, elementary point: The *Phonorecords III* rates were being challenged by the Services' appeal, and might not persist. Indeed, the rates were ultimately vacated and the parties returned in October 2020 to the *Phonorecords II* rates.[23] Now, the rates will be changed again by this post-remand Determination, and going forward may be subject to further potential change, consistent with the provisions of title 17. In light of such ongoing fundamental uncertainty, why would any economist or businessman assume that the sound recording companies would agree to adjust their rates in response to a change in the mechanical rate? The Judges are amazed that the economic experts neglected even to raise this uncertainty as a complicating issue, let alone a dispositive one.[24]

Moreover, no party called as a witness any representatives of the Majors, or subpoenaed their testimony or documents, to provide the Judges with evidence of how these record companies perceived the seesaw issue, whether as a permanent phenomenon or as an uncertain matter, given the pendency of the legal proceedings regarding the ultimate mechanical rate. Any of the parties could have requested that the Judges subpoena a sound recording industry witness to give testimony and produce documents as to this issue, pursuant to 17 U.S.C. 803(b)(6)(C)(ix), but none did so. Further, Copyright Owners, who are representing the music publishing interests of *inter alios,* Sony, Universal, Warner, and Merlin, likely could have produced such sound recording witnesses without the need for a subpoena. Witnesses from these entities who negotiated with the Services after the *Phonorecords III* rates and rate structure became effective certainly would have knowledge relevant to the testimony of the Services' witnesses [REDACTED] who claimed that [REDACTED].

Simply put, the period from period from January 2018 through September 2020 was a time the Judges construe as ''33-months of uncertainty,'' *see* 3/8/22 Tr. 87, 91 (Closing Argument) when no party could ascertain with any assuredness the ultimate *Phonorecords III* rates and rate structure. Thus, for the economists and the parties to claim vindication for their arguments by reliance on how the record labels did or did not respond to the challenged and ever-shifting rates during this ''33 months of uncertainty'' reflects the elevation of adversarial zeal over objective judgment.

Accordingly, the Judges place no weight on the purported changes or stability of the sound recording rates during the *Phonorecords III* rate period.

C. Percent-of-Revenue Rate Prong

1. Copyright Owners' Position

In their initial remand submission, Copyright Owners provided no new evidence to support any aspect of the 15.1% revenue-based rate (or for that matter, any new evidence to support the rates or rate structure in the Determination), and elected to rely on the pre-remand record. In fact, in their initial remand submission, Copyright Owners do not so much as mention the 15.1% revenue rate derived by the Judges. However, in their reply remand submission (which the Judges found also to constitute, in part, a substantive *initial* submission [25]) Copyright Owners do address the 15.1% revenue rate. In the reply submission, Copyright Owners simply stated: ''[T]he Circuit affirmed the Board's derivation of rate percentages, including raising the revenue rate to 15.1%.'' Copyright Owners' Reply Brief on Remand (in Reply Remand Submission of Copyright Owners, Vol. 1) at 64, n.48 (July 2, 2021) (''CO Reply''). In a subsequent submission, Copyright Owners added that ''*[t]he narrow mandate on this Remand does not allow for reopening the rate percentage determination in the [ ]Determination.*'' Copyright Owners' Motion for Reconsideration or Clarification at 15 & n.10 (Dec. 17, 2021) (emphasis added) (Dec. 17th Motion).

Thereafter, Copyright Owners asserted that the D.C. Circuit's affirmance of the

[23] There also was uncertainty as to the effective inception date of the *Phonorecords III* rate period, because the Services had appealed (ultimately unsuccessfully) the CRB Judges' finding that the period commenced, retroactively, as of January 1, 2018.

[24] To place this point in the economic context of this proceeding, the Judges characterize the ongoing ''legal uncertainty'' as another ''independent variable'' to add to the economic experts' list of such variables, discussed *infra,* that affect the ''dependent variable,'' *viz.,* the sound recording rate.

[25] *See* Order Denying in Part and Granting in Part Services' Motion to Strike Copyright Owners' Expert Testimony and Granting Services' Request to File Supplemental Testimony and Briefing at 11 (Oct. 1, 2021) (Oct. 1st Order) (The Judges found that ''with one exception . . . the challenged testimonial evidence of Copyright Owners' economic expert witnesses serve the dual purposes of direct and rebuttal statements'' and, as a consequence, ''provide[d] the Services an opportunity to file supplemental testimony and briefing in opposition.

[Judges'] revenue percentage rate calculation was ''strong[ ]'' and ''detailed.'' Copyright Owners' Reply in Further Support of Motion for Reconsideration or Clarification at 4 (January 5, 2022). Moreover, Copyright Owners took note that the Services had relied on substantively identical language in *Johnson* to support their argument that other statements in that D.C. Circuit decision should be deemed affirmed. *See id.* at 4–5 (noting Services' reliance on *Johnson's* description of the Judges' rulings regarding student and family discounts (''*grounded in substantial record evidence . . . based on the weight and credibility of the evidence [and] squarely within the Judges' expertise*)'' as demonstrating that the D.C. Circuit had affirmed those rulings) (emphasis added); *see also* Copyright Owners' Brief in Response to the Additional Materials Orders at 2, 6–7 (Jan. 24, 2022) (''CO Additional Submission'') (again asserting that ''the 15.1% revenue rate . . . was specifically affirmed in detail by *Johnson.*'').

2. Services' Position

In their initial submission after the remand, the Services objected to any continued application by the Judges of the 15.1% revenue rate because, ''as the Majority acknowledged, this particular division of revenues will never happen in the real world because of the complementary oligopoly power of the record labels.'' Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) at 52 (''Services' Initial Submission'') (Apr. 1, 2021). More particularly in this regard, the Services note that Professor Marx's Shapley Value Model,[26] which served as an input for the generation of the 15.1% revenue rate, also indicated that only [REDACTED]% of the interactive streaming revenue should be paid out as royalties to the sound recording rightsholders, with the remaining [REDACTED]% of these revenues retained by the interactive streaming services. *Id.* (''Both Professor Marx's and Professor Watt's models show lower combined royalties being paid by the services than are currently paid in the marketplace. . . . The discrepancy in total royalties between the models and the real world is explained, in part, by the absence of supranormal complementary oligopoly profits in the Shapley model, and the presence of those profits in the actual market.''). *Id.* (quoting *Phonorecords III,* 84 FR 1952).

By this approach, the Services maintain, ''the Majority awarded the Copyright Owners the full 15.1% of revenue dictated by its model (phased in over time), and left it up to the Services to convince the complementary oligopolist major labels to dramatically lower sound recording rates.'' *Id.* at 54–55. The Services argue that, instead, the Majority should have applied to Professor Marx's [REDACTED]% total royalty obligation what they characterize as ''any of the[ ] real-world ratios in place of the [REDACTED] ratio taken from ''Professor Gans' ''Shapley-inspired'' model. *Id.* at 54. According to the Services, these lower ratios would have reduced the revenue percentage rate well below 15.1%. *Id.*

Alternatively, the Services propose, through Professor Marx's post-remand written testimony, that the Judges now adopt ''a more balanced, burden-sharing approach'' to address what she described as the Majority's ''imbalance'' problem. *Id.* at 57; *see also* Marx WDRT ¶¶ 52–63.[27] Essentially, her proposal begins with an assumption, based on record evidence, that labels typically take specific shares of service revenue, including shares of [REDACTED]%, [REDACTED]% and [REDACTED]%.[28] These shares are significantly higher than the [REDACTED]% that Professor Marx generated from her Shapley model. Next, Professor Marx's post-remand burden-sharing approach uses as inputs the 15.1% of service revenue and the [REDACTED]% of service revenue that would be retained by the musical works owners and the Services respectively.[29] Putting these two factors together, she sets forth the basic math: Using her [REDACTED]% sound recording share as an example, she notes that there is not enough revenue for the labels to take this [REDACTED]% share, if the musical works owners also receive 15.1% and the Services also retain the [REDACTED]% derived from her model ([REDACTED]% + 15.1% + [REDACTED]% = [REDACTED]%, an irrational result). *See* Services' Joint Opening Brief at 57.

Professor Marx engages in an analysis based on the following math and logic (again, using the [REDACTED]% sound recording rate as an example of the fixed amount taken by the labels): (1) [REDACTED]% of the streaming revenues remain available to be split between the services and the musical works copyright owners; (2) adding the 15.1% revenue rate and her [REDACTED]% revenue retention percentage equals [REDACTED]%; and (3) the 15.1% revenue rate, as a percent of this [REDACTED]%, is [REDACTED]%; and (4) [REDACTED]% of the [REDACTED]% available for splitting between the services and the musical works copyright owners is [REDACTED]% (rounded). *Id.* at fig.8.

Thus, she identifies her version of a ''fair'' result: The Services and Copyright Owners would split the residual revenue remaining after the labels have exercised their complementary oligopoly power to take an outsized fixed share—with the split proportional to the 15.1%-to-[REDACTED]% revenue amounts calculated respectively by the Judges (the 15.1% musical works rate) and Professor Marx (the [REDACTED]% service revenue retention). *Id.* 59, table. 8.[30]

In their final post-remand submission, the Services also flatly state: ''[T]he D.C. Circuit did not ''affirm'' the 15.1% rate—it vacated that rate.'' Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal at 2 (Feb. 24, 2022) (''Services' Additional Submission''). However, the Services do not support that quoted statement with any citation to *Johnson. See id.* Further, the Services assert that the 15.1% revenue rate is not immune from post-remand review and reduction because ''the D.C. Circuit withheld judgment ''on whether that final percentage satisfies factors B through D of Section 801(b)(1). . . .'' *Id.* at 3.

[26] Generally, a Shapley Value Model is a game theory analysis. It models a hypothetical bargain that assigns each ''player'' the average marginal value it contributes to the bargain and (after accounting for the costs that each ''player'' would need to recover) the remaining ''surplus'' is allocated among the players according to their relative contributions. *See Johnson,* 969 F.3d at 372. For the reasons discussed *infra,* in the present case, the Shapley surplus from the streaming revenue is split essentially equally by the owners of the sound recording and musical works owners *inter se,* but the royalty rates themselves that would result from their bargaining would be different as between these two inputs, because of their differing costs. *See, e.g.,* Gans WDT ¶ 73.

[27] Claiming consistency with the Majority's analysis, Professor Marx appears to maintain that her ''burden-sharing'' approach generates the statutorily-required ''reasonable'' rate as well as a rate that satisfies the ''fair return''/''fair income'' objectives of statutory Factor B. *See* Marx WDRT ¶ 52 (introducing her correction of the alleged ''imbalance'' problem by noting that ''the ''right'' mechanical royalty rate is one that is ''reasonable'' and achieves the four objectives laid out in Section 801(b)(1).''

[28] *See* Marx WDRT, fig. 7 ([REDACTED]).

[29] The [REDACTED]% of revenue that the services would retain is based on one of Professor Marx's ''Shapley Value Models.'' Shapley Value modeling is discussed *infra.*

[30] Using the same logic and calculation method, Professor Marx finds that the services would retain |[REDACTED]% ÷ [REDACTED]%, which equals |[REDACTED]%. Assuming again that [REDACTED]% of the steaming revenue is available to split (because the labels have appropriated [REDACTED]%), the services would retain [REDACTED]% [REDACTED]% rounded) of the streaming revenue. *Id.*

3. Analysis and Decision Regarding 15.1% Revenue Rate Prong

The Judges determine that they are clearly bound by the D.C. Circuit's decision in *Johnson* to maintain the 15.1% revenue rate, as phased-in by the Determination. Several reasons support this decision.

First, the Judges conclude that the D.C. Circuit's decision in *Johnson* is conclusive and unambiguous regarding the revenue percentage rate. The D.C. Circuit rejected the Services' assertion that the Judges acted ''arbitrarily'' as to this particular issue, noting that the Services had misstated the relevant facts. *Johnson,* 969 F.3d at 385–86 (responding to Services' misdescription of Judges' analysis and explaining what Services described as ''not what happened.''). Moreover, the D.C. Circuit held that with regard to the construction of the 15.1% revenue rate, the Judges had ''engaged in the type of line-drawing and reasoned weighing of the evidence [which] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Id.* at 386. The D.C. Circuit further noted that the Judges ''proceed[ed] cautiously'' to set the 15.1% revenue rate by establishing a ''zone of reasonableness'' for the revenue rate. *Id.* at 385. Indeed, with regard to each aspect of this revenue rate analysis, the D.C. Circuit found that the Judges' decision making was ''grounded in the record and supported by reasoned analysis'' and that ''[s]ubstantial evidence supports [their] judgment.'' *Id.* at 385.

Second, when the D.C. Circuit reviewed the Determination, it applied ''the same standards set forth in the Administrative Procedure Act, 5 U.S.C. 706.'' *Id.* at 375 (noting that 17 U.S.C. 803(d)(3) cross-references 5 U.S.C. 706); *see also id.* (''[W]e will set aside the [ ] Determination 'only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the facts relied upon by the agency have no basis in the record.'').

Here, the D.C. Circuit explicitly found that the Judges' analysis and findings in connection with the 15.1% revenue rate are *not* arbitrary and capricious, and that the facts relied upon by the Judges have a sufficient basis in (are ''grounded in'') the record. It seems beyond dispute that the D.C. Circuit affirmed the Judges in their setting of the 15.1% revenue rate as a rate that is reasonable, and thus satisfies that aspect of the section 801(b)(1) standard.[31] Indeed, it would border on the Orwellian to misconstrue the D.C. Circuit's unequivocal and obvious affirmance of the reasonableness of the 15.1% revenue rate as a vacating of that finding.

Third, the Judges note that *Johnson* conspicuously declines to identify the Judges' setting of the 15.1% percent-of-revenue rate as one of the findings to be revisited on remand. Rather, *Johnson* states that the three overarching issues for resolution on remanded are the Majority's failure: (1) ''to provide adequate notice of the rate structure it adopted,'' (2) ''to explain its rejection of a past settlement agreement as a benchmark for rates going forward; and (3) ''[to] identif[y] the source of its asserted authority to substantively redefine a material term after publishing its Initial Determination.'' *Johnson,* 369 F.3d at 367. The Majority's finding that the 15.1% royalty rate is ''reasonable'' was not identified by the D.C. Circuit as a finding that was vacated and subject to further review and, indeed, as noted *supra,* the appellate panel credited what it characterized as the Majority's careful analysis and line-drawing in arriving at that finding.

The clarity of the D.C. Circuit's affirmance of the royalty rate of 15.1% for the percent-of-revenue prong moots the issue of whether Professor Marx's attempt, described *supra,* to correct the so-called ''imbalance'' problem has merit. However, the Judges note that, even if this issue had not been conclusively decided in *Johnson,* they would reject her approach as futile. That is, Professor Marx fails to acknowledge that any surplus that her approach would appear to provide to the Services would be siphoned off by the Majors, given their complementary oligopoly power.

More particularly, the sound recording royalty rates she posits ([REDACTED]%, [REDACTED]% and [REDACTED]%) are all functions of the sound recording companies' understanding of the Services' non-content costs (costs that the Services must recover out of retained revenues in order to remain in operation, *i.e.,* to ''survive'') and the then-existing musical works content (royalty) costs (comprised of the mechanical rate and the performance rate). If, as Professor Marx contemplates, the mechanical rate is reduced so that Copyright Owners ''share the burden'' of the complementary oligopoly effect on sound recording rates, that ''burden sharing'' would increase the revenues retained by the Services (that is the purpose of Professor Marx's approach!). But such an increase would raise the Services' revenue above their ''survival'' rate, as understood by the record labels. Thus, the record labels, given their complementary oligopoly power, would increase the Services' royalty rate above what it otherwise would have been.

Alternately stated, when Professor Marx hypothesizes a given sound recording royalty rate in column 1 of Figure 8 in her WDRT, that rate is assumed, by the logic of the complementary oligopoly theory, to have already allowed the services to cover only their non-content costs and musical works royalties, as understood by the record labels. So, her assumed rate in column 1 is not a fixed parameter, but rather an independent variable, which is a function of, *inter alia,* the costs incurred by the services, *i.e.,* their non-content costs plus their musical works royalty costs.[32] If those service costs decreased (for example, in an attempt to reduce the services' burden of bearing the full brunt of the labels' complementary oligopoly power as in Professor Marx's attempt to correct the imbalance problem), the percentage in column 1 of Figure 8 would increase, as the labels siphoned off that surplus over the services' survival revenue requirements. To find otherwise would be to refute the logic of the dynamics of the complementary oligopoly effect.[33]

Moreover, the defect in Professor Marx's attempt to remedy the so-called ''imbalance'' problem is a consequence of the statutory licensing and royalty scheme. To recap, the licensing of content used by the interactive services is bifurcated. The sound recording royalties paid by the interactive services to the record labels are not regulated, and complementary oligopoly power exists in that market, inflating sound recording royalty rates above an effectively competitive level. *See*

[31] The CRB Judges intentionally distinguish between the ''reasonable'' rate standard in the initial body of section 801(b)(1) and the objectives set forth as Factors A–D of section 801(b)(1). A rate can satisfy the statutory ''reasonable rate'' requirement yet require adjustment (higher or lower) to reflect the balancing of the four additional factors. Accordingly, the Judges defer to a subsequent section, *infra,* a discussion of how Factors A–D should be addressed on this remand.

[32] The interactive services also pay a separate royalty for the performance license necessary to transmit a song. However, under the Judges' ''All-In'' royalty structure, that performance royalty is deducted from the ''All-In'' calculation to determine the mechanical royalty. Also, the performance royalty paid to the largest Performing Rights Organization (PROs) are subject to determination by federal judges in the Southern District of New York (the so-called ''rate court'').

[33] To be clear, the Judges are not stating that the Services' retention of only enough revenue to allow them to cover their noncontent costs and thus merely ''survive'' is indicia of an effectively competitive (or even healthy) market—but are merely acknowledging the state of affairs given the unregulated nature of the sound recording royalties and the complementary oligopoly power that exists in that market.

Determination at 73 (''[T]he existence of complementary oligopoly conditions in the market for sound recordings'' is the basis for ''the record companies' ability to obtain most of the available surplus'' generated by interactive streaming.) [34] However (and to state the obvious), the mechanical rate paid by the interactive services for musical works is regulated, pursuant to 17 U.S.C. 115 and, until the 2018 enactment of the Music Modernization Act,[35] according to the rate standards in 17 U.S.C. 801(b)(1). Thus, there is no statutory or regulatory impediment to prevent record labels from responding to a decrease in the mechanical rate by increasing the unregulated sound recording rate if such an increase is in their economic interest.[36]

Accordingly, any attempt by the Judges to reduce the mechanical royalty rate in order to allow the Services to retain more of the surplus would fail; it would be like pouring water into a bucket with a siphon at its base. More water would not remain in the bucket, but rather would accumulate wherever the siphon leads—in this case, to the record labels. The Judges could keep mechanical royalty rates depressed and allow this to occur, but that would harm Copyright Owners while providing no relief to the Services. And despite the old adage that ''misery loves company,'' the Judges detect no directive under section 801(b)(1) that they harm Copyright Owners without providing a gain for the interactive streaming services—and that they provide a windfall for the record labels, to boot.

Although Professor Marx's attempt to reduce the Services' ''misery'' by sharing it with Copyright Owners is unavailing, the statutory scheme and market forces do appear to combine to mitigate the burden created by the complementary oligopoly power of the sound recording companies. If interactive streaming revenue were to grow over the rate period,[37] then the phase-in to the 15.1% rate will reflect fixed annual percentages of a larger base, allowing services to retain a higher dollar level of the interactive streaming revenues.[38] [REDACTED]. *See, e.g.,* Diab WDRT ¶¶ 10–11 (Google agreements); Mirchandani WDRT ¶¶ 16–17 (Amazon agreements); Bonavia WDRT ¶¶ 8; 14–19 (Spotify agreements); White WDRT ¶¶ 6; 8–14; 19; 24; 27–28 (Pandora agreements). Additionally, the Services' headline sound recording rates [REDACTED]. *Services' Joint Remand Reply Brief* at 40 (and record citations therein). Thus, assuming no increase in non-content costs (or increases smaller than the increases in streaming revenue), the Services will realize increased revenue above and beyond what they needed to survive.

The Services and Copyright Owners recognize the mitigation of harm to the Services generated by these facts (although they may well disagree with the Judges' application of these facts). During colloquy with counsel for Pandora and Spotify during closing arguments on remand, the Judges asked why they should in essence apply the ''misery loves company'' adage:

> [JUDGE STRICKLER] [T]he problem is . . . the sound recording [rates] are unregulated in the interactive market . . . . Congress did not want that to be controlled at all. So every time I see . . . the services' argument about how we have [to] set a rate that's fair even though there's this ability of the sound recording [companies] to take more, my margin note is always this: ''Are they arguing that 'misery loves company?' '' [W]hy shouldn't that misery be shared with Copyright Owners? . . . Isn't that really Professor Marx's argument in her proposed split . . . using the 15.1 percent figure . . . ?
>
> [COUNSEL] [Regarding] Judge Strickler['s] . . . ''misery loves company'' issue. . . . I think . . . the way [Judge Strickler] put it during the trial was, even if I thought rates needed to come down, how would that help you; wouldn't the labels just take all that surplus for themselves based on their complementary oligopoly power? . . . . I want[ ] to address it right off the bat . . . . in open session.
>
> Relat[ed] to . . . the seesaw . . . our point is that *these label rates* are *sticky* in both directions. If you see an increase in musical works rates, *you do not see a quick decrease in label rates, and the opposite is true. These rates are sticky.*
>
> . . .
>
> *There's a lot of friction with respect to the ability of label rates to change quickly* in response to the dynamic marketplace or the dynamic for business reasons or because of regulatory changes in musical works rate. *These are multi-year contracts. They take a long time to negotiate.* They are complex, *et cetera.*
>
> *So, I do think it's right that at a minimum you can buy time where the ratio is more aligned with the 801(b) factors. In other words, you don't have to worry that the labels will take it all right away, even if you believe they will ultimately take that.*
>
> [JUDGE STRICKLER] *So you are saying we have something that reduces misery for a period of time until the misery returns?*
>
> [COUNSEL] *That's right.* And I think that would have been true in 2018 when you were sitting drafting the decision. *It's even more true today in 2022 when the label rates, as I mentioned, are effectively set, bought and paid for.*
>
> 3/8/22 Tr. 29–30, 43–46 (Closing Argument) (emphasis added).

Similarly, on this topic, Copyright Owners' counsel accurately characterized the Judges' adoption of the static 15.1% Shapley-based rate as the inevitable consequence of ''regulatory lag,'' that requires a regulator to keep a rate constant over the statutory term because there is no sufficient data to project future rates. *Id.* at 273–75; *see generally* A. Kahn, 2 *The Economics of Regulation* at 48 (1971) ''The regulatory lag [is] the inevitable delay that regulation imposes in the downward . . . [and] upward adjustments'' to rate levels, and ''thus is to be regarded not as a deplorable imperfection of regulation but as a positive advantage [because] companies can for a time keep the higher profits they reap from a superior performance. . . .'').[39]

[34] As the Judges have consistently noted, this complementary oligopoly power is generated by the concentration of ownership of sound recording licenses for ''Must Have'' repertoires among the three Majors (Sony Music Group, Warner Music Group and Universal Music Group), plus Merlin (a consortium of Indies sometimes referred to as ''the fourth Major''), as indicated by their reported collective 85% share of Spotify's streams in 2018, the first year of the rate period at issue here. *See https://www.midiaresearch.com/blog/smaller-independents-and-artists-direct-grew-fastest-in-2020.*

[35] In subsequent rate periods, the rate remains regulated, but is subject to a different standard—the ''willing buyer-willing seller marketplace standard,'' for shorthand) under 17 U.S.C. 115.

[36] The inverse relationship between changes in the mechanical royalty rate and changes in the sound recording royalty rate has been characterized as the ''seesaw'' effect, which is discussed in further detail infra, with regard to the uncapped TCC rate prong.

[37] Because this proceeding was appealed and remanded, the Judges have the benefit of knowing the ''future'' (beyond 2017), during which U.S. interactive streaming revenues have continued to grow, a fact that is undisputed, and as to which the Judges take administrative notice. *See, e.g.,* RIAA 2018 Year-End Music Industry Revenue Report (available at *https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf;* RIAA 2020 Year-End Music Industry Revenue Report (available at *https://www.riaa.com/wp-content/uploads/2021/02/2020-Year-End-Music-Industry-Revenue-Report.pdf* (interactive streaming revenue increased within this rate period from (approximately) $1.6 billion in 2018 to $7.7 billion in 2019 and $8.8 billion in 2020).

[38] For example, if a royalty is set at a flat rate of 15.1% when a revenue base is $1,000, then the royalty is $151, leaving $849 in revenues to cover other costs which, for this example, are held constant. If the revenue base doubles to $2,000, the same flat 15.1% royalty rate generates $302 in royalties, leaving $1,698 in revenues to cover other costs which, if constant, allow for the additional revenue ($1,698 − $849 = $849) to generate profits.

[39] The Judges emphasize two points that mitigate any negative impact on Copyright Owners from the static nature of the 15.1% revenue rate. First, as a percent-of-revenue rate, it generates more royalty revenue in a growing market, so the quantum of revenue is not static. Second, Copyright Owners' own economic expert witness, Professor Gans, testified that the data in the ''market observations'' from the Goldman Sachs Report on which he relied were the result of ''negotiated rates in the free market and thus ''presumed to . . . fully consider[ ]

Continued

4. Consideration of Factors A–D in Section 801(b)(1)

Finally, the Judges consider the impact of Factors A–D of section 801(b)(1) in connection with the setting of the revenue percentage rate of 15.1%.[40] Regarding Factor A, it cannot be gainsaid that the D.C. Circuit has left this issue unresolved. Rather, *Johnson* unambiguously affirmed the Majority's finding that an increase in the mechanical royalty rate was warranted. Specifically, *Johnson* states that the Majority's decision in this regard met the ''test'' that it be ''supported by substantial evidence [and] reflect a reasonable reading of the record.'' *Johnson, supra,* at 388. Moreover, with regard to the level of the increase, the D.C. Circuit did not disturb the finding by the Majority that ''[t]he rates determined by the Judges represent a 44% increase over the current headline rate, and thus satisfies the Factor A objective. . . .'' Determination at 85.[41]

With regard to Factors B and C,[42] even if *Johnson* were construed as permitting the Judges to revisit this issue, they would not adjust the 15.1% revenue rate on the basis of these two factors. In this regard, the Judges note that the Majority found that the 15.1% revenue rate was not only ''reasonable,'' but also a ''*fair* allocation of revenue between copyright owners and services.'' Determination at 87 (emphasis added). The Majority thus found explicitly that ''with regard to Factors B and C . . . there is no basis to depart from [its] determination of the reasonable . . . rate structure and rates as set forth *supra.*'' *Id.* More particularly, the Majority calculated the 15.1% rate by utilizing the total royalty percentage revenue of only [REDACTED]% as calculated by Spotify's economic expert witness, Professor Marx, whose economic modeling intentionally reflected a conception of fairness by reducing the effect of the labels' complementary oligopoly market power. *See* Determination at 67–68 (noting that Professor Marx testified that this aspect of her model ''represents a *fair outcome* in the absence of market power [and] . . . eliminates . . . market power'' which . . . if left in the economic analysis would ''render[ ] . . . the analysis incompatible with the objectives of *Factors B and C* of section 801(b)(1).)'') (emphasis added).[43]

Accordingly, the Judges find it would be substantively unwarranted to engage in any new consideration on remand of the impact, if any, of Factors B and C on the otherwise reasonable 15.1% revenue rate.[44]

The final itemized statutory factor—Factor (D)—instructs the Judges to consider the ''competing priority'' of ''minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' 17 U.S.C. 801(b)(1)(D). As with Factors B and C, even if Johnson were construed to allow the Judges to revisit this issue on remand with respect to the 15.1% revenue rate, the Judges would not change the Majority analysis or findings. In the Determination, the Judges adopted the following interpretation of this standard set forth in previous determinations:

> [T]he Judges reiterated their understanding of Factor D, concluding that a rate would need adjustment under Factor D if that rate directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 86 (emphasis added).

Also, in order to minimize any economic disturbance to the Services' businesses, the Majority decided to phase-in the 15.1% rate over the five-year rate term, setting annual percent-of-revenue rates as follows: 11.4% in 2018; 12.3% in 2019; 13.3% in 2020; and 14.2% in 2021, before the full 15.1% rate became effective in 2022 the final year of the rate term. *Id.* at 87–88.

On remand, the Services have not made any argument that the rate structure or rates set by the Majority were ''disruptive under this standard.'' [45] In sum, there is insufficient basis for the Judges to change the Majority's application of Factor (D) to the 15.1% revenue rate finding by the Majority.[46]

. . . expectations of future costs and revenues . . . . incorporate[ing] expectations of future values.'' Gans WRT ¶¶ 37–38. On this issue, it is noteworthy that both the Majority and the D.C. Circuit credited Professor Gans's reliance on these projections. *See* Determination at 70 (''The Judges . . . find Professor Gans' reliance on financial analysts' projections for the respective industries to be reasonable.''); *Johnson,* 969 F.3d at 386 (holding that ''[t]he CRB Judges' finding that Gans's . . . reliance on Goldman Sachs' profit projections'' was ''reasonable'' and the] . . . type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the [Copyright Royalty Board's] wheelhouse as an expert administrative agency.'')

Thus, dynamic changes going forward in the rate term are embodied in the 15.1% revenue rate, and dynamic market expectations are incorporated in the modeling data used to establish that rate.

[40] The D.C. Circuit ruled, with regard to the ''*nature of the rate structure,*'' that because it had ''vacat[ed] and remand[ed] . . . for lack of notice'' ''[t]he question whether the [Judges] adequately addressed factors B through D is bound up with the [Judges'] analysis of sound recording rightsholders' likely responses to the new rate structure.'' *Johnson, supra,* at 389. However, the 15.1% revenue rate, viewed separately, is not bound up in the ''rate structure'' issue, which relates to the uncapped TCC prong and how the 15.1% revenue rate may be ''intertwined'' with that second rate prong. As explained *infra,* the Judges are not adopting an uncapped TCC rate prong, so the 15.1% rate is no longer ''bound up'' with the vacated and remanded ''rate structure'' issue, making moot the argument that a new post-remand analysis of Factors B through D is necessary or appropriate. However, on remand, Copyright Owners have placed in issue the ''disruption'' element of Factor D, claiming that the Services have not proven that the uncapped TCC rates and rate prong have or will cause disruption.

[41] The 44% figure cited by the Majority reflects the percentage increase of the headline rate, from 10.5% to 15.1%.

[42] Factors B and C are typically considered jointly, because of the overlap in the objectives of providing a ''fair return'' and a ''fair income'' to the licensors and licensees respectively (the Factor B objectives) and reflecting their relative roles in making the streamed music available to the public (the Factor C objectives). *See Johnson,* 969 at 388 (noting without criticism the joint consideration of Factors B and C; Determination at 85–86 (noting without criticism the several experts' joint consideration of Factors B and C).

[43] Additonal facts support the Majority's finding that the 15.1% revenue rate is fair. The record evidence indicates that the headline percent-of-revenue sound recording rate was between approximately [REDACTED]% to [REDACTED]% in 2017. *See* Marx WDRT ¶ 58, fig 7. When the 15.1% mechanical rate is added to that rate range, the range of the total royalty obligation (based on headline rates) is [REDACTED]% to [REDACTED]%. (Plus, given the phase-in of the rates expressly to avoid disruption, the total royalty obligation would be even lower before 2022, at current sound recording rates.) The evdence pre-remand indicated that the Services were ''surviving'' while incurring noncontent of costs of approximately [REDACTED]% of revenue, leaving about [REDACTED]% of revenue available to pay royalties while still remaining in business. *See* Eisenach WRT ¶ 79 (Copyright Owners' expert economic witness); McCarthy WDT ¶¶ 28–29 (Spotify's Chief Financial Officer.) Thus, even if the Judges were to engage in a *de novo* analysis of the potential applicability of Factors B and C to the 15.1% rate, they would not find any basis sufficient to warrant a downward rate adjustment, beyond the phase-in adopted in the Determination.

[44] However, the Judges take note of their further observation, discussed *supra,* that the combined impact of ''sticky'' sound recording royalty rates and the inevitable regulatory lag provide an additional modicum of fairness with regard to the mechanical royalty rate.

[45] The Judges further discuss the Factor D ''disruption issue *infra* in connection with their analysis of the uncapped TCC prong.

[46] Additional facts further support the Majority's finding that the 15.1% revenue rate is would not be disruptive under Factor D. The record evidence indicates that the headline percent-of-revenue sound recording rate was between approximately [REDACTED]% to [REDACTED]% in 2017. *See* Marx WDRT ¶¶ 14, 19. When the 15.1% mechanical rate is added to that rate range, the range of the total royalty obligation (based on headline rates) is [REDACTED]% to [REDACTED]%. (Plus, given the phase-in of the rates expressly to avoid disruption, the total royalty obligation would be even lower before 2022, at current sound recording rates.) The evidence pre-remand indicated that the Services were ''surviving'' while incurring noncontent costs of approximately [REDACTED]% of revenue, leaving about [REDACTED]% of revenue available to pay royalties while still remaining in business. *See* Eisenach WRT ¶ 79 (Copyright Owners' expert

5. Conclusion Regarding the 15.1% Revenue Rate

For the forging reasons, the Judges do not disturb the Majority's finding that the percent-of-revenue rate at 15.1%, phased-in annually over the rate period, constitutes a ''reasonable'' rate under section 801(b)(1) to be used as the statutory rate for the 2018 to 2022 period.[47]

D. Uncapped TCC Rate Prong

1. Two Post-Remand Rationales for Uncapped TCC Rate Prong

The Determination set forth the following two primary reasons for adopting a ''greater-of' rate structure that also included an uncapped TCC rate prong:

First, the use of an uncapped TCC metric is the most direct means of implementing a key finding . . . by the experts for participants on both sides in this proceeding: the ratio of sound recording royalties to musical works royalties should be lower than it is under the current rate structure. Incorporating an uncapped TCC metric into the rate structure permits the Judges to influence that ratio directly.

Second, an uncapped TCC rate prong effectively imports into the rate structure the protections that record companies have negotiated with services to avoid the diminution of revenue.

Determination at 35–36.[48]

2. Copyright Owners' Position

Copyright Owners claim that the uncapped TCC prong should be adopted. They contend that the D.C. Circuit remand was merely ''procedural'' rather than substantive, and the Judges thus are not precluded from readopting the uncapped TCC prong in this remand proceeding. CO Initial Submission at 35–38 (and record citations therein).

They further contend that the uncapped TCC prong was adopted to provide protection against revenue deferment and displacement occasioned by the Services choosing to elevate the growth of subscribers and other listeners over revenue maximization. *Id.* at 38–43 (and record citations therein). The uncapped TCC prong was first proposed by Google to persuade the Judges to reject Copyright Owners' proposed ''greater-of'' rate structure containing a per-play prong and a per subscriber prong. *Id.* at 43–46 (and record citations therein).

Copyright Owners argue that the uncapped TCC prong should be adopted because: (1) the Services have not shown any actual or threatened ''disruption'' or other harm resulting from the uncapped TCC prong during the 33-month period; (2) the Services actually experienced ''unprecedented growth and profit'' during this period; and (3) the Services paid lower percentages of revenues in mechanical and total royalties when the uncapped TCC prong was in effect. Copyright Owners' Reply Brief on Remand at 34–48 (and record citations therein).

Relatedly, according to Copyright Owners the Services' argument that the ''see-saw'' effect is unsupported by empirical evidence has collapsed, given the evidence relating to market performance. Further Copyright Owners maintain that this argument is irrelevant to the rate structure issue. *Id.* at 48–50 (and record citations therein).

3. Services' Position

The Services argue on remand that the uncapped TCC rate prong must be rejected. The Services reject the ''seesaw'' theory claiming it is disproved by the experience of the parties during the 33-month period. Services' Joint Opening Brief at 48–49; Services' Joint Supplemental Brief at 7–13 (Nov. 15, 2021) (and record citations therein). The Services further contend that Copyright Owners have disavowed the ''seesaw'' theory as understood by the Majority. The Services allege that Copyright Owners now claim that the theory was nothing more than ''a nod'' to certain ''core principles'' of bargaining theory, rather than a specific prediction of a commensurate inverse relationship between increases in the mechanical royalty rate and decreases in the sound recording royalty rate. Services' Joint Supplemental Brief at 2, 5–7 (and record citations therein).

With regard to the uncapped TCC rate prong, the Services assert that Copyright Owners have not even attempted to demonstrate—nor could they demonstrate—that the uncapped TCC rate prong is consistent with all four statutory objectives set forth in section 801(b)(1). Services' Joint Reply Brief at 1, 3–4, 33–34 36 (July 2, 2021) (''Services' Reply''); *see also* Services' Joint Opening Brief at 44–64 (and record citations therein). The Services claim that ''yoking'' the mechanical rate to the ''complementary oligopoly rates extracted by the labels is plainly unreasonable.'' Services' Joint Opening Brief at 44–46. The Services argue that the existence, *vel non,* of any ''disruptive impact'' arising from the uncapped TCC rate prong, is misguided and not dispositive, because it is only one of the four separately itemized factors and, as this factor relates to Copyright Owners' proposed uncapped TCC prong, they bear the burden of proof. Services' Reply at 35–37.

Finally, the Services contend that Copyright Owners have failed to explain their self-contradictory pre-remand argument that ''an uncapped TCC prong 'does nothing to protect Copyright Owners from the Services' revenue

economic witness); McCarthy WDT ¶¶ 28–29 (Spotify's Chief Financial Officer). Thus, even if the Judges were to engage on remand in a *de novo* analysis of the potential applicability of Factor D to the 15.1% rate, they would not find any disruption sufficient to warrant a downward rate adjustment, beyond the phase-in adopted in the Determination.

[47] The Services' assert that the Judges previously found that the reasonableness of the 15.1% rate was subject to revision on remand. In support of this position, the Services cite to the Judges' Order Granting in Part and Denying in Part Copyright Owners' Motion for Reconsideration or, in the Alternative, Clarification at 3, 4 n.7 (January 6, 2022) (Jan. 6th Order). But the Judges said in that interlocutory proposal merely that Copyright Owners were incorrect in their extreme assertion that the Judges could not make an ''alternative rate and rate structure finding . . . except for the re-adoption of the vacated rate and rate structure approach in the *Phonorecords III Determination* [because] . . . [t]hat . . . would . . . be inconsistent with *Johnson* [and] . . . would render the D.C. Circuit's vacating and remanding of the proceeding without force or effect.'' *Id.* at 4, n.7. That did not mean that certain elements of the D.C. Circuit's ruling could be ignored. Further, when the Judges provided the parties with the Judges' *explicitly tentative* ''Working Proposal,'' they did not declare that the 15.1% revenue rate calculation could be revisited. Rather, the Judges ''express[ed] a *concern,* not that the foregoing calculations could be *overridden,* but rather that this analysis . . . is '*incomplete*' . . .'' Jan. 6th Order at 6 (emphasis added). The parties' submissions in response to the Judges' ''Working Proposal'' demonstrated that the 15.1% revenue rate calculation was not ''incomplete'' in the manner that had raised the Judges' concern. Nothing the Judges said in this interlocutory and tentative ''Working Proposal'' constituted a definitive statement regarding the Judges' view of what was and was not subject to review on remand. *See generally merriam-webster.com (defining the adjective* ''*working*'' *in this context as* ''assumed or adopted to permit or facilitate further work or activity . . . a working draft.''). Indeed, a primary purpose of the ''Working Proposal'' was to allow the Judges and the parties to address potential issues and resolutions, without prejudice going forward.

[48] The Majority added two other reasons that are not germane to this remand. In particular, the Majority stated that, compared to the *Phonorecords II* benchmark proposed by the Services, the ''greater-of'' structure with the uncapped TCC rate prong was ''simpler'' to understand than the ''Rube Goldberg-esque'' nature of the *Phonorecords II* rate structure. *Id.* at 36. This issue apparently was not raised on appeal, as it was not mentioned in *Johnson,* and Copyright Owners have not raised the issue on remand. *See* CO Initial Submission, *supra.* (However, the Judges do consider this issue in their analysis of the PR II-based benchmark, *infra.*) The final reason provided by the Majority was that its adoption of an uncapped TCC rate prong was supported by evidence of Google's agreements with labels that included an uncapped rate structure, on which Google had relied to propose, post-hearing, the same greater-of rate structure. *Id.* However, the D.C. Circuit found that Google's proposal was distinguishable, as it was based on a far lower TCC rate (15%) as well as a far lower percent-of-revenue rate (10.5%). The D.C. Circuit thus declined to rely on the Google-based approach as support for the uncapped TCC rate prong. *Johnson,* 969 F.3d at 383.

displacement and deferment.' '' Services' Reply at 43.

4. Application of *Johnson* Findings Regarding Uncapped TCC Rate Prong

The Judges conclude that the D.C. Circuit affirmed the Majority's *derivation and calculation* of the 26.1% TCC rate, but vacated and remanded the Judges' *application and inclusion* of that rate prong in the rate structure. The D.C. Circuit noted that, on appeal, the Services contended that ''it was arbitrary and capricious for the [Judges] to rely on information drawn from different expert analyses in calculating the mechanical royalty rates.'' *Johnson,* 969 F.3d at 384. Thus, the Services were making the same ''information''-based argument in opposition to the calculation of both aspects of the mechanical royalty rates—the revenue percentage prong and the TCC prong. *See also id.* (''the Streaming Services separately leveled objections to the particular percentages adopted by the Copyright Royalty Board to calculate the revenue *and total content cost prongs.*'') (emphasis added)

In fact, both rate prongs were indeed derived from the same analyses. *See* Determination at 75 (table) (showing that both 15.1% revenue rate and 26.2% TCC rate derived from same data—Professor Marx's model showing total royalties as high as [REDACTED]% [Majority's lower bound] and Professor Gans's ''Shapley-inspired'' model showing TCC percent should be [REDACTED]%.)[49]

It is also clear from *Johnson* that the D.C. Circuit found that the Majority had reasonably derived and calculated the 26.2% TCC rate:

> When it came to . . . the ratio of sound recording to musical work royalties that Gans derived from his analysis the [CRB Judges] specifically found . . . reasonable Gans' equal value assumption [for dividing the Shapley surplus . . . between sound recording and musical works owners] and his reliance on Goldman Sachs' profit projections. *That type of line-drawing and reasoned weighing of the evidence falls squarely within the Board's wheelhouse as an expert administrative agency.*

See Johnson, 969 F.3d at 385–86 (cleaned up) (emphasis added). Accordingly, because the identical analysis was performed by the Judges to derive the 26.2% TCC rate as was done to derive the 15.1% revenue rate, the Majority's finding with regard to the *derivation and calculation* of the TCC rate likewise is not subject to further consideration on remand by the Judges.

However, it is equally clear that the D.C. Circuit *vacated* and remanded the Majority's *application and inclusion* of *the 26.2% TCC rate* in a separate ''greater-of'' TCC prong. The defect that generated the vacating on this issue was *procedural*— ''the Streaming Services had no notice that they needed to defend against and create a record addressing such a significant, and significantly adverse, overhaul of the mechanical license royalty scheme . . .'' *Id.* at 382. The consequence of the D.C. Circuit's action, however, was *substantive.* The D.C. Circuit stated:

> This is no mere formality. Interested parties' ability to provide evidence and argument bearing on the essential components and contours of the [Judges'] ultimate decision not only protects the parties' interests, it also helps ensure that the [Judges'] ultimate decision is well-reasoned and grounded in substantial evidence. . . .
>
> The Streaming Services separately challenge the uncapped rate structure as *arbitrary* and *capricious.* In particular, they argue that the rate structure formulated by the [Judges] failed to account for the sound recordings rightsholders' market power. They also object that the [Judges] failed to provide a 'satisfactory explanation, or root in substantial evidence, [their] conclusion that an increase in mechanical license royalties would lead to a decrease in sound recording royalties [the ''inverse relationship'' a/k/a the ''seesaw'' effect].

Id. at 381–83 (cleaned up) (emphasis added). Thus, the D.C. Circuit explicitly declined to address these substantive issues, because of the deficient procedure. Instead, the D.C. Circuit remanded these substantive issues back to the Judges. *Id.* Simply put, *Johnson* found that the absence of notice here could be outcome-determinative. Thus, the Judges categorically reject Copyright Owners' assertion that the remand as to the uncapped TCC rate structure was merely ''procedural.'' The Judges do not accept the notion that the Majority simply committed some ministerial *faux pas* that could be summarily corrected so that the uncapped TCC rate structure could be rubber-stamped on remand. Rather, the Judges' error rendered it impossible for them to consider the pros and cons of such a rate structure without the necessary input from the Services (and, for that matter, Copyright Owners as well).

Because the procedural infirmity precluded the D.C. Circuit from deciding whether the Majority's decision was ''well-reasoned and grounded in substantial evidence,'' there also can be no substantive presumption of the appropriateness of the uncapped TCC rate prong, as suggested by Copyright Owners. To the contrary, the D.C. Circuit's opinion makes it clear that on remand the Judges must engage in a fresh consideration of the statutory appropriateness, *vel non,* of the uncapped TCC rate prong, by weighing and contextualizing the *competing* evidence and testimony entered into the record both before and after the remand.

Accordingly, although Copyright Owners correctly assert that *Johnson* did not find the uncapped TCC rate structure to be ''unfair, unreasonable or inequitable,'' *Johnson* just as clearly did *not* find that structure to be ''fair, reasonable or equitable.'' Rather, the purpose of the remand was for the Judges to make these determinations. Accordingly, the Judges next examine whether setting the statutory mechanical rate as an uncapped TCC rate is ''reasonable,'' as required by section 801(b)(1).[50]

5. Determining Whether Uncapped TCC Rate Prong is ''Reasonable''

a. Rejection of First Rationale for Including Uncapped TCC Rate

Two substantive issues are implicated raised with regard to the issue of reasonableness: (1) whether the ''seesaw'' theory is valid; and (2) if it is valid, whether there exist sufficient data to support the phased-in 26.2% uncapped TCC rate.[51] To demonstrate that this uncapped TCC rate prong and the (phased-in) 26.2% rate are reasonable, Copyright Owners rely on the combined application of two economic models—the Shapley Value model and a Nash Bargaining Model. Accordingly, it is necessary to consider how these two models relate to each other and how these models and their interrelationship impact the setting of the statutory rate.

The D.C. Circuit described the Shapley Value Model methodology:

> The Shapley methodology is a game theory model that seeks to assign to each market player the average marginal value that the player contributes to the market. This methodology first determines the costs that

[49] The reciprocal of Professor Gans's [REDACTED]ratio of sound recording:musical works royalties is [REDACTED], or [REDACTED]%.

[50] The Judges consider *infra* whether any of the four itemized statutory factors require an adjustment to this analysis.

[51] As noted *supr*a, in the Judges' recitation of the parties' remand arguments regarding the uncapped TCC rate prong, they make other arguments as well, specifically regarding: (1)) whether it would be necessary and/or appropriate to adopt this uncapped TCC rate prong to offset revenue deferral and/or displacement by the Services; (2) whether this rate prong has caused, or would cause, economic ''disruption'' to the Services (under Factor D of section 801(b)(1)); (3) whether the uncapped TCC rate prong would satisfy Factors B and C of section 801(b)(1); and (4) whether this rate prong improperly imports the complementary oligopoly power of sound recording licensors. The Judges consider these issues after addressing the issues relating to the ''seesaw'' theory.

each player should recover, then divides the ''surplus'' among the players in proportion to the value of their contributions to the worth of the hypothetical bargain that would be struck.

Johnson, 969 F.3d at 372. The Judges provided a consistent but more detailed definition:

> The Shapley value gives each player his average marginal contribution to the players that precede him, where averages are taken with respect to all potential orders of the players. The Shapley value approach models bargaining processes in a free market by considering all the ways each party to a bargain would add value by agreeing to the bargain and then assigns to each party their average contribution to the cooperative bargain. The idea of the Shapley value is that each party should pay according to its average contribution to cost or be paid according to its average contribution to value. It embodies a notion of fairness. The Shapley model is a game theory model that is ultimately designed to model the outcome in a hypothetical 'fair' market environment. It is closely aligned to bargaining models, when all bargainers are on an equal footing in the process.

Determination at 62–63 (cleaned up).

To apply a Shapley Value Model in a rate proceeding, the economic modeler must obtain usable cost and revenue data to be inputted into the model. More particularly for this proceeding, the modeler must identify the parties' input costs, including the Services' non-content costs, and the revenue derived from interactive streaming.[52] The difference between these revenues and the Services' noncontent costs represents the Shapley ''surplus'' that can be shared among the Services, the sound recording companies and Copyright Owners.

(i) The Shapley Approach of the Parties' Economic Expert Witnesses

(a) Professor Gans's ''Shapley-Inspired'' Model

Professor Gans, Copyright Owners' expert, utilized royalty and profit interactive streaming data for record companies and music publishers that he obtained from ''a [then] recent music industry equity analysis report,'' namely, a Goldman, Sachs Equity Research report dated October 4, 2016 entitled ''Music in the Air, Stairway to Heaven.'' Gans WDT ¶ 76 & n.39. As the Majority summarized Professor Gans's approach, ''[h]e found that, for the music publishers to recover their costs and achieve profits commensurate with those of the record companies under his approach, *the ratio of sound recording royalties to musical works royalties derived from his Shapley-inspired analysis was* [REDACTED] (which attributes equal profits to both classes of rights holders and acknowledges the higher costs incurred by record companies compared to music publishers).'' Determination at 69 (citing Gans WDT ¶ 77 tbl.3) (emphasis added).

Regarding Professor Gans's Shapley-inspired analysis, the Majority stated:

> [T]he Judges find the *ratio* of sound recording to musical work royalties that Professor Gans derived from his analysis to be informative. Professor Gans computed this ratio based on an assumption of equal Shapley values between musical works and sound recording copyright owners. The Judges find this assumption to be reasonable . . . .[53]

Determination at 70. This is part and parcel of the ''line-drawing'' undertaken by the Majority that the D.C. Circuit affirmed. Thus, on remand, the Judges do not find cause to reconsider the Majority's limited adoption of Professor Gans's Shapley-inspired analysis.[54]

(b) Professor Marx's Shapley Value Model

Professor Marx constructed two Shapley Value Models, one of which was relied upon by the Majority. In the model credited by the Majority, Professor Marx assumed one collective owner of sound recording copyrights and one collective owner of musical works. She also assumed the presence of a single interactive service. *See* Determination at 64–68. That approach yielded a total royalty obligation for sound recordings and musical works ranging between [REDACTED]% and [REDACTED]% of the hypothetical service's revenue. Dissent at 133.

Copyright Owners criticized Professor Marx's decision to assume in her model only one interactive streaming service, rather than the multiple services that actually existed. They contend that assumption reduced the market power of the licensors in her model. According to Copyright Owners' economic experts, Professor Marx's approach was a misuse of the Shapley Value Model. They aver that the Shapley Value approach is intended only to eliminate from the rate derivation the bargaining ability of a ''Must Have'' input supplier (like the sound recording companies and Copyright Owners) to ''hold-out'' and thus squeeze licensees for higher royalties. By modeling every possible ''arrival ordering,'' they contend, the ''hold-out'' problem is avoided. They further contend that Professor Marx misconstrued the purpose of the Shapley approach by wrongly modeling market participants in a manner that significantly reduced the actual market power of these ''Must Have'' input suppliers. Determination at 66–67.

The Majority agreed with Professor Marx. The two Judges in the Majority found that her modeling reasonably ''attempts to eliminate a separate factor—market power—that she asserts renders a market-based Shapley Analysis incompatible with the objectives of Factors B and C of section 801(b)(1).'' *Id.* at 68.

Although the Majority ultimately relied upon Professor Marx's modeling in this regard, the Majority found that her data inputs were problematic. Determination at 65. Specifically, Professor Marx relied on 2015 data from Warner/Chappell and Warner Music Group for music publisher sound recording company noncontent costs, respectively. The Majority found that 2015 data was less probative than 2016 data and understated the percentage of revenue to be paid to the two classes of content providers. However, the Majority ultimately found only that this one-year older data served to ''understate'' the allocation of surplus to the upstream content providers, and thus rejected only her lower [REDACTED]% bound for total royalties, The Majority did decide to adopt her upper bound of [REDACTED]% value for total royalties, which could (and ultimately did) ''constitute a lower bound for total royalties in computing a royalty rate,'' applied by the Majority in order to make a downward adjustment to offset the complementary oligopoly effect of ''Must Have'' inputs. *Id.* at 73, 75.

(c) Professor Watt's Criticisms of and Adjustments to Professor Marx's Shapley Modeling

Professor Richard Watt was called by Copyright Owners as a rebuttal witness at the hearing, for the purpose of reviewing Professor Marx's WDT. Watt WRT ¶ 3. He concluded that Professor Marx's Shapley Value Model contains important methodological and data

[52] Identifying useful data is a vexing problem. As one of Copyright Owners' expert economic witnesses, Professor Watt, has written: ''[T]he main problem with the Shapley approach . . . a particularly pressing problem [is] that of data availability.'' R. Watt, *Fair Copyright Remuneration: The Case of Music Radio,* 7 Rev. Econ. Rsch Copyright. Issues at 21, 27 (2010).

[53] The assumption of equal Shapley values is based on the understanding that a sound recording license and a musical works license are both necessary (*i.e.,* perfect complements) in order for a service to stream a song. Determination at 69 & n.122 therein.

[54] Because the ratio of sound recording to musical works royalties that Professor Gans derived from the data and other evidence was the only portion of his testimony on which the Majority relied, and because that reliance was affirmed by the D.C. Circuit, the criticisms of other aspects of Professor Gans's modeling are no longer relevant.

flaws which, in his opinion, caused her to significantly understate the mechanical and overall (musical works + sound recording) royalty rates to be paid by interactive services pursuant to a proper Shapley analysis. *Id.* at ¶ 5.

Professor Watt also criticized her Shapley Value Model for failing to incorporate the fact that ''the different interactive streaming companies—Spotify, Apple Music, Rhapsody/Napster, Google Play Music, Amazon, etc.—do all compete (and rather fiercely) among themselves, offering (perhaps perfectly) substitutable services.'' *Id.* at ¶ 25. Even more strongly in this vein, Professor Watt relied on the following description of the substitutability of the streaming services, *inter se:*

> Each [interactive streaming] service in the increasingly crowded field is working frantically to overcome the perception that the main distinction among the uniformly priced $9.99 a month offering is little more than font style, quirky playlist title and color scheme. . . . [M]usic platforms have long fought against the perception that they're . . . selling a nearly interchangeable product . . . You're getting sold the same car [with] just got a different lick of paint on it.'').

Id. at ¶ 32 n.19.

Professor Watt claimed that incorporating this downstream competition into the model would reduce the Shapley values of the Services and increase the Shapley values for the input suppliers, by recognizing which players provide ''essential inputs'' and which are in competition with other suppliers of substitutable inputs. *Id.*

He further criticized Professor Marx for including in her model ''other distributors'' who are not interactive streaming services. *Id.* at ¶ 27. According to Professor Watt, these other distributors ''do not belong in a properly constructed Shapley Value Model because their presence would ''show up'' in the model as lower revenues for interactive services as their subscribers or listeners left for these other distributors (such as noninteractive services). *Id.*

Additionally, because he criticized Professor Marx's use of 2015 data (as noted *supra*), Professor Watt re-worked Professor Marx's model by examining how the use of 2016 data, as opposed to her 2015 data, would ''better reflect[ ] . . . the reality of the market. *Id.* at ¶ 37*; see also id.* at ¶ 44. When using the (higher) 2016 revenues (and making some relatively more minor adjustments he found necessary), Professor Watt estimated that the share of streaming revenues that would be paid out in total royalties (for musical works + sound recordings) in Professor Marx's model would range from [REDACTED]% to [REDACTED]%. *Id.* at ¶¶ 50–52.[55]

After analyzing these Shapley analyses,[56] the Majority found that the mechanical royalty rate needed to be increased in order to provide Copyright Owners with a reasonable rate as required by section 801(b)(1). As a matter of arithmetic though, if the mechanical rate increased and the sound recording rate did not decrease by a corresponding amount, then the total royalties paid by the Services would increase. That issue brings the Judges to consideration of Professor Watt's bargaining model, on which the Majority relied to posit an inverse relationship (the seesaw effect), by which an increase in the mechanical rate would result in a commensurate reduction in the sound recording rate.

(ii) Professor Watt's Bargaining Model

Professor Watt's Nash Bargaining Model is the linchpin that connects: (a) the higher mechanical royalty rates generated by the Shapley Value results relied upon by the Majority with (b) the assumed lower sound recording rates—a connection that the Majority found to render ''reasonable'' and ''fair'' its uncapped TCC prong. *See* Determination at 73–74 (''As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight (demonstrated by his bargaining model) that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works.''). Alternately stated, Professor Watt's bargaining model result, *i.e.,* the seesaw effect, if sufficiently supported in the record, is the phenomenon that would allow the Judges on remand to apply the Shapley results by increasing the mechanical rate, without unduly exposing the Services to the risk of higher total royalties.

More particularly, the Majority recognized a potential problem that those Judges would have to resolve before utilizing the Shapley Value approach to create an uncapped TCC prong: ''This is problematic because the sound recording rate against which the TCC rate would be applied is inflated . . . both by . . . complementary oligopoly [market] conditions . . . and the record companies' ability to obtain most of the available surplus due to the music publishers' absence from the bargaining table.'' Determination at 73.[57] But the Majority found that Professor Watt had provided a rationale which permitted them to resolve the second problem:

> As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight . . . that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works. 3/27/17 Tr. 3090 (Watt) (''[T]he reason why the sound recording rate is so very high is because the statutory rate is very low. And if you increase the statutory rate, the bargained sound recording rate will go down.'').

Determination at 73–74; *see also* Watt WRT ¶ 23 n.13 (''[I]in my Appendix 3, I show that . . . if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar . . . .''); *see also id.* at ¶ 36 (''The statutory rate for mechanical royalties . . . is significantly below the predicted fair rate, and the statutory rate effectively removes the musical works rightsholders from the bargaining table with the services. Since this leaves the sound recording rightsholders as the only remaining essential input, bargaining theory tells us that they will successfully obtain most of the available surplus.'').[58]

[55] As noted *supra,* when the Majority weighed and credited Professor Watt's entire Shapley analysis, in which his estimate of total royalties was [REDACTED]%, those Judges contextualized Professor Marx's [REDACTED]% total royalty calculation as the lower bound of a zone of reasonable rates, and applied it as a measure that, in their analysis, would offset the complementary oligopoly effect of real-world royalties. Determination at 75 (text and tbl.).

[56] Because his testimony was made in rebuttal, leaving the Services no procedural right to file written testimony in opposition, the Majority gave little weight to Professor Watt's total royalty projections and no weight to his proffered ratios of sound recordings-to-musical works royalties. Determination at 75.

[57] The other problem the Majority needed to resolve was how to deflate the market-based sound recording royalty rates to mitigate the complementary oligopoly effect in those rates. *Id.* As discussed *supra,* the Judges resolved this problem by applying the low total royalty payment sum, [REDACTED]%, from Professor Marx's Shapley Value Model.

[58] In full detail, Professor Watt concluded: ''[F]or every dollar that the statutory rate for musical works undercuts a fair and reasonable rate, the freely negotiated rate for sound recordings will increase by an estimated [REDACTED] cents. That is, if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar, with only a minor change in the total royalty rate for all copyrights combined.'' *Id.* at ¶ 23, n.13; see also *id.,* appx. 3 at 12.

To repeat: *This inverse relationship is what has been described as the ''seesaw'' effect.* The question in this regard on remand is whether the record proves that the seesaw theory is valid and measurable going forward. Alternately stated, does the record prove that Professor Watt's bargaining model serves as the linchpin that would allow the Judges to apply the Shapley results by increasing the mechanical rate, without unduly exposing the Services to the risk of higher total royalties?

To resolve this issue, the Judges examine this bargaining model dispute in detail, as it bears on whether the uncapped TCC rate structure can be incorporated into the statutory rate.

(a) Bargaining Model Dispute

Professor Watt utilized a general Nash Bargaining Model.[59] In his particular application, Professor Watt modeled the streaming services and the labels each as a ''single unit,'' asserting (as is common in Shapley analyses) that this single-unit modeling was done ''for simplicity.'' Watt WRT, appx. 3 at 10. Applying this and other modeling assumptions, Professor Watt posited: ''If there were to be no successful deal, then each of these two bargainers [the assumed ''single'' interactive service and ''single'' label] would earn 0, since in that case the interactive streaming service could not operate.'' *Id.*

In his *oral* testimony at the hearing, Professor Watt did not opine as to whether changes in variables *other than musical works royalties* would also have an impact on the level of sound recording royalty rates, even as higher musical works rates would otherwise place virtually 1:1 downward pressure on the sound recording rate. However, in his *written* rebuttal hearing testimony, *i.e.,* his WRT, Professor Watt *did* make varying assumptions regarding the changes in the Services' non-content costs, by which he did change the total revenue share for content providers. Watt WRT ¶¶ 50–52. He concluded from this varying replication of Professor Marx's Shapley model ''*that the results that it delivers are very dependent upon the amount of total interactive streaming revenue and the fraction of that revenue that is taken up by downstream non-content costs.*'' *Id.* at ¶ 53 (emphasis added).[60]

The Services had no procedural right under part 351 of the Judges' regulations to proffer surrebuttal written testimony from economic witnesses to challenge Professor Watt's assertion, made for the first time in rebuttal, of the seesaw relationship between changes in the musical works royalty rate and the sound recording royalty rate paid by interactive services. Moreover, the Services and their economists also had no opportunity to weigh in on the Majority's application of same (which was not revealed until the Judges rendered their decision). *See Johnson,* 969 F.3d at 381 (''Streaming Services had no notice that they needed to defend against and create a record addressing such a significant, and significantly adverse, overhaul of the mechanical license royalty scheme.'').[61] Now though, on this remand, the Services have been afforded the opportunity to present these criticisms, through their expert witnesses.

(b) Professor Katz's Principal Criticism

Pandora's economic expert, Professor Michael Katz, levied several criticisms of the bargaining model proffered by Professor Watt and applied by the Majority. The most important problem with Professor Watt's analysis, according to Professor Katz, is that the former's model assumes an ''extremely unrealistic'' *zero payoff* to the label in the absence of an agreement with a streaming service—an assumption which is ''far from . . . innocuous.'' Written Direct Remand Testimony of Professor Michael Katz (Katz WDRT) ¶¶ 16, 20.

Professor Katz opines that this *zero payoff* assumption is equivalent to assuming, contrary to undisputed market facts, that: (1) subscribers and listeners to an interactive service would not switch to other interactive services if that service failed to reach an agreement with the labels; and (2) the interactive service is a ''Must-Have'' input supplier. Katz WDRT ¶¶ 17–18. In terms of Nash modeling, according to Professor Katz, Professor Watt's assumption is thus equivalent to ''assum[ing] that the sound recording copyright owners have no *outside option.*'' Katz WDRT ¶ 127 (app. A) (emphasis added).

Moreover, not only does Professor Katz assert the indisputability that such substitution would occur, he points out that *Professor Watt himself* acknowledged in his own testimony that such substitution would occur. Katz WDRT ¶ 19.[62]

Beyond this purported inconsistency, Professor Katz finds Professor Watt's no-substitution assumption to be a serious *modeling* error because, in order to quantify accurately each Nash bargainer's contribution to the net surplus to be divided, the extent of substitutability on each side of the market must be captured by the modeling. Katz WDRT ¶ 20. That is, he opines that ''Professor Watt's assumption that there is no substitution dramatically biases his model toward finding a large seesaw effect and renders his analysis unreliable . . . lead[ing]to a prediction that the share of an increase in musical works royalties that will fall on the streaming services is approximately *eight times* larger than Professor Watt's prediction. *Id.* at ¶ 21.

As a matter of music business dynamics, Professor Katz interprets Professor Watt's substitutability error as follows.

> The assumption that a label receives a zero payoff if it does not reach agreement with a streaming service is equivalent to assuming that, if a streaming service shut down, none of the consumers who would otherwise have used that streaming service will switch to alternative streaming services or other sources of licensed music. The two forms of the assumption are equivalent because, when the services are substitutes, failure to reach an agreement with one service will not drive a label's payoffs from interactive streaming to zero. It will not result in the loss of all of the benefits that could be enjoyed by reaching an agreement. Instead, many consumers would engage in substitution and choose other streaming services, which will allow the label to earn profits from the additional royalties that would be paid to it by those other services.

Id. at ¶ 18.

Professor Katz attempts to adjust Professor Watt's Nash Bargaining Model to account for this substitution effect. In his Appendix A, Professor Katz—acknowledging the reality of multiple interactive services—changes Professor Watt's assumed single label's payoff

[59] The Nash Bargaining Model is one type of game-theoretic approach used by economists to model the distribution of ''gains from trade'' between two parties ''in a manner that reflects 'fairly' the bargaining strength of the different agents. Marx WDRT ¶ 28 n.33 (citing A. Mas-Colell, M. Whinston, and J. Green, *Microeconomic Theory* 838 (1995)). To understand the parties' modeling dispute, it is necessary to appreciate the essential elements of the Nash Bargaining Model, as previously summarized by the Judges: ''In the Nash Framework [for full quotation, see eCRB no. 27063 n.48].'' *SDARS III* Final Determination, 83 FR 65210, 65215 & n.32 therein (Dec. 19, 2018).

[60] The Judges take note here of Professor Watt's presentment of alternative scenarios, because, as discussed *infra,* the Services and their economists accuse Professor Watt of changing his testimony, post-remand, by limiting the scenarios in which his ''seesaw'' argument would apply in order to salvage the credibility of his bargaining model.

[61] The Services could have sought leave to file surrebuttal testimony, and could have challenged the Majority's understanding of Professor Watt's testimony, after the Initial Determination, by filing a Motion for Rehearing pursuant to 37 CFR 353.1. However, a party is not required to engage in either of these procedural approaches, but rather may challenge the Determination on appeal, as has occurred here.

[62] The Judges have quoted Professor Watt's testimony in this regard *supra.*

(designated as parameter ''A'' in the Nash Bargaining Model) from a value of zero to a value equal to ''the share of revenues that would be diverted to other streaming services'' multiplied by ''the royalty rate that the label receives from the other interactive streaming services.'' *Id.* ¶¶ 119, 127. Professor Katz asserts that the diversion to other streaming services represents an ''outside option'' available to a label. *Id.* ¶ 127. Professor Katz incorporates this ''outside option'' in his revised version of Professor Watt's Nash Bargaining Model.

In addition, Professor Katz asserts that Professor Watt's modeling is unreliable because ''his prediction of the size of the see-saw effect is very sensitive to the assumed values of various other parameters.'' *Id.* at ¶ 23. For example, Professor Katz asserts that a change in the royalty rate paid to the labels could materially affect the balance or even the existence of the seesaw effect. *Id.* at ¶ 127. As further support for his opinion, Professor Katz relies on the testimony of one of Copyright Owners' own economic expert witnesses, who gave testimony clearly indicating that the ''seesaw'' effect was not at all likely to occur. *Id.* ¶ 24, n.16 (citing Gans WRT ¶ 32).[63]

In sum, Professor Katz finds Professor Watt's Nash Bargaining Model to be unusable as a foundation to set royalty rates because, although ''there are theoretical reasons to believe that a see-saw effect *may* occur, . . . there are complications and it is difficult to predict how big the effect will be.'' *Id.* ¶ 24 (emphasis added).

(c) Professor Watt's Rebuttal to Professor Katz

In rebuttal to Professor Katz's criticisms, Professor Watt states that ''the record needs to be straight on Nash bargaining theory,'' in order to explain ''the foundational error'' committed by Professor Katz. Watt RWRT ¶ 52. This basic mistake, according to Professor Watt, is Professor Katz's erroneous assertion that the bargaining model must account for a label's ''outside option.'' *Id.* ¶ 53. Relying on economic authority regarding bargaining theory, Professor Watt defines an ''outside option'' as ''the best alternative that a player can command *if he withdraws unilaterally* from the bargaining process.'' *Id.* ¶ 59 (emphasis added); *see also id.* ¶ 53 (''An outside option is a payoff that the label would receive *if negotiations with the service do not result in an agreement.*'') (emphasis added).[64]

Connecting this principle of bargaining theory to economic theory, Professor Watt explains his understanding of the relationship of the ''outside option'' to the more familiar economic concept of ''opportunity cost'':

> An outside option could also be referred to as an ''opportunity cost,'' since it is the value of what would be foregone should a deal with the service actually be struck. It is . . . useful to recognize the equivalence between an outside option and an opportunity cost, because economics in general has a very long history of understanding how opportunity costs weigh in on economic decision making.

Id.

Professor Watt then opines how Professor Katz confused the ''outside option'' with the disagreement (a/k/a threat) point in the Nash Bargaining Model:

> [Professor] Katz claim[s] that the outside option value that the labels would enjoy should they not reach an agreement with the services should be included as part of the ''disagreement point'' within the bargaining model and reimbursed like a cost prior to bargaining. Doing this can dramatically alter the results of the model. It is also definitively not how such an option should be modelled. [Professor] Katz [is] guilty of misunderstanding the Nash bargaining model, and concretely, the meaning of a ''disagreement point,'' and the way that an outside option should be brought into the model.

Id. ¶ 55.

More particularly, according to Professor Watt, these outside options/opportunity costs do not belong in a Nash Bargaining Model, because they are ''not the types of status quo actual financial payments that may be modelled as disagreement points.'' *Id.* ¶ 57. Rather, he asserts that, as Professor Katz essentially acknowledged, they are ''payoffs from *substitution,* [*i.e.,*] an option *instead of* the deal, and they are not actual financial payments, but opportunity costs. *Id.*

Professor Watt then explains that an outside option/opportunity that by definition exists as an alternative to a bargain between two parties lies outside the two parties' bargain, and is thus out-of-place within a proper Nash Bargaining Model:

> In the case at hand, if the parties never stop negotiating and never take up substitute options, then no joint enterprise is offered and there is no surplus to share, so each necessarily gets a payoff equal to 0, just as I assumed in my model.
>
> . . .
>
> [A]gainst this backdrop, an outside option (a potential payoff that is not directly related to a share of the surplus that is being negotiated) . . . comes in [to the model] as a constraint upon the set of feasible deals that could be struck, exactly as an opportunity cost would be treated.

Id. ¶¶ 57–58.

(d) Dr. Leonard's Criticisms of Professor Watt's Bargaining Model

According to Google's economic expert witness, Dr. Gregory Leonard, the Majority wrongly relied on Professor Watt's bargaining model because it is ''highly stylized'' and theoretically ''simplified'' in ways that make it unable to predict that ''an increase in the musical works royalty would be offset nearly dollar-for-dollar by a decrease in the sound recording royalties (the ''seesaw effect''), thus leaving the services virtually unaffected by the proposed increase in musical works royalties.'' Leonard WDRT ¶8.

Pointedly, Dr. Leonard criticizes Professor Watt's bargaining model as comprised of a ''veneer of 'complexity' . . . mathematical formulas and [a] reference to John Nash,'' adopted to provide a rationalization for adoption of his Shapley Value modeling that would significantly increase the mechanical royalty rate.'' *Id.* ¶ 16. These modeling deficiencies, Dr. Leonard asserts, are not merely ''simplifying assumptions [that] better focus on the specific question the model is meant to address,'' but rather ''simplify away economic characteristics . . . entirely abstract[ing] away economic characteristics . . . central to the question at hand.'' *Id.* ¶ 18.

In particular, Dr. Leonard avers that Professor Watt's bargaining model materially abstracts away from, *inter alia:* (1) the nature of consumer demand for streaming services and competing forms of music; (2) how services decide to enter or exit the streaming market; (3) the nature of the oligopolistic interaction among the labels; (4) the nature and timing of the bargaining between each label and each service; (5)

[63] In this regard, Professor Gans testified: ''[When considering] the general distribution of profit when royalty rates for musical works rightsholders are increased[,] [i]n principle, those funds could come from a decrease in service profit, a decrease in sound recording royalties, or an increase in consumer pricing . . . . The general redistribution of profit in response to increased musical works royalties is fundamentally an empirical question. . . .'' Gans WRT ¶ 32.

[64] The phrase ''outside option'' suggests the existence of an ''inside option.'' Indeed, a treatise cited by Professor Watt identifies the ''inside option,'' defining it as ''[t]he payoff the [bargainer] obtains while the parties *temporarily* disagree''—contrasting it with the ''outside option'' as (consistent with Professor Watt's testimony) ''the payoff [the bargainer] obtains if she chooses to *permanently* stop bargaining, and chooses not to reach an agreement with [the counterparty].'' A. Muthoo, *Bargaining Theory with Applications* at 137 (1999).

the potential for ''hold-up'' [65] by labels that perceive the services to be in a vulnerable bargaining position due to their previous industry-specific investments made under their assumption that the pre-existing statutory structure would be maintained; and (6) the failure of Professor Watt's bargaining model to grapple with the complementary oligopoly structure of the sound recording market. *Id.* ¶¶ 18, 20.

These factors, he posited, are ''important for determining how sound recording royalties would *actually* change in response to a change in the statutory musical works royalty.'' *Id.* Professor Leonard concludes that, by not modeling these factors, Professor Watt's ''prediction of a virtual dollar for dollar decrease in sound recording royalties is unreliable as a basis for formulating policy.'' *Id.* ¶ 20.

Regarding the complementary oligopoly structure of the market and its impact on the bargaining process, Professor Leonard emphasizes that an important ''real-world hurdle'' assumed away by Professor Watt's modeling of a single label entity is that ''each label would prefer to have the other labels lower their sound recording royalties while maintaining its own royalties at pre-existing levels . . . .'' *Id.* ¶ 21. More particularly, Dr. Leonard explains that ''even if a label were to recognize that it is more efficient for overall sound recording royalties to be lower, the label may not be willing to lower its royalty rate without assurance that the other labels will do the same,'' a result which he asserts ''is unlikely to happen absent some form of collusive behavior.'' *Id.* Thus, Dr. Leonard maintains that the existence and size of any ''seesaw''-induced decrease in sound recording royalties remains indeterminate, and it remains ''within the realm of theoretical possibility that the labels do not agree to *any* reduction in sound recording royalties even if a reduction in overall royalties would be economically efficient. *Id.*

(e) Professor Watt's Rebuttal to Dr. Leonard's Criticisms

Professor Watt replies with a spirited defense of economic modeling in general and his economic bargaining model in particular. He begins by pointing out that models are not supposed to be ''perfect representations of reality [but rather] are intended to isolate what is important, in order to expose a useful insight on some issue of relevance.'' Watt RWRT ¶ 105. He adds that economic models (not merely his bargaining model) ''*do not necessarily deliver predictions* of situations that are immune to changes in variables outside the model, but rather the results inform conclusions about the relationships between the variables and parameters within the model, [which is] by nature *a crude representation[ ] of reality,* but the lessons and insights that they provide can be very relevant to real-world applications.'' *Id.* ¶¶ 106–07 (emphasis added).

With particular regard to his bargaining model, Professor Watt takes issue with Dr. Leonard's assertion that in the former's model the surplus is a ''fixed constant.'' *See* Watt RWRT ¶¶ 110–111. Rather, Professor Watt avers that his bargaining model assume[s] that when the surplus . . . *whatever value it takes* . . . is to be shared, the parties understand that the amount to be shared is, *at that moment, given*.'' *Id.* ¶ 111 (emphasis added).

Turning to Dr. Leonard's critique regarding the purported distortionary effect of Professor Watt's modeling assumption of a single label and a single interactive service, Professor Watt responds by acknowledging that, if he had modeled multiple labels and services in the bargaining process, that would be ''not particularly enlightening *vis-à-vis* the single bargain setting, as it will not lead to different insights than those distilled by the [Majority].'' *Id.* ¶ 113.[66] Further, Professor Watt characterizes this criticism as ''empty,'' because under either his two-player Nash model or Dr. Leonard's posited multi-player (Nash-in-Nash) model, the labels will not respond to a musical works royalty increase *ipso facto* with a reduction in the sound recording royalty (*i.e.,* the seesaw effect will not occur if there is ''a change in some other variable.''). *Id.* ¶ 114.

(f) Professor Marx's Criticisms of Professor Watt's Bargaining Model

Professor Marx criticizes Professor Watt's application of the Nash Bargaining Model because, in her opinion, its ''precise prediction'' of the nearly one-to-one seesaw relationship ''depends critically on the assumptions that he makes and the numerical inputs that he uses.'' Marx WDRT ¶ 33. First, criticizing his modeling *assumptions,* like Professor Katz, she criticizes his decision to abstract from reality by positing a single label and a single interactive streaming service. She opines that his one label/one service modeling assumption ineluctably leads to his conclusion that each of these two parties ''has a 'disagreement payoff' of zero [meaning that] each party ends up with nothing in the absence of a deal.'' *Id.* ¶ 34. But this zero ''disagreement payoff'' is merely a product of Professor Watt's abstraction from reality, according to Professor Marx, because ''[i]n reality, if interactive streaming went away, a share of the music listening that had occurred through interactive streaming services would migrate to other forms of music distribution, generating revenues for the label . . . *meaning that the disagreement payoff would be positive for the label*). *Id.* (emphasis added).[67] Consistent with Professor Katz, she maintains that Professor Watt himself acknowledged the presence of this substitution effect when he testified that ''[t]he existing interactive streaming companies do not hold an essential input, as first they compete with the non-interactive services . . . .'' *Id.* ¶ 35, n.43 (citing Watt WRT, app. 3).

More particularly, Professor Marx maintains, a record label's disagreement payoff must be considered realistically ''in any accounting of what would happen if record labels and interactive streaming services failed to reach an Agreement . . . .'' Marx RWDT ¶ 35. And, she opines, when this real-world substitution effect is taken into account, the seesaw effect that Professor Watt estimates is reduced dramatically, because ''[t]he greater . . . the substitution between streaming and other forms of distribution, the greater is the revenue that the record label can capture in the event of disagreement

[65] A hold-up problem occurs when: (1) parties to a future transaction must make specific investments prior to the transaction in order to prepare for it; and (2) the exact form of the optimal transaction (*e.g.,* how many units if any, what quality level, the time of delivery) cannot be specified with certainty *ex ante.* W. Rogerson, *Contractual Solutions to the Hold-Up Problem,* Rev. Econ. Stud. 777 (1992). Here, the interactive services may need to commit to paying for long-term investments, even though they cannot know the level of their largest costs (content royalties) beyond a single rate term.

[66] Professor Watt describes Dr. Leonard's multiple simultaneous negotiations in a bargaining model as a ''Nash-in-Nash'' model, but the former does not explain why he concludes that this approach ''will not lead to different insights'' than those the Majority distilled from his two-party Nash model.

[67] Professor Marx's reference to a substitution from a shutdown interactive service to ''other forms of music distribution'' is different from, but analytically analogous to, Professor Katz's assertion that the shutdown of any one interactive service would result in migration of its subscribers and other users to the remaining interactive services. These analogous critiques are complementary. *See* Marx WDRT ¶ 37 (''One would expect the same decrease in the estimated see-saw effect by including a second, competing interactive streaming service in the market instead of just the one that Professor Watt uses. In that case, if no deal is reached, users would migrate to an even closer substitute—a competing interactive streaming service—resulting in an even higher degree of profit migration and thus an even lower estimated see-saw effect'').

and the lower is the estimated see-saw effect.'' *Id.*[68]

Professor Marx opines that modeling the bargaining process without these real-world particulars diminishes the value of Professor Watt's Nash model in several significant ways. First, because his model fails to incorporate the presence of three major record labels, ''each with substantial complementary oligopoly power,'' it fails to capture the fact that ''each record label does not fully internalize the impact of its rates on the viability of the industry.'' *Id.* ¶ 39. She points to the Judges' Final Determination in *Web IV,* where the Judges note how this aspect of complementary oligopoly compromises the value of a rate as a useful benchmark. *Id.* ¶ 39 n.45 (quoting *Web IV* Final Determination). More particularly, she opines that when, as here, ''there are multiple negotiations between multiple record labels and multiple services,'' sound recording rates can be affected ''by the order of negotiations'' among the several label:service negotiating pairs—a factor that Professor Watt's bargaining model fails to capture. Marx WRDRT ¶ 41.

Next, Professor Marx avers that Professor Watt's bargaining model ''does not explain how or over what time frame the market would move to a new equilibrium.'' *Id.* ¶ 40. More particularly, she testifies, because interactive services' ''agreements with record labels often contain multi-year terms and can take many years to negotiate . . . there may be little incentive or practical ability for both sides to move to a new rate before the contract expires''. *Id.* ¶ 41. She takes note that this point was established at the hearing during questioning of Professor Watt from the bench:

> JUDGE STRICKLER: What of the situation . . . that the . . . time period for the existing agreements between the . . . labels and the interactive streamers is such that they've already locked in a particular rate and then we set a rate that's higher for the mechanical to reflect the fact that the sound recording royalty should drop, but it's locked in for a period of time? Are we running the risk, then, of disrupting the market by having a total royalty that's greater than what is indicated by your Shapley testimony, simply because of the disparity of times in which the rates are . . . implemented?
>
> PROFESSOR WATT: That's a very fair point. And I didn't even think of that until you've mentioned it . . . [T]he model I have done is . . . assuming that . . . the bargained thing happens at the same time as the—or in the same general period of time as a change in the statutory rate. You're absolutely correct.

3/27/17 Tr. 3091–92 (Watt); *see* Marx WRDRT ¶ 42, n.46

Third, Professor Marx points out that Professor Watt's Nash model does not attempt to capture the effects of the heterogeneous and asymmetric distribution of information relevant to the bargain available to each party at the time of negotiation. *Id.* ¶ 41.

Lastly, Professor Marx avers that Professor Watt's Nash Bargaining Model fails to address, on a more general basis beyond informational issues, other ''asymmetries among record labels and among services.'' Marx WDRT ¶ 41.

In sum, Professor Marx concludes that these foregoing real-world points all preclude the Judges from relying on Professor Watt's testimony to identify a stable relationship between changes in the mechanical royalty rate and the sound recording royalty rate because they all share a common defect—they ''lie outside Professor Watt's model.'' Marx WRDT ¶ 41.

To be clear, Professor Marx does not criticize Professor Watt for neglecting to include these points in his bargaining model; rather, she acknowledges that ''[t]hese are difficult features to capture in a tractable equilibrium model.'' *Id.* Indeed, she urges *the Judges* to appreciate that relying on such a necessarily limited model, as the Majority did, can have ''dramatic effects'' on the royalty rates derived. *Id.* Professor Marx emphasizes that all of these inherent modeling deficiencies are especially pernicious, if the bargaining model is applied yet again on remand, to set specific rates *over a five-year period,* when other variables will have independent effect on royalty rates. *Id.*

(g) Professor Watt's Rebuttal to Professor Marx

Because Professor Marx's criticisms are of a similar nature to Professor Katz's criticisms, Professor Watt responds to Professor Marx as he did to Professor Katz. To summarize, Professor Watt responds to Professor Marx's points as follows:

- Her criticism is centered on what he characterizes as her ''bogus'' argument that he supposedly had predicted almost a ''dollar for dollar'' sound recording rate reduction in response to an increase in the musical works rate (the seesaw effect). Watt RWRT ¶ 19. Professor Watt finds this argument ''particularly disheartening,'' because Nash bargaining theory explains why the seesaw would apply to the splitting of the surplus based on the available data, and that ''there are quite apparent reasons why available surplus may not decrease even if the musical works rate increased, *because of simultaneous changes to other variables in the model.*'' *Id.* ¶ 34 (emphasis added).
- Professor Marx implicitly contradicts her own reliance on the complementary oligopoly power of the Major labels by modifying his bargaining model through the insertion of a lower value for their bargaining power. *Id.* ¶¶ 19, 22–24, 26.
- Professor Marx misconstrues the purpose of his Nash model, which was to serve ''as a reply'' to Professor Marx's direct testimony, and ''to show bargaining insights that bore upon aspects of the case.'' *Id.* ¶ 29.
- Professor Marx, like Professor Katz, improperly includes in her bargaining model a potential payoff for the label arising from an ''outside option,'' *i.e.,* from an alternative that the label can choose only if the Nash bargaining terminates. *Id.* ¶¶ 53—68.

(h) Professor Marx's Reply to Professor Watt's Criticism[69]

In her supplemental remand testimony, Professor Marx challenged several of Professor Watt's criticisms contained in his remand testimony. First, she takes issue with what he identified as two ''core'' economic principles of bargaining: (1) that all of the available net surplus will be shared; and (2) that neither of the two bargainers will demand a share such that more than the total net surplus is shared. Marx WSRT ¶¶ 7–8.

As an initial matter, she disputes the notion that these are ''core'' principles of bargaining. *Id.* ¶ 8. More particularly, she states that, in the present case, because ''the label does not know with exactitude the precise maximum that a service would be willing to pay (*i.e.,* its ''survival'' rate), and the service likewise does not know the exact minimum that the label would be willing to accept,'' the simple bargaining model must be expanded to address ''the potential for delay and/or bargaining breakdown.'' *Id.*

As a further criticism, Professor Marx avers that ''[i]n the real world, the negotiated royalty outcomes do not involve just two parties, but rather a sequence of overlapping, interrelated,

[68] In the context of the bargaining model, Professor Marx identifies Professor Watt's choice of ''a market structure that is completely symmetric between record labels and services not reflective of the real world'' as forcing his model ''to attribute[ ] all the . . . surplus division to . . . bargaining power . . . and none of it to the market structure.'' *Id.* ¶ 38.

[69] The Judges found that Professor Watt's remand testimony, denoted as ''rebuttal,'' also provided *de facto* ''direct'' testimony, to which the Services could respond with supplemental testimony and argument. Oct. 1st Order at 11–12. Professor Marx's response in the following text was set forth in Spotify's permitted supplemental testimony.

bilateral bargains involving multiple competing services and multiple record labels with complementary oligopoly power.'' *Id.* ¶ 12.[70] This complication, she opines, exacerbates the informational deficit noted in the immediately preceding paragraph, such that negotiations within the several pairings of labels and services ''are affected by uncertainty and private information and . . . Professor Watt's discussion of bargaining theory [thus] does not support any particular real-world see-saw outcome.'' *Id.*

(iii) Resolution of the Bargaining Dispute

(a) Professor Watt's Nash Bargaining Model Does Not Support Adoption of Uncapped TCC Rate

The purpose of Professor Watt's Nash Bargaining Model was to allay the Judges' concern that increasing the mechanical rate would lead to higher total royalties for the Services. His bargaining model was understood by the Majority to show that such higher total royalties would not result, because the model demonstrated the ''seesaw'' effect, whereby the sound recording rate would fall almost dollar-for-dollar with the increase in the mechanical rate. *See* Determination at 73–74 (''[T]he Judges rely on Professor Watt's insight . . . *demonstrated by his bargaining model* that sound recording royalty rates in the unregulated market will decline in response to an increase in the compulsory license rate for musical works. . . . Professor Watt's bargaining model *predicts* that the total of musical works and sound recordings royalties would stay 'almost the same' in response to an increase in the statutory royalty.'') (emphasis added).[71]

On the surface, the economic experts on both sides appear to be at loggerheads regarding the existence and applicability of the seesaw relationship. However, as discussed below, on further analysis of their respective positions, in light of Professor Watt's remand testimony regarding *a key assumption* in his bargaining model, their disagreement narrows considerably and—in an important respect—vanishes completely.[72]

To recap: In his WRT, Professor Watt stated

> [W]ith an appropriately modelled bargaining analysis . . . in my Appendix 3 . . . I show that for every dollar that the statutory rate for musical works undercuts a fair and reasonable rate, the freely negotiated rate for sound recordings will increase by an estimated [REDACTED] cents.
>
> That is, if the musical works rate is increased to what would be a realistically fair and reasonable rate, then the negotiated fee for sound recordings would decrease almost dollar for dollar, with only a minor change in the total royalty rate for all copyrights combined.

Watt WRT ¶ 23 & n.13. But nowhere in his WRT did he qualify this statement by explicitly acknowledging that in his bargaining model there are certain assumptions lurking, *i.e.,* that his ''concrete'' analysis is subject to the ''*ceteris paribus*'' constraint—that all other things are held constant (*i.e.,* equal before and after the change in the musical works rate) other things being equal).[73]

It is only in his later remand testimony—after the D.C. Circuit's remand had compelled him to confront criticism from adverse economists—that Professor Watt expresses this assumption overtly, making explicit the ''understanding'' that he had theretofore only tacitly assumed:

> In other words, a model in which only the two copyright rates are permitted to change . . . as was the *understanding* in my original model, allows the system to derive a clear relationship between those two rates, and that relationship is that an increase in one leads to a decrease in the other, that is, the 'see-saw effect.' But if . . . something else changes along with the musical works rate . . . then *the net effect does not predict that the negotiated rate of the labels will decrease.*''

Watt RWRT ¶ 35 (emphasis added).

Indeed, as noted *supra,* Professor Watt *did* give a nod to the relaxing of his implied *ceteris paribus* assumption in his WRT, by identifying varying ''scenarios'' in which he considered the impact of potential changes in service revenues and service non-content costs, leading to different percentages of royalties paid to content providers. Watt WRT ¶¶ 45–52. Professor Watt then used these several assumptions and scenarios to opine as follows: ''The message that should be taken from this exercise . . . is that the results . . . are very dependent upon the amount of total interactive streaming revenue and the fraction of that revenue that is taken up by downstream non-content costs.'' *Id.* ¶ 53.[74]

Professor Spulber, on behalf of Copyright Owners, likewise emphasizes on remand the importance of the *ceteris paribus* assumption in economic modeling:

> [A]long with an increase in the compulsory license rate, *all other things being equal,* we would expect to see a decrease in sound recording royalty rates.
>
> . . .
>
> ''All other things being equal'' (*ceteris paribus* in Latin), is a central principle for economic modelling. This economic analysis of bargaining highlights an important relationship between two content cost variables. However, that relationship does not exist in a vacuum. *Many other variables affect the bargaining situation and, for any given period, the net effect of all of the different variables may be different than the effect of the modeled variable alone.* Thus, this economic analysis of bargaining will not assure that a streaming service will not face disruption in the real world for any reason.
>
> . . .
>
> Economic modeling is supposed to simplify the situation in order to distill useful principles and teachings.

Spulber RWRT ¶¶ 26–28 (emphasis added).

The Judges agree that the *ceteris paribus* principle[75] is a fundamental

[70] In like manner, Professor Marx opines that Professor Spulber's discussion of bargaining theory is irrelevant to any assessment of ''the complexities affecting real-world negotiations'' and the presence, *vel non,* of a seesaw outcome. *Id.* ¶ 13.

[71] Copyright Owners note the Majority's recognition that, regardless of the rate structure, *i.e.,* uncapped TCC or otherwise, Professor Watt's ''insight'' from ''bargaining theory'' would still apply. *See* Determination at 74, n.138. That being the case, the Majority's first rationale for adopting an uncapped TCC rate is undermined.

[72] This is unsurprising. The difference of opinion among economists often lies in their assumptions, which may be left unstated or opaque (intentionally or not). Once those assumptions are laid upon the table, their differences often evaporate. As the esteemed economist Fritz Machlup noted more than sixty years ago: ''The most prolific source of disagreement lies in differences of factual assumptions. It is not customary for experts to state all the assumptions that underlie their conclusions; it would be much too cumbersome. But when they have reached very different conclusions, then we are forced to go back and find out what implicit assumptions they have made.'' F. Machlup, *Why Economists Disagree,* 109 Proceedings of the American Philosophical Society 1, 3 (1965). In the modern world of more formal economic modeling as well, the obfuscation of assumptions continues to be an important source of dispute, according to a book written by a leading game theorist upon which Professor Watt relies in his testimony. A. Rubinstein, *Economic Fables* at 20 (2012) (''[T]he model's formal mantle enables economists . . . to conceal from the layman the assumptions the model uses.''); *see* J. Schlefer, *The Assumptions Economists Make* at 29 (2012) ([S]ome assumptions made by economists capture important insights, others are insane. All you have to do is decide which capture insights, which are insane, and in which situations.'')

[73] In his oral testimony, Professor Watt likewise did not qualify his opinion by taking note of his *ceteris paribus* assumption. See 3/27/17 Tr. 3026 *et seq.* (Watt).

[74] Further, in his remand testimony, Professor Watt points out that Professor Katz made clear in his testimony that he applied the ''all else equal'' assumption expressly in his own Nash bargaining analysis at the hearing. Watt RWRT ¶ 20 (quoting Katz WRT ¶ 67).

[75] The phrase is often translated into English as ''all other things *equal.*'' However, that is somewhat ambiguous. Equal to what? Not to other things. Rather, every ''thing'' (*i.e.,* every other independent variable) whose effects are not being measured

Continued

principle in economic analysis and modeling. Professor Watt succinctly makes this point, quoting the Nobel laureate economist James Buchanan, for the following proposition:

> At the heart of any analytical process lies simplification or abstraction, the whole purpose of which is that of making problems scientifically manageable. In the economic system we recognize, of course, that 'everything depends on everything else,' and also that 'everything is always changing'.

Watt RWRT ¶ 32 (*quoting* J. Buchanan, *Ceteris paribus: Some Notes on Methodology,* 24 *So. Econ. J.* 259, 259 (1958).

However, Professor Watt does not quote another portion of Professor Buchanan's article that makes a point that looms large in the present proceeding, *to wit,* the *limitations* inherent in applying the necessary *ceteris paribus* condition:

> Real problems require the construction of models, and the skill of the scientist is reflected in the predictive or explanatory value of the model chosen. We simplify reality to construct these models, but the fundamental truth of interdependence must never be forgotten. . . . [However,] *[f]ew, if any, meaningful results may be achieved by using ceteris paribus to eliminate the study of large numbers of variables.* If such variables are closely related, they must be studied simultaneously; there is no escape route open.

Id. at 259–60 (emphasis added); *see also* A. Rubinstein, *Comments on Economic Models, Economics, and Economists: Remarks on Economics Rules by D. Rodrik,* 55 J. Econ. Lit.162, 167 (2017) ''[W]hat matters to the empirical relevance of a model is the realism of its *critical* assumptions'') (emphasis added).[76]

This is not to say that Professor Watt was unaware of this caveat. As noted *supra,* he recognizes the difficulty of extrapolating from a *ceteris paribus* world to the real world. The present panel of Judges likewise recognizes this. However, the Majority missed this distinction in the Determination when it applied Professor Watt's correct but *ceteris paribus* ''insight'' for a constant real-world relationship between sound recording and musical works royalty rates. Again, not a single economist made this improper analytical leap or proposed an uncapped TCC rate in order to set a TCC ratio across the entire rate term. Indeed, on careful inspection, no economist states in his or her remand testimony that Professor Watt's bargaining model provides economic support for the uncapped TCC rate prong.

With the foregoing testimony in mind, the Judges see particularly relevant several additional points in Professor Watt's *remand* rebuttal testimony that pertain to the appropriateness, *vel non,* of a TCC rate prong. Referring to the application of his bargaining model to the present case, Professor Watt made these crucial statements regarding the lack of a seesaw effect that would generate decreases in sound recording rates when the mechanical rate is increased:

> [T]he actual effects one would expect to see several years later would be based on the actual data at that time. Moreover, I would expect many other variables to have a larger effect on the bargains than the relatively small changes in the musical works rate. . . . [U]nderstanding actual market outcomes requires understanding these variables.
>
> . . .
>
> [A]n attempt to capture all aspects of the real world is too complex for a simple statistical exercise involving an econometric regression. There is no obvious data to actually use for some of the independent variables, such as consumer demand equations, costs of entry and exit, a measure of oligopolistic interaction, different timings of different rate bargains, and the actual values of outside options.

Watt WRWT ¶¶ 6(iv), 118.[77]

Although Professor Watt was hardly transparent in *disclosing* his *ceteris paribus* assumption in his original testimony, it seems clear that he always *understood* its presence, and that, when this assumption was relaxed, ''the actual effects . . . several years later would be based on the *actual data at that time* [and] *many other variables [with] a larger effect on the bargains than the relatively small changes in the musical works rate.*'' *Id.* ¶ 6(iv) (emphasis added).

Professor Spulber likewise opined that the absence of an explicit statement of these assumptions in Professor Watt's testimony was unremarkable and appropriate:

> [A]ll other things being equal'. . . should be generally read into economic modeling conclusions or predictions, whether or not the words are repeated in each instance. Economists do not typically repeat these words in each place where they apply, since it would lead to constant repetition.

Spulber RWRT ¶ 46, n.8.

Regardless of whether economists invariably identify the existence of implicit assumptions lurking in each other's models, Professor Watt overlooked a cardinal rule of communication: *Know your audience.* Here, his audience is comprised of three Judges, only one of whom is also an economist.[78] Failing to appreciate Professor Watt's implied *ceteris paribus* assumption, the Majority transformed his limited (albeit important) ''insight'' regarding the equal split of the Shapley surplus between the two classes of rights holders—and the seesaw effect that would have if the mechanical rate were increased when the split was imposed—*into a justification for the imposition of an uncapped TCC rate prong over the five-year rate term.* The Majority's language reveals this point clearly:

> As to the issue of applying a TCC percentage to a sound recording royalty rate that is artificially high as a result of musical works rates being held artificially low through regulation, the Judges rely on Professor Watt's insight . . . *demonstrated by his bargaining model* that sound recording royalty rates in the unregulated market *will decline in response to an increase in the compulsory license rate for musical works. See* 3/27/17 Tr. 3090 (Watt) (''[T]he reason why the sound recording rate is so very high is because the statutory rate is very low. And *if you increase the statutory rate, the bargained sound recording rate will go down.''*)
>
> Professor Watt's bargaining model *predicts* that the total of musical works and sound recordings royalties would stay ''almost the same'' in response to an increase in the statutory royalty. *Id.* at 3091.

Determination at 73–74 (emphasis added).

Making the point ever so plainly, Professor Watt *now* expressly acknowledges that his '' 'see-saw effect' was never really a '*prediction*' '' at all! Watt RWRT ¶ 117. Rather, he now cautions the present panel of Judges, that, ''to make the jump from the model to the actual real-world effects, one cannot ignore the words that are omnipresent in all economic modeling,

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remain ''constant,'' or ''controlled,'' *i.e.,* ''equal'' to their measure prior to the change of the independent variable being examined. *See* W. Nicholson, *Microeconomic Theory: Basic Principles and Extensions* at 649 (9th ed. 2005) (defining ''*ceteris paribus*'' as ''[t]he assumption that all other relevant factors are held constant when examining the influence of one particular variable in an economic model'').

[76] The Judges note now that Professor Watt did not claim that his bargaining model generated any *predictions,* but rather that it explained the splitting of the Shapley surplus by the sound recording and musical works copyright owners, respectively, and the impact of that split on royalty rates, *given the assumptions and the data in his model.*

[77] In the language of econometrics, Professor Watt describes this problem as the ''almost sure[ ] impossibil[ity] of ''introduce[ing] a control variable for each and every possible aspect that could potentially impinge upon the relationship [that] could easily lead to such a low R^2, and/or statistically insignificant key coefficients, as to make the regression meaningless.'' *Id.* ¶ 118.

[78] The dissenting Judge (the only economist on the panel) warned that the seesaw effect was rife with assumptions that rendered it too speculative to be relied upon to support the uncapped TCC rate prong. *See* Dissent at 7–8.

that predictions about causal relationships are understood to be ''all else equal.'' *Id.* ¶ 32.

Without the benefit of these caveats regarding an extrapolation of the ''seesaw'' theory to the real-world, and with absence of an explicit statement of the *ceteris paribus* assumption, the Majority misapplied his testimony as a basis to adopt a fixed TCC rate, based upon data from a snapshot in time (2016) to cement that rate relationship for the entire five-year period.[79] The Majority misapplied Professor Watt's *correct* insight from bargaining theory regarding the use of a fixed ratio for the equal division by two ''Must Have'' input suppliers of the Shapley surplus to set royalty rates in a period, by using that insight *incorrectly* to establish a fixed ratio of royalty rates over the rate term.[80]

[79] The importance of Professor Watt's failure to make explicit the *ceteris paribus* assumption in his WRT is demonstrated by his need to make it explicit in his RWRT. But even now, rather than acknowledge that the Majority missed the point, he claims that the Services' are wrongly blaming the Majority for failing to understand this assumption: ''The Services' testimony on this remand seems primarily focused on creating a ''straw man'' argument . . . accus[ing] the [Majority] of something that the [Majority] did not do—that is, rely on a guarantee of a particular decrease in sound recording royalty rates—and the Services then attack the Board's determination by claiming that the decrease did not occur.'' Watt RWRT ¶ 5. As shown *supra,* however, this is precisely how the Majority interpreted Professor Watt's ''insight.'' The Judges understand that, as a matter of tact and tactics, Copyright Owners may be reluctant to acknowledge that the error lies in the combination of their witness's opaque testimony and the Majority's lack of understanding of the assumptions economists make. Copyright Owners might prefer to cast the Majority as the victims of the Services' incorrect accusation. But the plain language of the Determination belies Copyright Owners' characterization as to how the confusion arose.

[80] The forgoing analysis as applied to the uncapped TCC rate needs to be contrasted with the application of Professor Watt's bargaining model to increase the percent of-revenue rate to 15.1%. That higher rate was set by the Majority after its consideration of the same Shapley approaches, pursuant to the Judges' combination of inputs from Professor Gans model (his [REDACTED] round recording-to-musical works ratio) and the Shapley Value Model of Professor Marx that adjusted for complementary oligopoly power by establishing a lower total royalty level ([REDACTED]%). But the difference is that the 15.1% revenue rate was set by applying the Shapley results *based on actual and projected market data, see* Gans WRT ¶ 38, whereas the uniform uncapped TCC rate (26.2%) was based on the *ceteris paribus* assumption that held constant the actual data regarding the aforementioned independent variables. As explained above though, Professors Watt and Spulber make it clear that the ''insight'' from bargaining theory did not have implications to allow for a ''prediction'' of rates in future periods.

Thus, when the Majority engaged in its analysis and ''line-drawing'' to apply the data and market projections relied upon by Dr. Gans's data, the Majority was operating—to use the D.C. Circuit's phrase—in its ''wheelhouse,'' making a finding that withstood appeal. *Johnson, supra,* 969 F.3d at 385–86; *see also* Determination at 69–70 (''Professor Gans utilized data from projections in a Goldman Sachs analysis to identify the aggregate profits of the record companies and the music publishers, respectively. . . . The Judges also find Professor Gans's reliance on financial analysts' projections for the respective industries to be reasonable.'').

Additionally, an examination of the expert economists' testimony reveals that their facial disagreements vanish once the necessary assumptions are laid bare. Professor Watt and the Services' three economists all identify the following independent variables that will impact the relative levels of sound recording and musical works rates paid by interactive services:

(1) the level of downstream consumer demand;
(2) entry costs;
(3) exit costs;
(4) oligopolistic interaction;
(5) the timing of sound recording agreements *vis-à-vis* statutory rate setting; and

Professor Watt and the three Service economists agree with regard to the relevancy of these six independent variables. *Compare* Watt RWRT ¶¶ 6(iv), 118 (identifying all five independent variables) *with* Leonard WDRT ¶ 18 (identifying independent variables 1–4 above); Marx WDRT ¶¶ 4–5, 42; (identifying independent variables 1–5 above); Katz WDRT ¶¶ 127, 134 n.115 (identifying independent variables 4 and 6 above). Accordingly, the remand record shows a consensus as to the lack of modeling of independent variables that would be important to estimate an uncapped TCC royalty ratio that could be utilized by the Judges to lock-in a ratio over the rate term.

Indeed, as noted *supra,* a careful reading of the remand testimony by Copyright Owners' economists, Professors Watt and Spulber, reveals that neither of them actually testifies that there is sufficient theoretical and empirical evidence to support the uncapped TCC rate prong and the 26.2% TCC rate phased in on that prong. Rather, those two witnesses testify to something far narrower: the alleged correctness of Professor Watt's ''seesaw'' theory as demonstrating an equal splitting of the surplus between the two ''Must Have'' input suppliers, and the effect of that split when all other relevant independent variable are held constant.

In this regard, it is noteworthy that none of Copyright Owners' several economic experts in this proceeding (Dr. Eisenach, Professor Gans, Dr. Rysman, or Professor Watt) ever *proposed* an uncapped TCC rate prong in any form, let alone within a greater-of formulation. Such a proposal would have been improper, because, as the expert testimony described above makes clear, the *ceteris paribus* assumption, reasonable for modeling purposes to provide insight as to the surplus split, lacks the input of the omitted variables that the experts on both sides find relevant to the application of economic modeling in this proceeding. A further review of Copyright Owners' economic expert witness testimony on remand—the first time any of them had occasion to weigh-in on the appropriateness of the uncapped TCC prong—reveals that they also *have not endorsed* the uncapped TCC rate prong as a proper form of rate setting. To be sure, they strongly endorse the insight first described by Professor Watt in his WRT that the Nash surplus would be split essentially evenly between the two suppliers of essential content, given his simplifying assumptions. But such endorsement is hardly the same as endorsement of the uncapped rate prong itself.

For these reasons, the Judges find erroneous the Majority's identification of a fixed relationship between the sound recording and mechanical royalty rates that could serve as a basis for the Majority's first rationale for yoking the mechanical rate to an uncapped TCC rate prong.

(b) The Services Have Not Rebutted Copyright Owners' *Prima Facie* Showing That Professor Watt's Model Demonstrates a More Limited ''Seesaw'' Effect

The foregoing analysis and decision related to the absence of a fixed relationship between the sound recording and mechanical royalty *rates.* A *separate* fixed relationship—the one Professor Watt has clarified he was demonstrating all along—is that if the Judges increase the mechanical royalty rate, the Shapley surplus realized by the labels will decrease almost dollar-for-dollar with the increase in the mechanical rate. The Services' economists aver that even this version of the seesaw is defective.

According to Professors Katz and Marx, the Nash Bargaining Model constructed by Professor Watt is deficient because it fails to properly characterize the ''disagreement payoff'' to the sound recording company when it and an interactive service fail to reach an agreement. More particularly, as explained *supra,* they assert that Professor Watt's model omits the value of ''outside options'' available to the sound recording company. This criticism relates to the issue of whether the seesaw effect would occur as posited in Professor Watt's model. That is, the increase in the sound recording

company's ''disagreement payoff'' (a/k/a ''threat point'') would lead to a higher royalty in the Nash bargain between the sound recording company and the interactive service than needed to generate the seesaw effect to offset the higher mechanical royalty rate.

As the several experts' positions in this regard, discussed *supra,* make clear, however, each side has a different understanding of whether an ''outside option'' is properly included in the definition and calculation of the ''disagreement payoff.'' On the one hand, Professors Katz and Marx claim that the existence and value of ''outside options'' should be included in the ''disagreement payoff.'' However, they provide no economic authority for that assertion.

By contrast, Professor Watt cites to multiple economic game theory publications and authorities for the proposition that the presence and value of ''outside options'' are not to be included in the ''disagreement payoff'' contained in a Nash Bargaining Model. *See* A. Muthoo, *Bargaining Theory with Applications* at 105 (1999) (''I thus emphasize that *the outside option point does not affect the disagreement point.*''); M. Osborne & A. Rubinstein, *Bargaining and Markets* at 88 (1990) (''it is definitely *not* appropriate to take as the disagreement point an outside option. . . .''); K. Binmore, A. Rubinstein & A. Wolinsky, *The Nash Bargaining Solution in Economic Modeling,* 17 RAND J. Econ. 176, 185 (1986) (''An outside option is defined to be the best alternative that a player can command if he withdraws unilaterally from the bargaining process.'').

According to Professor Watt and these authorities, the reason for excluding ''outside options'' from the Nash Bargaining Model is fundamental to the nature of the model itself. In the Nash approach, the negotiating parties are bargaining with each other only over the surplus *their deal* can generate, and they are attempting to agree upon an allocation of that surplus that exists within the bounds of their respective ''disagreement payoffs.'' Each may have ''inside options,'' which are alternatives available to them *while bargaining is ongoing and they temporarily disagree. See Muthoo, supra,* at 137. However, ''outside options'' are available to a Nash bargaining party *only* in lieu of continuing the Nash bargaining with the original counterparty if it ''withdraws'' from the Nash bargaining process. *See Binmore et al., supra.* Professor Watt characterizes the distinction as follows:

> [T]he Nash bargaining model [is] designed as [a] self-contained portrayal[ ] of negotiating behavior. . . . Given a surplus to share, the Nash model . . . provide[s] allowance for *financial* payments that a party is *actually* receiving, only while negotiations are *ongoing, without* walking away for another option, and that would cease as a result of the deal, to be factored into modelling as a cost in some situations.'')
>
> . . .
>
> [A]n outside option (a potential payoff that is not directly related to a share of the surplus that is being negotiated) . . . comes in as a constraint upon the set of feasible deals that could be struck. . . .''

Watt RWRT ¶¶ 56, 58.[81]

The Services never sought to introduce further testimony regarding this important dispute. This is particularly striking because the Services filed a motion to strike certain portions of the CO Reply, or for leave to file supplemental testimony responsive to those itemized portions. The portions the Services identified in their motion *did not include Professor Watt's criticisms as to the inclusion of* ''*outside options*'' *in their experts' Nash modeling.* Further, after the Judges granted the Services' motion by providing them leave to file supplemental testimony—consistent with the designations in their motion—the supplemental testimonies did not address this ''outside options'' issue.

In the course of discussions among the parties and the Judges regarding remand procedures, the Judges invited the parties to produce witnesses for a hearing, at which one or more of the Services' economic expert witnesses could have addressed this ''outside options'' issue. However, the Services (and Copyright Owners) waived the opportunity to produce witnesses at a hearing. Rather, they offered, and the Judges agreed, that they would stand on their written testimonies and proceed to closing arguments by counsel.

In the closing arguments, each side argued numerous points of controversy and provided the Judges with dozens of demonstrative aids summarizing record evidence and the parties' arguments, but none of those arguments or demonstrative aids so much as mentioned this ''outside options'' dispute. Moreover, when the Judges inquired during closing arguments as to whether Services' counsel would be addressing any of the experts' ''modeling disputes,'' counsel said that they were resting on their papers. 3/8/22 Tr. 86–87 (Closing Argument). Similarly, when the Judges inquired of Copyright Owners' counsel whether he would be addressing the modeling ''dust-up'' between Professors Watt and Katz, counsel demurred, stating that although he would ''love to engage on it but . . . ''there would be too many slides. . . .'' *Id.* at 262–64.

Simply put, the Services' economic experts made an assertion regarding the need for Professor Watt to have included ''outside options'' in his Nash Bargaining Model, but Professor Watt presented authority clearly stating that such inclusions would be improper. Thus, Copyright Owners made a *prima facie* showing that in a Nash Bargaining Model, the surplus generated by the streaming surpluses acquired by the content providers would be split equally as between the sound recording licensors and musical works licensors, and that, *ceteris paribus,* an increase in the mechanical rate to provide Copyright Owners more of the surplus (per the Shapley-based results relied on by the Majority) would be essentially offset through a nearly 1:1 reduction in the sound recording rate. In response to Copyright Owners' *prima facie* case, the Services stood mute in response to the rebuttal argument claiming that their experts misapprehended the Nash modeling distinctions between ''inside options'' and ''outside options.''[82]

Accordingly, the Judges find that the Services' criticisms in this regard are insufficient to rebut Copyright Owners' *prima facie* showing that Professor Watt's Nash Bargaining Model properly

[81] Professor Marx in fact cites several of these authorities (for other points), without noting the distinction they make between the appropriate inclusion of ''inside options'' and exclusion of ''outside options'' in Nash modeling. *See id.* ¶ 59.

[82] The third economic expert for the Services, Dr. Leonard, did not utilize the ''outside option'' phraseology to describe his critiques. Rather, he first criticized Professor Watt for assuming the existence of a ''fixed surplus.'' Leonard WDRT ¶ 16. However, as discussed *supra,* that assumption came from the Majority's extrapolation from Professor Watt's hearing testimony. His explicit statement regarding the *ceteris paribus* assumption makes clear that he was not assuming a ''fixed surplus.'' Watt RWRT ¶¶ 110–11. (Again, the only ''fixed'' surplus was not ''assumed,'' but rather *quantified,* in order to establish the Majority's percent-of-revenue prong royalty rate of 15.1%.)

Dr. Leonard next claims that Professor Watt's assumption that the labels would bear virtually the entirety of an increase in the statutory rate, because they previously ''have captured almost all'' [the] surplus,'' has been contradicted by the evidence. Specifically, he refers to the 33-month period in which the Phonorecords III rates were effective (January 2018 through September 2020). Leonard WDRT ¶ 16. However, as the Judges find in this Determination, that 33-month period was marked by significant uncertainty with regard to the ultimate rates and rate structure (and the rates were being phased-in), so no findings could reliably be made based on sound recording rate changes during that period.

The remainder of Dr. Leonard's critique concerns issues that would make a fixed TCC ratio inappropriate over the rate term. The Judges agree with those criticisms as previously discussed, but they do not pertain to this narrower issue of whether the *surplus* generated by interactive streaming would be split in a manner consistent with Professor Watt's Nash Bargaining Model.

identified and valued the ''disagreement payoff.'' [83] [84]

b. Rejection of Second Rationale for Including Uncapped TCC Rate Prong

In the Determination, as noted *supra,* the Majority also justified the adoption of the uncapped TCC rate prong because it had the effect of ''import[ing] into the rate structure the protections that record companies have negotiated with services to avoid the undue diminution of revenue through the practice of revenue deferral.'' Determination at 36; *see also Johnson,* 369 F.3d at 372 (''By pegging the mechanical license royalties to an uncapped total content cost prong, the Board sought to ensure that owners of musical works copyrights were neither undercompensated relative to sound recording rightsholders, *nor harmed by the interactive streaming services' revenue deferral strategies.* . . .'') (emphasis added).

(i) Parties' More Specific Arguments

Copyright Owners likewise argue that the uncapped TCC rate structure should be ''adopted to provide protection against revenue deferment and displacement in a revenue-based rate structure.'' CO Initial Submission at 38; *see also id.* at 40 (describing uncapped TCC rate prong as ''critical backstop in a revenue-based rate structure.'').

Whereas Copyright Owners echo the Majority, the Services adopt the reasoning of the Dissent. They argue as follows:

> [A] rate structure with a capped TCC prong, like the *Phonorecords II* settlement, achieves the same goal of protecting the Copyright Owners from any potential revenue deferral through a ''structure that provides alternate rate prongs and floors, below which the royalty revenue cannot fall,'' . . . and does so *without allowing Copyright Owners to impermissibly share in the labels' complementary oligopoly power.* . . . [T]he streaming industry has twice concluded, after extensive negotiations, that the appropriate way to address any concerns regarding revenue deferral is to have a rate structure that includes a capped TCC prong. *Phono I,* 74 FR 4510; *Phono II,* 78 FR 67938.

Services' Joint Opening Brief at 62 (quoting *Dissent,* 84 FR 1990) (emphasis added).

In their Reply, Copyright Owners argue that the Majority maintained the benefits of price discrimination contained in the prior *Phonorecords II* framework, but balanced that goal with added protection against Service revenue deferral and displacement. Copyright Owners' Reply Brief on Remand at 49 (''In adopting a rate structure with [an uncapped] TCC for all service offerings, the [Majority] balanced its concerns about fostering price discrimination while also protecting against proven revenue diminution by the Services.'').

The Services, in their Reply, take note that pre-remand, Copyright Owners had strenuously objected to any yoking of the mechanical royalty rate to the sound recording rate, maintaining that, although the Copyright Owners now advocate for an uncapped TCC rate to protect against revenue displacement and diminution:

> [I]n their [pre-remand] reply proposed findings, the Copyright Owners had expressed a very different view, arguing that an uncapped TCC prong ''does nothing to protect Copyright Owners from the Services' revenue displacement and deferment'' [and] Copyright Owners have not even tried to explain away their complete about-face on this issue.

Services' Reply at 43.

(ii) Analysis and Decision Regarding Revenue Diminution or Deferral

The Judges find that the second rationale put forth to support an uncapped TCC rate does not justify the adoption of that rate prong. Several reasons support this finding.

First, there is insufficient evidence to show how the sound recording companies contractually structure their own royalty rates, which would constitute the rate base for an uncapped TCC rate for the mechanical royalty. The sound recording royalty rate, when proffered for use as a mechanical royalty rate base, is analogous to pegging the value of a foreign currency to the U.S. dollar. That is no mere benchmark. The Judges must have the benefit of sufficient record evidence to demonstrate that the pegging (or, to use the D.C. Circuit's word in *Johnson,* ''yoking'') of a statutory rate to an unregulated rate serves the statutory purposes for the rate at issue, here, the mechanical rate.

But Copyright Owners presented virtually no evidence regarding how the sound recording companies structure their interactive service royalties. Indeed, in the hearing, Dr. Eisenach acknowledged that the ''relative value of sound recording [to] musical works licenses may depend on a variety of factors,'' but he intentionally eschewed unnecessary ''assumptions, complexities and uncertainties associated with theoretical debates'' as to why the particular market ratios existed. *See* Determination at 44. Indeed, the Majority found fault with Dr. Eisenach's willful ignoring of these issues, agreeing with the Services' criticism that Dr. Eisenach's ''use of sound recording royalties paid by interactive services embeds within his analysis the inefficiently high rates that arise in that unregulated market through the complementary oligopoly structure of the sound recording industry and the Cournot Complements inefficiencies that arise in such a market. *See* Determination at 47. The uncapped TCC rate advocated now by Copyright Owners suffers from the same affliction.

The only reference to such sound recording rate formulae in Copyright Owners' voluminous PFF after the hearing was its statement that the effective revenue calculations in two of the Major labels' agreements with the

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[83] To be clear, the Judges' ruling is narrow; they make no finding beyond crediting this *prima facie* showing and the failure of the Services to rebut sufficiently that showing. It might be the case that the existence and definition of ''outside options''—and their relationship to ''inside options''—have other implications *vis-a-vis* a Nash Bargaining Model applied in the context of a rate setting proceeding. However, the Judges may not introduce and rely on analytical approaches not developed by the parties. *See Johnson,* 969 F.3d at 381 (the Judges must not ''procedurally blindside[ ]'' the parties with an ''approach . . . first presented in the determination and not advanced by any participant.''). *See generally* P. Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking,* 50 J. L. & Contemporary Problems 225, 228 (1987) ('' judicial analysis, economic or otherwise, takes place only in the context of lawsuits between two or more parties imposes a practical constraint on the judge's ability to use economic analysis.'').

[84] Professor Katz also criticizes Professor Watt's assumption that ''a label's non-content costs are proportional to licensing revenues.'' Katz WDRT ¶ 22. More particularly, Professor Katz claims that this is not ''plausible'' because ''the royalty rate does not directly affect the sound recording copyright owners' non-content cost.'' *Id.* ¶ 133. The effect of eliminating this assumption, according to Professor Katz, is to reduce the seesaw effect in Professor Watt's model of [REDACTED] slightly further away from a 1:1 ratio, to .92. *Id.*

In rebuttal, Professor Watt says this criticism is inconsistent with Professor Katz's own analysis, because the latter also ''sets the cost equal to a fraction of revenue. . . .'' Watt ¶ 82 n.31 (referring apparently to a comparison of Katz WDRT ¶ 129 with *id.* ¶ 133). Professor Watt concludes that not only does ''[Professor] Katz's own model contain the same feature that he is critical of in my model,'' it is also ''not a flaw in the bargaining model.'' Watt ¶ 82. As a substantive matter, Professor Watt defends the assumption that non-content costs would rise with royalty income, because ''[g]reater revenue should be directly equated with a larger scale of business'' and ''the additional royalty income would have to be managed (*i.e.,* distributed to those who need to be paid from it, such as artists), implying higher administration costs.'' *Id.* ¶ 79.

The Judges find that the common use by both experts of this assumed proportionality of a label's non-content costs to licensing revenues alone blunts Professor Katz's criticism of Professor Watt's modeling. Further, Professor Watt reasonably posits that higher revenue would imply a larger scale of business with associated general cost increases. (But the Judges do no agree that it was reasonable for Professor Watt to assume that distribution and administrative costs in particular would increase merely because of an increase in royalty rates; simply paying more money, *ceteris paribus,* is not self-evidently associated with an increase in costs.)

services was based on [REDACTED]. *See* Copyright Owners' PFF ¶¶ 72, 91 (cited post-remand at Copyright Owners' Motion for Reconsideration or Clarification at 25, n.14). On remand, the Services have provided a further summary of the types of [REDACTED]. *See* White WDRT ¶¶ 6–7, 14–15, 20, 24–26, 28–29 ([REDACTED]); Bonavia WDRT ¶¶ 15–17 ([REDACTED]); Mirchandani WDRT ¶¶ 16, 21–24 ([REDACTED]). Clearly, the levels of [REDACTED] would have to be weighed and the impact of complementary oligopoly power would need to be identified in order to adjust the rate prongs to account for that power. But the record is devoid of such details.

Second, compounding this problem, because the uncapped TCC rate is embedded in a ''greater-of'' rate structure, the labels can exploit their complementary oligopoly power when creating *the switching points that toggle royalty payments between and among rate prongs.* As the Judges have explained previously, in declining to import a ''greater of'' structure from the unregulated interactive market, this structure[it] is based on ''agreements [which] were all negotiated in a market characterized by the lack of effective competition, and that *the lack of competition would affect the structure* as well as the level of rates.'' *SDARS III,* 83 FR 65210, 65228 (Dec. 19, 2018) (emphasis added). Further, the Judges held therein that the ''advantageous'' nature of a ''greater-of'' structure to sound recording licensors ''may well represent an example of what licensors can and would obtain when they exploit their ''must have'' status for a special competitive advantage.'' *Id.; see also* Dissent at 47 (in absence of testimony explaining how greater-of structure is consonant with effective competition, use by licensor suggests a game of ''heads I win tails you lose.).''

Thus, there is insufficient evidence or testimony that would permit the Judges to make any adjustment for the complementary oligopoly power that may be built into each prong of the sound recording royalty rate structures.

Third, as the Services note, Copyright Owners pre-remand, opposed the *identical rate structure*—consisting of a percent-of-revenue prong and an uncapped TCC prong—before Copyright Owners were in favor of it, post-remand.[85] Although Copyright Owners took a 180-degree turn on this issue, they never stated they were wrong to oppose it previously. Indeed, the *Dissent* relied upon Copyright Owners' strenuous objection to an uncapped TCC rate, quoting it verbatim:

> Copyright Owners rightly note that they obtain no legal protection under such a TCC prong. In making this argument regarding displacement and deferral of revenue, Copyright Owners lay out comprehensively *all the problems* inherent in an uncapped TCC prong set in a greater of rate structure, such as adopted in the majority opinion:
>
> The notion that [the] TCC prong will provide protection from revenue gaming, deferral and displacement, and other revenue prong problems is unsupported and speculative. *Relying on just the TCC to solve those admitted problems leaves the Copyright Owners' protection from such problems entirely outside the statute.* . . . the per-user rates in the label deals are what protects the Copyright Owners from price-slashing by the services. *What is left unanswered . . .is . . . how can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair return . . . but simply puts the Copyright Owners' fair return in the hands of the labels to negotiate terms that will adequately protect the publishers and songwriters as well? The labels do not have a mandate to ensure that the Services provide a fair return to the Copyright Owners, and cannot be directed to ensure such.* Indeed, labels may not have the same incentives as songwriters and publishers to negotiate such protections in their deals. To wit, a label could make an agreement with a service that includes only a revenue prong in exchange for equity or some other consideration that it may never include in the applicable revenue subject to the TCC. . . . [W]hat if Google purchased one or more record labels and did not have to pay *any* label royalties? Or what if Spotify chose to avail itself of the compulsory license to create its own master recordings embodying musical works—which it is already doing . . . and chose to compensate itself for its use of the master recordings on a sweetheart basis (or not at all)? Or what if one or more labels decided to enter the interactive streaming market and did not have to pay themselves royalties? In each case, the Copyright Owners' protection—the protection that the Services admit the Copyright Owners need and is provided by the TCC—would be gone.

Dissent at 5–6 (quoting Copyright Owners' RPFF-Google at 39–41) (emphasis added). To make the identical point post-remand, *but from the Services' perspective,* Pandora's economic expert witness, Professor Katz, simply utilizes Copyright Owners' verbatim language (bolded above), but substitutes the word ''Services'' for ''Copyright Owners'' (and ''income'' for ''return'') to highlight how reliance on the sound recording royalty rate is improper:

> What is left unanswered . . . is . . . how can it be reasonable to ask the Judges to set a rate that does not itself provide for a fair income . . . but simply puts the Services' fair income in the hands of the labels to negotiate terms that will adequately protect the Services as well? The labels do not have a mandate to ensure that the Copyright Owners provide a fair income to the Services, and cannot be directed to ensure such.

Katz WDRT ¶ 71.

The Judges find this argument persuasive, both in its own right and in the fact that it has been advanced by Copyright Owners and the Services alike.[86]

Fourth, the Judges note that the Majority did not find that revenue diminution, via displacement, deferral, or otherwise was pervasive, as Copyright Owners aver. *Compare* CO Initial Submission at 40 (''The record overwhelmingly established that the percent of revenue prong *often* results in musical works royalties that are too low . . . drive[n] [by] . . . . revenue deferral [and] revenue displacement'') *with* Determination at 21 (''The Judges agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'') (emphasis added) *and* 36 (''The Judges find that the present record indicates that the Services do seek to engage *to some extent* in revenue deferral in order to promote their long-term growth strategy.'') (emphasis added).

Given that the Majority found revenue diminution through displacement and/or deferral exists only ''to some extent'' and is not a ''sweeping'' issue, the Judges on remand find that the uncapped TCC rate structure creates the potential for unbalanced harm. As noted *supra,* the only protection against runaway mechanical rates, the seesaw hypothesis, cannot justify yoking the mechanical rate to a fixed ratio with the

[85] When Copyright Owners opposed the concept of an uncapped TCC rate prong in a greater-of structure, the proposed uncapped TCC rate was Google's 15% (and its proposed percent-of-revenue rate was 10.5%). Determination at 13. But after the Majority set the uncapped TCC rate at 26.2%—a *75% increase over the 15% TCC rate*—Copyright Owners became zealous converts to the concept of an uncapped TCC rate proper.

[86] At Closing Arguments on remand, Judge Strickler queried counsel for Copyright Owners regarding their prior *rejection of an uncapped TCC prong* within a ''greater-of'' rate structure. Counsel's response was that an uncapped TCC doesn't provide *enough* protection against revenue diminution: ''It provides more than the *Phonorecords II* rates, but not as much as we want,'' although ''still better than'' the negotiated *Phonorecords II* approach. 3/8/22 Tr. 240–41(Closing Argument). But Copyright Owners have neither distinguished nor disavowed their persuasive legal point quoted in the text above, to wit that an uncapped TCC rate would be unreasonable if the ''protection'' it affords lies ''entirely outside the statute.'' Whether the ''protection'' relates to Copyright Owners' concern over revenue diminution or to the Services' concern over uncapped mechanical rates, the legal defect is the same—the unreasonableness of leaving the purported protection ''entirely outside the statute.''

unregulated sound recording rate.[87] By contrast, and as discussed *infra,* the *Phonorecords II*-based benchmark approach, despite its own imperfections, is superior in this regard, because its series of alternate rate prongs and floors represents a negotiated compromise (negotiated by trade associations with countervailing power) between the potential for revenue diminution that would harm Copyright Owners, on the one hand, and the potential for runaway mechanical rates (yoked to the sound recording companies' complementary oligopoly power) that would injure the Services, on the other.

(iii) Distinction Between the ''Reasonable'' Rate Statutory Standard and the Factor (D) Objective To Minimize ''Disruptive Impact''

The Judges next consider an issue emphasized by Copyright Owners: whether the Services have demonstrated that the uncapped TCC rate prong would cause a ''disruptive impact'' as set forth in Factor (D) of section 801(b)(1).[88]

Section 801(b)(1) provides that one of the competing priorities of the Judges in setting the mechanical rate is ''[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' 17 U.S.C. 801(b)(1)(D). In *Johnson,* the D.C. Circuit did not identify any argument by the Services that was predicated on a claim that this statutory form of ''disruption'' had occurred, or was likely to occur, as a consequence of the Majority's rates and rate structure. Additionally, the D.C. Circuit did not ground its decision to vacate and remand the Judges' uncapped TCC rate and rate structure rulings based on the potential that these rulings would be disruptive to the Services, let alone would cause a statutory ''disruptive impact.''

After the D.C. Circuit's ruling, an argument regarding ''disruption'' was first made by Copyright Owners, not the Services. Copyright Owners argued that the vacated rates should nonetheless be maintained as interim rates, during the pendency of the remand proceeding. Motion of Copyright Owners to Adopt Interim Rates and Terms Pending the Remand Determination, *passim* (Nov. 2, 2020). Copyright Owners argued that reverting to the rates that existed before the Determination would constitute a ''disruption'' and self-servingly predicted that the Services would attempt to argue that the uncapped TCC rate and rate structure were themselves ''disruptive.'' Copyright Owners opined that such an argument would be a ''hollow exercise.'' *Id.* at 12, n.5; *see id.* at 2–3, 9 (claiming absence of disruption from uncapped TCC rate and structure despite absence of such argument by Services).

In response to that motion, the Services did *not* assert that the Majority's uncapped TCC rates and rate structure would constitute disruption or have disruptive impact, whether under statutory Factor D or otherwise. *See* Services' Opposition to the National Music Publishers' Association (NMPA) and Nashville Songwriters Association International's (NSAI) ''Interim Rates Motion'' (Nov. 18, 2020). In reply, Copyright Owners shifted from anticipating a ''disruption'' argument to misinterpreting *Johnson,* asserting, *without citation:* ''With respect to the TCC prong, *the remand directs only that services be given opportunity to offer evidence of disruption* from rates that have now been in effect for three years without any disruption.'' Copyright Owners' Reply in Support of Motion to Adopt Interim Rates at 7–8 (Nov. 25, 2020) (emphasis added).

On December 10, 2020, the Services submitted to the Judges their Proposal for Remand Proceedings, in which they made *no argument* that the uncapped TCC rates and rate structure (or, for that matter, any aspect of the Determination) would cause disruption or have a disruptive impact, whether under statutory Factor D or otherwise. By contrast, in their remand proposal, Copyright Owners reference twelve times that, for the Judges to reject the uncapped TCC rates and structure, the Services must show the presence of ''disruption'' arising from the Majority's uncapped TCC rates and structure. Copyright Owners made this argument notwithstanding that the ''reasonable'' rate standard is separate from the ''disruptive impact'' issue, which is an itemized objective (one of four) to be considered as an adjustment to what would otherwise constitute a ''reasonable'' rate. *See* Proposal of Copyright Owners for the Conduct and Schedule of the Resolution of the Remand at 2, 7–8, 22–24 (Dec. 10, 2020).[89]

In the CO Initial Submission, Copyright Owners assert, *without citation to any of the Services' filings:* ''The Services contend that, had they been given such an opportunity [at the hearing], they supposedly could have established that an ''uncapped'' TCC *is disruptive* because the market for sound recordings is not effectively competitive.'' *Id.* at 5. Copyright Owners further aver that the Services must ''provide evidence, consistent with the [CRB Judges'] well-established disruption standard, that because of the labels' supposed market power, the TCC structure adopted by the Board has *actually, substantially, immediately* and *irreversibly* threatened the continued viability of the interactive streaming industry'' in a manner that will ''threaten the viability of the music delivery service currently offered to consumes under [the] license.'' *Id.* at 7, 56 (citations omitted).

Copyright Owners then assert that *the Services* bear the burden of proving disruption under Factor D from the

[87] Even Google, the party that, post-hearing, broached in its PFF the idea of an uncapped TCC prong, candidly identified the risk arising from an uncapped TCC: ''Having no cap on TCC . . . leaves the services exposed to the labels' market power, and *would warrant close watching if adopted.* . . .'' Google PFF ¶ 73 (emphasis added). But as the Dissent noted, there is no satisfactory way to monitor an uncapped TCC rate prong: ''*Who* would do the ''watching''? *When* would such watching occur? Congress directed the Judges to be the ''watchers,'' and Congress instructed that the ''watching'' should occur only through rate proceedings. . . .'' Dissent at 4 (emphasis in original).

[88] Separate and apart from the ''disruptive impact'' argument made by Copyright Owners, there is no need to consider how this prong would relate to Factor D, because the Judges find the uncapped TCC rate prong with the (phased-in) 26.2% rate to be ''unreasonable.'' If it were necessary to separately consider the four itemized factors, the Judges would confirm that Factor A is satisfied, because, as the D.C. Circuit found, the Majority reasonably found that rates should increase from the *Phonorecords II* period, and the 15.1% revenue rate represents a 44% increase. The Judges would also find Factors B and C to be satisfied without a separate uncapped TCC rate prong. The reason is that, under the section 801(b)(1) standard, the ''reasonableness'' standard filters out more statutorily infirm rates than the fairness objectives. By contrast, when a rate does satisfy the ''reasonableness'' standards under section 801(b)(1), the Judges must also consider the rate through the finer ''fairness'' filter. *Cf.* Determination at 68 & n.120 (distinguishing between: (1) a Shapley Value analysis that filters out *unreasonable* rates by reducing licensors' ability to *abuse* market power by threatening or exercising their refusal to license (''hold-out or ''hold-up'' power); and (2) a Shapley Value analysis that further filters out *unfair* rates by going beyond eliminating *abuse* of market power to also make a ''market power *adjustment*'' explicitly to address Factors B and C). Finally, as the text *infra,* explains, the Judges also find no basis under Factor D to alter their analysis.

[89] When Copyright Owners do address an argument that the Services *actually* made (on appeal) regarding the uncapped TCC rates and structure, they note *not* that the Services had made a ''disruption'' argument, but rather that ''the Services appealed for the reversal of the TCC prong as *substantively unreasonable.*'' *Id.* at 22 (emphasis added). But Copyright Owners then assert, coyly, that ''this request was not granted by the Circuit'' (citing *Johnson,* 969 F.3d at 383), when in actuality, the D.C. Circuit did not rule against the Services on this point, but rather stated only that it was not addressing substantive arguments made by the Services ''[b]ecause we have vacated the rate structure devised by the [Judges] for lack of notice. . . .'' *Id.*

uncapped rates and rate structure embodied within the rate proposal (even though only Copyright Owners are pursuing this approach on remand). Further, Copyright Owners assert that the Services' objection to the uncapped rates and rate structure must fail unless they can show that such a disruptive impact occurred during the 33-month period (from January 2018 through September 2020) when the *Phonorecords III* rates were in effect. *Id.* at 56.

In their initial substantive remand briefing, the Services once more *did not* assert that the Determination's uncapped TCC rates and structure would cause disruption pursuant to Factor D of section 801(b)(1), or even assert a non-statutory disruption arising therefrom. Rather, the Services directly attacked this rate approach as inconsistent with the statutory ''reasonable'' rate requirement, maintaining that ''[t]ying the mechanical rates directly to the complementary oligopoly sound recording rates in the manner of the Majority's uncapped TCC rates and rate structure is plainly *unreasonable.*'' Services' Joint Opening Brief at 46 (Apr. 1, 2021) (emphasis added). The Services also asserted that the uncapped TCC rates and rate structure are ''unreasonable'' because they do not promote the statutory objectives of Factor B (''fair income'' to the copyright user) and Factor C (reflecting the copyright users' itemized role in making the musical works ''available to the public.''). *Id. a*t 45, 50–51, 55.[90]

In the Services' Reply, the Services attack Copyright Owners' ''singular focus on the disruptive impact of the uncapped TCC prong.'' Services' Reply at 35. In particular, the Services argue:

1. they have maintained and demonstrated that Copyright Owners' uncapped rates and rate structure are ''*unreasonable,*'' separate and apart from demonstrating that this uncapped approach also fails to satisfy the four itemized statutory factors;

2. the burden of proof with regard to Factor D disruption lies with Copyright Owners, because they are the ones who are advocating for the uncapped TCC rates and rate structure;

3. the presence of Factor D disruption, *vel non,* is not dispositive, because section 801(b)(1) and *Johnson* require the Judges to apply the entirety of the statutory standard (which consists of the ''reasonable rate'' requirement and consideration of all four itemized Factors; and

4. the ''full extent of the disruption to the Services from an uncapped TCC prong was never tested in the marketplace [because] [t]he Majority set escalating rates, and the [ ] Determination was vacated before the significant hike in rate levels was fully implemented.''

Id. at 35–36.

In their Remand Reply, with regard to the issue of ''disruption,'' Copyright Owners assert:

1. The Services have ''completely abandoned'' their appellate argument asserting disruption, and admit to having no evidence that the Board's adopted rate structure has any materially disruptive impact. Copyright Owners' Reply Brief on Remand at 5 (July 2, 2021).

2. The Services have not even attempted to show any Factor D related effect or other disruption from the adopted rates and structure. *Id.* at 15, n.9.

3. The failure of the Services to provide evidence of disruption or to pursue the argument that disruption had occurred was inconsistent with their prior assertions that the uncapped TCC rates and rate structure created ''a real risk of economic harm'' and the ''impact'' or ''harm' that the uncapped approach generated. *Id.* at 35.

4. Each of the Services, in response to Copyright Owners' discovery requests, acknowledges that it was not offering new evidence regarding the ''impact'' of the Phonorecords III rates and rate structure. *Id.* at 36–38.

5. The Services did not merely suffer no disruption, they experienced unprecedented growth and profit under the uncapped TCC rate prong. *Id.* at 45.[91]

6. The Services on remand have attempted to replace their prior ''disruption'' assertion with a claim of ''unreasonableness.'' *Id.* at 50, n.36.

(iv) Analysis and Decision Regarding ''Disruption'' Issue

The full Factor D ''disruption'' standard, as set forth by the Judges, states that an adjustment is warranted by Factor D if the rate analysis made by the Judges would otherwise:

> directly produce[ ] an adverse impact that is substantial, immediate and in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 87. Factor D is not applicable, particularly as proposed by Copyright Owners. Thus, the Judges reject Copyright Owners' assertion that the uncapped TCC prong should be adopted because of the absence of evidence of ''disruptive impact'' proffered by the Services. This rejection is based on several findings of fact and conclusions of law.

First, the issue of ''disruptive impact'' pertains here to the proposal advanced by Copyright Owners, not the Services. Thus, the burden of proving that this uncapped TCC rate prong proposal satisfies the elements, including Factor D, of the section 801(b)(1) standard in a sufficient manner lies with Copyright Owners, not the Services. *See* 5 U.S.C. 556(d). Accordingly, the fact that the Services did not affirmatively assert an argument of ''disruptive impact'' is of no consequence. Moreover, as the review of the Services' filing makes clear, *the Services never abandoned that argument, because they never made it.*

[90] The Services' only references to the concept of ''disruption'' relate to their argument that their own benchmark premised on the prior *Phonorecords II* rate structure and rates would not be disruptive. *Id.* at 4, 24, 29–30. That argument is properly made by Services in this context, because a party seeking to persuade the Judges to adopt its proposal bears the burden of proof, pursuant to section 556(d) of the APA, regarding the consonance of its proposal with all the standards contained in section 801(b)(1). The Judges do note that one of the Services' expert witnesses, Professor Katz, found the Majority's attempt to avoid disruption by phasing-in the new rate provisions insufficient ''to mitigate the risk of short-term market disruption''. That testimony does not constitute a direct reliance by the Services on the statutory disruption objective in Factor D, but rather emphasizes the Majority's own concern with such disruption and the witness's concern that the phase-in did not prevent the disruptive effect that the Majority itself had contemplated. In any event, Professor Katz, as an economist, cannot make a *legal* argument regarding the applicability of the Factor D objective, the Services did not rely on his testimony in that regard and, as noted, the Services made no legal Factor D ''disruption'' argument on remand. Thus, the Judges do not give any weight to Professor Katz's testimony in this regard.

[91] The Judges allowed the Services to make a supplemental filing in response to Copyright Owners' remand reply, because those papers contained direct as well as reply materials. In their supplemental filing, the Services argued that they had not ''thrived,'' that the financial data on which Copyright Owners' relied did not isolate revenue attributable to interactive services, was not limited to U.S. generated revenue, and used changes in the market capitalization of Amazon and Alphabet (Google's parent corporation) as a proxy for the economic fortunes of their interactive services. Services' Joint Supplemental Brief at 13–15. As explained *supra,* the Judges find the permanency of the *Phonorecords III* rate structure during the 33-month period from January 2018 through September 2020 to have been in question, pending the appeal that resulted in the vacating and remanding of the Determination and the reversion back to the *Phonorecords II* rates and rate structure. Given that uncertainty, the Judges find it wholly inappropriate to draw any conclusions from the change or stasis in the sound recording rates or the total royalty payments by a Service over that period.

Rather, they have consistently argued that the uncapped TCC rate prong was *unreasonable,* not that it was statutorily ''disruptive'' as that standard has been applied by the Judges.

Second, Copyright Owners did not demonstrate with sufficient evidence or testimony that the uncapped TCC rate would be consistent with Factor D. To be clear, by this the Judges do not mean that Copyright Owners were obliged to prove a negative. Rather, they needed to prove, and indeed attempted to do so, that it was unlikely that their rates would cause a ''disruptive impact.''

In this regard, as an *empirical* matter, Copyright Owners proffered the testimony of an economic expert witness, Dr. Eisenach, who opined that the Services' [REDACTED]. Eisenach WRT ¶¶ 12–41 ([REDACTED]) CO Reply at 40–41. However, as the Judges discuss *supra,* that period reflected ''33 months of uncertainty,'' during which no one could predict the final mechanical rate and structure that would be adopted by the Judges and/or the D.C. Circuit after appeals. Accordingly, that factual evidence is unpersuasive.

Further, as a *theoretical* matter, Copyright Owners rely on Professor Watt's testimony regarding the ''seesaw'' effect. In that regard, and as discussed *supra,* the Majority took comfort in what it understood to be Professor Watt's ''prediction'' that increases in mechanical royalties would be offset almost dollar-for-dollar by reductions in the sound recording royalty. However, as also discussed *supra,* Professor Watt has now clarified on remand that he never made such a ''prediction,'' and that his testimony regarding the so-called ''seesaw'' was limited to shifts in the share of the surplus to Copyright Owners and from sound recording companies as a consequence of an increase in the mechanical rate, holding all other factors unchanged (the *ceteris paribus* assumption).

Moreover, Professor Watt further explained that many other factors would likely impact the sound recording rate together with an increase in the mechanical rate, including ''a measure of oligopolistic interaction, different timings of different rate bargains, and the actual values of outside options.'' Watt RWRT ¶ 118. Professor Watt candidly acknowledged that he has not modeled these independent variables, and he further notes that the data may not exist to allow for such modeling. *Id.* But the inability to model the impact of independent variables does not mean that their potential to cause disruption can be ignored.

In particular, the purpose of the ''seesaw'' contention was that it prevented economic harm to the Services in connection with a rise in the mechanical rate. Although not of Professor Watt's design, that connection is intentionally built into the Majority's uncapped TCC rate. *See* Determination at 35 (''Incorporating an uncapped TCC metric into the rate structure permits the Judges to influence that ratio directly.'') But the ''measure of oligopolistic interaction'' referenced by Professor Watt was the very concern expressed by the Dissent, which cautioned that there was no evidence that the sound recording companies would be compelled to maintain the same industry structure and accept the loss of substantial royalty income. *See* Dissent at 4 (''[T]he record companies may decide to keep their rates high despite the increase in mechanical rates, or decide it is in their interest to avoid a reduction in royalty revenue by creating a completely different paradigm for streaming, by which the record companies move the streaming service in-house and effectively destroy the existing services.'').[92]

Also, the ''different timings of different rate bargains,'' another independent variable identified in Professor Watt's remand testimony, was an issue raised to him at the hearing by Judge Strickler. Professor Watt candidly agreed that the Judge was ''absolutely correct'' that there is a ''risk, then, of *disrupting the market* by having *a total royalty* that's greater than what is indicated by your Shapley testimony, simply because of *the disparity of times* in which the rates are . . . implemented.'' 3/27/17 Tr. 3091–92 (Watt) (emphasis added). However, this *admitted risk of disruption* was not addressed by sufficient record evidence.[93]

Third, disruption in the narrow sense of Factor D as applied by the Judges previously is not relevant to the present problem. An increase in total royalties is not a short-run immediate issue, but rather an ever-present possibility that the seesaw analysis does not sufficiently address. Rather, the uncapped nature of the TCC rate prong renders it unreasonable rather than narrowly disruptive.

Balancing the foregoing considerations, the Judges find that Copyright Owners' disruption-based argument lacks merit.

6. Conclusion Regarding Uncapped TCC Rate Prong

For the foregoing reasons, the Judges decline to adopt the uncapped TCC rate tier proposed on remand by Copyright Owners.

III. Rejection of Phonorecords II Settlement as a Benchmark

A. D.C. Circuit Ruling

Each of the Streaming Services advanced somewhat different rate plans, but all four proffered a benchmark that ''broadly sought to maintain the *Phonorecords II* rate structure,'' while lowering or eliminating the mechanical floor.[94] *Johnson,* 969 F.3d at 371. With regard to the Services' proposed benchmark based on the *Phonorecords II* rates, rate structure, and terms (hereinafter, PR II-based benchmark),[95] the Judges are guided by several rulings in *Johnson.*

In particular, the D.C. Circuit found the Judges' treatment of the PR II-based benchmark to be ''muddled.'' *Johnson,* 969 F.3d at 387. The D.C. Circuit emphasized that the Judges ''failed to

[92] The Dissent noted that this risk was speculative in nature because there was no evidence proffered at the hearing regarding the reactions of the sound recording companies. But no such evidence was forthcoming in the remand proceeding either, and, as noted *supra,* the burden of proof in this regard falls on Copyright owners as the proponents of the uncapped TCC rate prong. In fact, because the major publishers who are members of the NMPA (a constituent of Copyright Owners) are part of the same corporate structure as the sound recording Majors, the burden of producing evidence would fall on Copyright Owners as well regarding the sound recording companies' reaction to the ''seesaw'' effect.

[93] As noted *supra,* Copyright Owners did not call any sound recording industry witnesses, or provide evidence from sound recording companies, indicating that labels would even be amenable to considering such renegotiated rate reductions. Instead, at the hearing, Professor Watt merely *speculated* that the sound recording companies might renegotiate their rates downward to reflect the seesaw effect when mechanical rates increased. Tr.3/27/17 3093–94 (Watt) (''I'm not able to comment on how, you know, how possible it is to take an agreement that's in force and then change it.''). Not only was that mere speculation, it was provided by an economist who is neither a music industry executive nor an attorney, and the witness did not testify that he had spoken to anyone who would have industry knowledge regarding whether a label would even be amenable to considering such rate reductions.

[94] The ''mechanical floor'' refers to an alternative rate calculation. ''If the All-In Rate calculation results in a dollar royalty payment below the stated Mechanical Floor rate, then that floor rate would bind.'' Determination at 26 n.59.

[95] *See* Services' Joint Rate Proposal (in Services' Joint Written Direct Remand Submission at Tab C) (Apr. 1, 2021). According to the Services, their rate proposal in this proceeding is meant to ''update the *Phonorecords II* terms to include terms of the Determination, as amended during the implementation of the Music Modernization Act, that were upheld in *Johnson* . . . including terms relating to student and family plan products, or that were not challenged by either the Copyright Owners or the Services.'' *Id.* at 2. The Services include in their Joint Rate Proposal a chart summarizing the proposed rates for their offerings. That chart is attached as an Addendum to this Initial Ruling.

explain'' their rejection of the PR II-based benchmark. *Id.* at 367. *See also id.* at 376 (Judges ''failed to ''reasonably explain'' rejection).

In the appeal, Copyright Owners attempted to defend the Judges' reliance on the absence of evidence of the settling parties' subjective intent in reaching the *Phonorecords II* terms. *Id.* at 387. The D.C. Circuit dismissed Copyright Owners' *post hoc* attempt, noting that ''nowhere does the [ ] Determination explain why evidence of the parties' *subjective intent* in negotiating the *Phonorecords II* settlement is a prerequisite to its adoption as a benchmark.'' *Id.* at 387 (emphasis added).

The D.C. Circuit also criticized the attempt by the Judges' appellate counsel to ''change tack'' and argue that their rejection of the PR II-based benchmark was reasonable because: (1) evidence showed that the prior rates had been set far ''too low'' and (2) it was ''outdated''. The D.C. Circuit found that those arguments also were ''nowhere to be found in the [ ] Determination's discussion'' of the appropriateness of the *Phonorecords II* settlement as a potential benchmark. *Id.* at 387 (emphasis added).[96] In the end, the D.C. Circuit agreed with the Streaming Services that, *inter alia,* the Judges failed to reasonably explain their rejection of the benchmark and, for all of the reasons cited, vacated and remanded the adopted rate structure and percentages for further proceedings. *Id.* at 381.

B. Remand Procedure Regarding the PR II-Based Benchmark

On December 15, 2020, subsequent to the D.C. Circuit's decision, the Judges entered an Order Regarding Proceedings on Remand, in which the Judges stated:

> The Judges accept the parties' proposals to resolve the issues concerning the use of the Phonorecords II settlement as a benchmark. . . .
>
> . . .
>
> The Services and Copyright Owners also agree that the Judges should resolve this issue based on the existing record, after receiving two rounds of additional briefing from the parties.

Remand Order at 1–2.

Based on the ruling in *Johnson* the Judges reject Copyright Owners' position that they need not engage in a full analysis of the issue. The Judges conclude that they must engage in, and fully articulate, a reasoned analysis that adequately addresses ''*the issues concerning the use of the Phonorecords II settlement as a benchmark.*'' *Id.* (emphasis added). If the Judges determine that the Majority properly rejected the Services' proposed use of the PR II-based benchmark, the rejected portions will play no part in the Judges' remand ruling. On the other hand, if the Judges find, after engaging in that analysis, that the PR II-based benchmark was not properly rejected then, as a matter of law and logic, the Judges must weigh the Services' PR II-based benchmark for application, in whole or in part.

The Judges reject Copyright Owners' reading of *Johnson* as holding that the Judges cannot fully consider the PR II-based benchmark on remand. Copyright Owners argue that the D.C. Circuit ''did not suggest the [Judges] substantively erred'' in rejecting that benchmark, or that they ''needed to reconsider [their] decision,'' but had ''merely remanded for a 'reasoned analysis' . . . as to why it did so.'' CO Initial Submission at 10; *see also* Copyright Owners' Reply Remand Brief at 7–8. Because *Johnson* ruled that the Majority's reasoning was muddled, indiscernible, unexplained and lacking in reason, the D.C. Circuit obviously neither accepted nor rejected the Majority's disregard for the PR II-based benchmark—thus requiring the CRB Judges to take a comprehensive look at that benchmark. In this regard, the Judges agree with the Services that, pursuant to apposite case law, if the outcome of the remand as to this issue was preordained pending the further ''reasoned analysis,'' the D.C. Circuit would have expressed a desire simply to remand *without vacating* as to this issue. Services' Joint Remand Reply Brief at 7–8 (citing *Allied-Signal, Inc.* v. *NRC,* 988 F.2d 146, 150–51 (D.C. Cir. 1993) (''The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'')).[97]

Because *Johnson* held that the Majority's reasoning was muddled, indiscernible, unexplained, and lacking in reason, the D.C. Circuit obviously neither accepted nor rejected the Majority's disregard for the PR II-based benchmark. Thus, the Judges take a comprehensive look at that benchmark's rates and rate structure to evaluate its usefulness in this proceeding.

Relatedly, the Judges also reject Copyright Owners' assertion that the Judges can only consider on remand the *Phonorecords II rates,* and cannot consider on remand the relative strengths and weaknesses of the *structure* in which those rates are embedded. *See* Copyright Owners' Reply Brief on Remand at 14. This distinction is impractical and unworkable. If the (non-''headline'' rates[98]) themselves can be reviewed and found acceptable (as they are *infra*) into what structure would they be placed? There are multiple provisions in the *Phonorecords II* rate structure providing for different rates, designed to balance (1) the ability of services to attract consumers with a low Willingness-to-Pay and/or a low Ability-to-Pay (the price discriminatory and differentiated features[99]) with (2) the revenue diminution protections for which Copyright Owners had successfully negotiated. Moreover, the D.C. Circuit has vacated the Determination, and in doing so did not make any rulings critical of the rate structure in the *Phonorecords II*-based benchmark that would suggest the cramped review advocated by Copyright Owners. Indeed, the D.C. Circuit explicitly stated, *without distinguishing between rates and structure,* that it ''agree[s] with the Streaming Services that the [Judges] . . . failed to reasonably explain [their] rejection of the Phonorecords II settlement as a benchmark . . .'' *See Johnson,* 969 F.3d at 376; *see also id.* at 389 (issues relating to ''rates'' and ''rate structure'' are ''intertwined'').

Further, the Judges emphasize that the rate structure of the PR II-based benchmark provides protection *sought by Copyright Owners* against revenue diminution by the Services—*protection they would otherwise lose*—because in this Initial Ruling the Judges are not adopting the vacated uncapped TCC prong for which Copyright Owners are now advocating, and which they claim

[96] In the present remand ruling, the Judges do not rely on their appellate counsel's *ad hoc* arguments that the D.C. Circuit found to be absent from the Determination. The Judges note though (as discussed in more detail *infra*) that in this Initial Ruling they are increasing the 10.5% royalty rate in the *Phonorecords II* rates by 44% to 15.1% (as phased-in by the Determination), thus addressing appellate counsel's *ad hoc* assertion that the *Phonorecords II* rates were ''too low.'' Similarly, as discussed *infra,* the Judges address the notion that the PR II-based benchmark is outdated.

[97] However, the Judges note that section 803(d)(3) may require the D.C. Circuit to remand rather than reverse when the issue concerns more than rates alone. Thus, the statute appears to require a remand in order for the Judges to apply their statutory authority and expertise *in toto.*

[98] As explained elsewhere in this Initial Ruling, the Judges are increasing the ''headline'' rate from 10.5% to 15.1%.

[99] Specifically, the PR II-based benchmark would incorporate the price discriminatory features for product differentiation as between: (1) subscription vs. ad-supported services; (2) portable and non-portable services; and (3) unbundled vs. bundled services. *See* Determination at 10; Dissent at 26. The third category—bundled vs. unbundled—is discussed *infra* in the context of the Bundled Revenue definition.

would have protected them in that regard. *Cf.* CO Additional Submission at 4–6 (acknowledging PR II-based benchmark provided some TCC provisions, allowing for protection against revenue diminution). Thus, the Judges' remand rulings on the PR II-based benchmark rates and on the uncapped TCC rate prong are inextricably interlaced. *See Johnson,* 969 F.3d at 381 (absence of ''reasoned explanation'' for rejecting PR II-based benchmark was problematic because it occurred ''*when*'' Judges adopted an alternative proposal that called for ''setting . . . total content cost and revenue rates.'') (emphasis added).

The Judges weigh each benchmark's *intrinsic* strengths and weaknesses, as well as its *comparative* advantages and disadvantages *vis-à-vis* other proffered benchmarks. On remand, the interrelationships of the competing benchmarks are of particular importance, given Copyright Owners' need for the aforementioned protections against revenue diminution via price discrimination.[100]

Through this approach, the Judges ultimately may adopt only one of the parties' benchmarks or other methodologies, or they may modify the proposals by combining them, provided such a modification is ''within a reasonable range of contemplated outcomes . . . piecing together a rate structure, the economic and policy consequences of which had already been explored and developed by the parties in the record.'' *Johnson,* 369 F.3d at 382.

In their consideration of the PR II-based benchmark, the Judges are not suggesting that this benchmark is the optimal tool to use in order to identify rates and terms among all approaches that *might* have been proffered (but were not). But the Judges are cabined by the evidence they receive. *See* 17 U.S.C. 803(a)(1) (''the Judges shall act . . . on the basis of a written record . . . .''); *see also* P. Wald, *supra,* (noting that parties' economic proposals made in an action ''impose[ ] a practical constraint'' on judge who will, ''for the most part, be limited by what the parties serve up to her.''). Based upon the available record evidence, the Judges find that the Services' PR II-based benchmark—although not necessarily perfect—is more than sufficient to satisfy the legal requisites for application, as well as a practical benchmark, when used in conjunction with the 15.1% headline revenue rate advocated by Copyright Owners. *See generally Nat'l Cable Television Ass'n* v. *Copyright Royalty Tribunal,* 724 F.2d 176, 182 (D.C. Cir. 1983) (rate-setting is an intensely practical affair).

C. Parties' Remand Arguments Regarding PR II-Based Benchmark [101]

1. Services' Arguments

The Services maintain that their PR II-based benchmark satisfies the ''reasonable'' rate requirement and is consistent with the four itemized factors set forth in section 801(b)(1). They make several arguments in favor of this position.

First, they aver that their PR II-based benchmark possesses all the characteristics of an ''ideal'' benchmark. Services' Joint Opening Brief at 19. In this regard, they argue that their proffered benchmark ''involves the same sellers, the same or similar buyers, and the same rights as at issue in this proceeding,'' and that there has been ''no material change in the economic circumstances of the marketplace that would warrant adjusting the rate levels or rate structure in the benchmark.'' *Id.* at 20.

Applying the facts to these benchmark characteristics, the Services assert that the first three elements—same sellers (here, licensors), same buyers (here, licensees) and same rights (the mechanical license for interactive streaming) are satisfied. In particular, they note that the majority of the participants in the present proceeding either directly participated in the *Phonorecords II* settlement process or were active in the market contemporaneous with that settlement. *Id.* at 20–21.

Turning to the next benchmark characteristic—the absence of a ''material change in the economic circumstances of the marketplace that would warrant adjusting the rate levels or rate structure in the benchmark''—they emphasize that the PR II-based benchmark contains different rate levels for different product offerings, to account for (a) consumers' varying willingness-to-pay (WTP) and (b) the zero marginal physical cost of digital reproductions of sound recordings containing musical works. *Id.* at 21–22 (citing multiple experts).

Next, the Services point to the fact that the ''headline'' [102] royalty rate is based on a percent-of-revenue, so that revenue growth (or decline) on this rate prong allows for royalty payments to directly adjust in tandem. *Id.* Further, the Services assert that the importance of streaming as ''the future of the music industry'' was known to the *Phonorecords II* negotiators, as evidence by the then-recent launch in the United

[100] The Judges categorically reject Copyright Owners' assertion that the PR II-based benchmark cannot be considered because the parties agreed in the *Phonorecords II* settlement that any future statutory mechanical rate determination would made ''*de novo*'' *vis-à-vis* that settlement determination. In fact, the industrywide representatives (NMPA and Digital Media Association (DiMA)) who entered into the settlement conspicuously did not agree that the existing rate structure or rates could not be considered as the bases for future rate determinations. By contrast, the *Phonorecords I* settlement agreement expressly stated ''[s]uch royalty rates shall not be cited, relied upon, or proffered as evidence or otherwise used in the [Phonorecords II] Proceeding.'' Trial Ex.6013, Ph*onorecords I* Agreement at sec. 3. *Compare* Trial Ex. 6014, *Phonorecords II* Agreement at sec. 5.5 (omitting clause precluding reliance on evidentiary value of *Phonorecords II* royalty rates and including full-integration clause). This change objectively demonstrates that the parties to the 2012 settlement understood the evidentiary value of the *Phonorecords II* settlement in the next section 115 proceeding, *i.e., this proceeding. See* Dissent at 15–16.

On the other hand, the Judges reject the Services' argument that the *Phonorecords II* rates and structure should be retained merely because the Services relied on their continuation to make investments in their business models. As Copyright Owners note, the applicable regulations provide that ''[i]n any future proceedings the royalty rates payable for a compulsory license shall be established *de novo*.'' 37 CFR 385.17; *see also* 37 CFR 385.26. A party may feel confident that past is prologue and that the parties will agree to roll-over the extant rates for another period; a party could be sanguine as to its ability to make persuasive arguments as to why the rates should remain unchanged; a party might even conclude that the mechanical rate is such a small proportion of the total royalty obligation that its increase would be unlikely to alter long-term business plans. But for sophisticated commercial entities to claim that they *simply assumed* the rates would roll-over—without the reasonable possibility of significant adjustment or outright abandonment—strikes the Judges as so irrational and reckless as to raise serious doubts about the credibility of that position. (If the Services had made a persuasive argument that certain fixed cost investments were ''sunk'' and had useful lives that substantially exceeded the five-year rate term, then such costs could be considered under Factor C of section 801(b)(1), but they did not make a persuasive argument in this regard. *Cf. SDARS II,* 78 FR 23054, 23069 (Apr. 17, 2013) (adjusting rates downward under Factor C, and distinguishing *internet* music transmissions, to reflect that—because Sirius XM needed to make ''unique and substantial'' investments in the form of ''sunk'' costs paid for satellites with a useful life of l2–15 years—''it is not unreasonable for Sirius XM to expect to recoup a certain amount of those costs over the expected useful life of the [s]atellites,'' which exceeded the five-year rate term.)

[101] The parties made arguments both in the original hearing and in this remand proceeding regarding the Services' proffer of the PR II-based benchmark. Each party's pre-remand and post-remand arguments overlap to some extent. Examination of the pre-remand arguments is also necessary because of the findings in *Johnson* and because the parties agreed that the evidentiary record on this remanded issue would not be enlarged.

[102] The Judges and the parties characterize the percent-of-revenue of revenue rate as the ''headline'' rate. *See Johnson,* 969 F.3d at 383 n.10.

States of the popular Spotify service. *Id.* at 23.

Beyond these benchmark requisites, the Services also emphasize that the PR II-based benchmark is the product of a settlement whose *negotiated* features burnish the value of this benchmark as reflective of effective competition. Specifically, they note:

- The settlement was negotiated in the same statutory context, concerning the identical rate standard and factors as applicable to the present proceeding.
- Neither side would have accepted a deal materially worse than what it expected from a section 115 proceeding applying the section 801(b)(1) considerations.
- The statutory alternative diminishes any additional licensor-side negotiating power arising from ''Must-Have'' complementary oligopoly of the licensors of the musical works publishers.

Id. at 22. Moving from the negotiating context to market performance under this standard, the Services aver that this approach has borne fruit for the industry as a whole. They point to the evidence of the licensors' consistent profitability and the licensees' ability to ''benefit'' from the *Phonorecords II* approach. *Id.* at 23.

The Services also maintain that the *Phonorecords II* structure ''addresses any concerns with bundling and the potential for revenue deferment.'' *Id.* at 24.[103] They assert that these issues were specifically addressed by Copyright Owners during the *Phonorecords II* negotiation, because ''multiproduct firms such as Yahoo and Microsoft'' that offered streaming services had the capacity to make bundled offerings to consumers. These concerns were addressed in the *Phonorecords II* rate structure, the Services note, through the use of ''multiple rate prongs, minima and floors,'' ensuring that ''the total musical works royalty for certain types of offerings does not fall below a specified level,'' thereby ''mitigat[ing] the effect of any potential revenue deferrals and appropriately address[ing] any concerns with bundling.'' *Id.*[104]

Finally, the Services maintain that ''[d]irect agreements between Copyright Owners and Services also support adoption of the PR II-based benchmark.'' *Id.* at 34. In particular, they note that many of the royalty rates (and terms) in these direct agreements apply the *Phonorecords II* rates. Moreover, the Services maintain, because these direct agreements are in the nature of blanket license of a publisher's entire catalog, they provide an added ''access'' value in the form of full-repertoire licensing. These direct agreements do not include a rate above *Phonorecords II* levels; thus, the Services contend, they underscore the reasonableness of the *Phonorecords II* rates. *Id.*[105]

Finally, the Services aver that the PR II-based benchmark satisfies the itemized four section 801(b)(1) factors. With regard to Factor A, they maintain that: (1) the *Phonorecords II* framework has corresponded with an increase in the supply of musical works; (2) the PR II-based benchmark will increase the likelihood that the Services will increase subscriber counts, generating profitability, which will make streaming available to more listeners; and (3) the price discriminatory aspects of this royalty rate structure allows the Services to afford to offer streamed music to listeners with a low willingness (or ability)-to-pay, at lower rates or through ad-supported services. Services' Joint Opening Brief at 25–27.

Regarding Factors B and C (the ''fair return'' and ''relative contributions'' objectives), the Services emphasize that the PR II-based benchmark satisfies these statutory elements because it: (1) was the result of negotiations between industrywide representatives who had every incentive to obtain a ''fair'' return and to receive recompense for their ''contributions'' to streaming; and (2) allowed interactive streaming to become ''a significant means for consumers to listen to music'' while simultaneously generating growth in annual royalties for Copyright Owners.'' *Id.* at 27–29.

Lastly on the subject of the statutory factors—regarding Factor D (minimizing disruptive impact)—the Services make a succinct argument: ''By renewing the rate levels and structure of *Phonorecords II,* there is minimal risk of disruption.'' *Id.* at 29–30.

The Services also address several further criticisms of the PR II-based benchmark contained in the Determination. Focusing first on an issue specifically addressed in *Johnson,* they assert the irrelevancy of the ''subjective intent'' of the parties that negotiated the *Phonorecords II* settlement—a factor on which the Majority relied in deciding not to adopt the PR II-based benchmark. In this regard, the Services are also responding to the D.C. Circuit's concern regarding this issue. *See Johnson,* 969 F.3d at 387 (''In rejecting that settlement as a possible benchmark, the [Judges] faulted the Streaming Services for failing to explain why the parties to the *Phonorecords II* settlement agreed to the rates in that settlement . . . [b]ut nowhere does the [ ] Determination explain why evidence of the parties' subjective intent in negotiating the *Phonorecords II* settlement is a prerequisite to its adoption as a benchmark.'').

The Services note that no benchmark evidence presented by any party is proffered with supporting evidence of the subjective intent of the bargainers who negotiated the benchmark. Moreover, they note that the Majority in fact acknowledged that ''[r]elying on a benchmark as *objectively* useful without [the need for] further inspection'' is ''typical and appropriate for the benchmarking method.'' *Id.* at 35 (quoting Determination at [55] & n.106 (emphasis added)).

With regard to other criticisms of the Majority's failure to use the PR II-based benchmark, the Services argue that the Majority misapplied their previous rulings that they ''cannot and will not set rates to protect any particular streaming service business model.'' *Id.* at 37 (quoting *Phonorecords III,* 84 FR 1945). The Services find this principle inapposite, because their point is that the multiple price-discriminatory aspects of the *Phonorecords II* approach made it ''a valuable benchmark . . . because it had allowed for different service types to emerge and grow, which benefits the entire market.'' *Id.* at 37. The Services also take issue with the Majority's assertion that the *Phonorecords II* rate structure was too complex, deriding it as a ''Rube-Goldberg-esque'' contraption. *Id.* at 38. Rather, the Services maintain that the structure was as complex as necessary to effectuate the parties' needs, particularly the price discriminatory features and the protections against

[103] The issue of bundling is addressed in this Initial Ruling *infra,* in connection with the Judges' definition of Service Revenue generated through the offering of sound recordings as part of a bundle containing other goods or services.

[104] The Services also reiterate their pre-remand argument that the *Phonorecords III* settlement of subpart A rates for sales of physical and digital download phonorecords (now reorganized in subpart B) confirms the appropriateness of the Phonorecords II-based benchmark. However, any further reliance by the Services on that argument is moot, because the D.C. Circuit affirmed the Majority's analysis of the subpart A rates. *Johnson,* 969 F.3d at 386 (noting that the Majority adequately explained treatment of the subpart A rates as '' 'at best' a floor'' below which the mechanical royalty rates paid by the Services for interactive streaming cold not fall).

[105] Under section 115—prior to the effective date of the 2008 Music Modernization Act—an interactive service was required to serve a ''Notice of Intent'' to use the copyright license (NOI) with the owner of a copyright for each musical work before streaming the sound recording embodying that musical work. By contrast, a direct license with a publisher covers more than an individual musical work by providing ''access'' value to an entire catalog, without the transaction cost burden of filing multiple individual NOIs.

revenue diminution. *Id.* at 38–39. Further, the Services note that the record is devoid of any testimony or evidence indicating any actual confusion caused by the *Phonorecords II* rate structure. *Id.* at 39. Finally in this regard, the Services maintain that the rate structure adopted by the Majority is essentially as complex as the structure in *Phonorecords II,* with the only major change being the replacement of the capped TCC rates with uncapped TCC rates.[106] *Id.*

The Services address another criticism—that the rates in the PR II-based benchmark are too low. This issue is largely moot, as the D.C. Circuit's affirmance of the Majority's expert ''line-drawing'' and ''reasoned weighing of the evidence'' confirmed that a rate increase was necessary. In this Initial Ruling, the Judges have acknowledged specifically the appropriateness of the 15.1% revenue rate—a 44% increase over the 10.5% headline rate in the PR II-based benchmark.[107]

2. Copyright Owners' Arguments

Copyright Owners assert that the record evidence overwhelmingly supports the Judges' rejection of the PR II-based benchmark. At the outset, they maintain that the Judges found—and the D.C. Circuit affirmed—that a rate increase was required in the *Phonorecords III* terms. CO Initial Submission at 13. (As noted, an increase in the headline rate by 44%, to 15.1%, is adopted in this Initial Ruling.)

Next, Copyright Owners maintain that the evidence established that ''market conditions'' were ''radically different'' at the time of the *Phonorecords III* proceeding compared with when the parties entered into their 2012 industrywide agreement in *Phonorecords II. Id.* at 17. In particular, Copyright Owners point to testimony describing the streaming industry as ''nascent'' in 2012, with fewer streams, subscribers, services, and choices of music; operating in a consumer environment when download purchases and Pandora's noninteractive service were the predominant means for consumers to listen digitally to music. *Id.* at 18–21. In sum, Copyright Owners maintain, that streaming was ''economically insignificant'' to the music industry when the PR II provisions were adopted. *Id.* at 20.

Copyright Owners particularly emphasize the substantial increase in streaming revenue during the *Phonorecords II* period. They point out that while ''total streaming revenue had ranged from approximately $150 million in 2005 to $212 million in 2010, . . . after 2012[,] annual [streaming] revenue exploded to reach approximately $1.6 billion by 2015.'' *Id.* at 23. Further, they note there is no evidence that the music publishers or anyone else had predicted this substantial rise in streaming and the revenues it generated, and that in no way could it be inferred that those rates had ''baked-in'' future growth. In fact, Copyright Owners assert at the hearing that the PR II rates were merely ''experimental''—consistent with the relatively nascent stage of the streaming industry. *Id.* at 25.

Additionally, Copyright Owners maintain that the identities of the parties involved in the *Phonorecords III* proceeding are different from those who established the *Phonorecords II* framework. Although they acknowledge the presence of current interactive services Spotify and Rhapsody in this market prior to the *Phonorecords II* framework agreed to by the trade associations for the interactive services and the music publishers, they point out that ''[n]one of the other participants in this proceeding even entered the streaming business until after the *Phonorecords II* settlement.'' *Id.* at 21.

Next, Copyright Owners assert that the Services' evidence is inadequate to support a finding that the rates in their PR II-based benchmark are suitable for use in setting royalty rates in this proceeding. First, they echo the Determination, which stated that the Services (1) did not examine in detail the particular rates within the existing rate structure; (2) relied on the 2012 rates as objectively useful without further inspection; and (3) did not call witnesses to testify regarding the 2012 settlement negotiations. *Id.* at 27 (citing Determination, 84 FR 1944 & n.106). Because of the absence of the foregoing evidence, Copyright Owners assert that the Services were left with ''no evidence explaining how the particular rates and percentages in those settlements were calculated or derived, how they were negotiated, or how they were reasonable in light of the explosive growth in the streaming marketplace between the time of those settlements and the *Phonorecords III* proceeding.'' *Id.* at 28. The absence of such evidence, according to Copyright Owners, meant that the Services had failed to carry their burden of proof under 5 U.S.C. 556(d) with respect to their proposal, a burden Copyright Owners assert the Services acknowledged they bore. *Id.* at 29–30.

Additionally, Copyright Owners claim that the D.C. Circuit found ''validity'' in Copyright Owners' assertion that the subjective intent of the parties to the *Phonorecords II* settlement is relevant because it would have revealed whether the agreed-upon rates were based on economic realities or instead were driven by other considerations. *Id.* at 30–31 (citing *Johnson,* 969 F.3d at 387). However, Copyright Owners acknowledge that, because this was not a reason given by the Majority, it carried no weight with the D.C. Circuit on appeal. *Id.* at 31.

3. Analysis and Decision Regarding PR II-Based Benchmark [108]

a. PR II-Based Benchmark Meets Most of the Requisites for a Useful Benchmark

The four classic characteristics of an appropriate benchmark are:

(1) the degree of comparability of the negotiating parties to the parties contending in the rate proceeding,

(2) the comparability of the rights in question,

(3) the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, and

(4) the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned.

In re Pandora Media, 6 F.Supp.3d 317, 354 (S.D.N.Y. 2014, *aff'd sub nom Pandora Media Inc.* v. *ASCAP,* 785 F.3d 73 (2d. Cir. 2015). As discussed below, the PR II-based benchmark meets criteria (1), (2) and (4), but requires adjustment to fully satisfy criterion (3).

First, the PR II-based benchmark obviously pertains to the same rights at issue in this proceeding, as it reflects the licensing provisions from the immediately preceding mechanical license proceeding.

Second, the licensors (songwriters and music publishers) and licensees (interactive streaming services) are

[106] As discussed *infra,* the relative complexity or simplicity of the rate structure is not a statutory factor, nor is it a decisive element of a reasonable rate structure, when the details of that structure effectuate price discriminatory configurations that would increase the availability of music and streaming revenues and otherwise satisfy the statutory criteria.

[107] The Judges characterize this issue as largely moot because the PR II-based benchmark includes on its ''lesser of'' prongs price discriminatory rates, discussed *infra.* But those ''lesser of'' rates are overridden by the ''greater'' 15.1% rate. As also discussed *infra,* Mechanical Floors continue to bind at lower mechanical royalty levels (without reducing the songwriters' ''All-In'' musical works royalty that includes the performance royalties), because these floors were retained in the Determination and were not the subject of appeal.

[108] The setting of statutory royalty rates involves to a significant degree the application of economic analysis. Accordingly, the Judges find it appropriate to set forth certain key aspects of microeconomics that guide the application of the section 801(b)(1) standard in the present proceeding. That guidance is set forth more fully in the Dissent at 29–39.

comparable (albeit not identical). While Copyright Owners emphasize the different identities and market involvement of the licensees, particularly the greater market penetration of Amazon, Apple, and Google, the Services note that even prior to the more significant entry of these three entities, similar multiproduct firms, such as Yahoo and Microsoft, were active licensees. The Judges find that the changing identities of the large multiproduct technology firms does not demonstrate the absence of comparability between and among such firms in the *Phonorecords II* and *Phonorecords III* rate periods. The shifting market entries, exits, strategies, successes and setbacks of otherwise comparable firms are expected occurrences in a dynamic capitalist market system and are not factors that materially diminish the necessary comparability of the parties for benchmarking purposes.

Third, important economic fundamentals of the marketplace are sufficiently similar in crucial respects. First, the heterogeneity of the willingness-to-pay among subscribers and listeners in the downstream market continues to support price discrimination and thus differentiated royalty rates upstream pursuant to the concept of ''derived demand.'' *See* Determination at 19 (and record citations therein) (''Weighing all the evidence and based on the reasoning in this Determination, the Judges conclude that a flexible, revenue-based rate structure is the most efficient means of facilitating beneficial price discrimination in the downstream market.''); Dissent at 32, 51, 86, 121, 126 (and record citations therein).[109] Second, the items being licensed for transmission—''second copies'' of sound recordings (with embedded musical works)—have a marginal physical cost of zero, a critical economic point on which the experts for both parties concur, and as to which the Majority and the Dissent repeatedly and significantly rely. *See* Determination at 18, 21, 36, 59, 80 (and record citations therein); Dissent at 30–31, 33–34, 37, 47, 49–50, 59, 122, 127–128 (and record citations therein).[110]

Copyright Owners are clearly correct, however, in noting a substantial change in economic circumstances that distinguished the *Phonorecords II* negotiations from the current proceeding; *viz., the dramatic growth of interactive streaming revenues.*[111] The economic impact of this revenue growth is incorporated into the experts' Shapley Value Models and the Judges' analysis of same. This analysis has generated the 44% increase in the headline royalty rate, from 10.5% to 15.1% (as phased-in by the Majority and again in this Initial Ruling).[112]

Simply put, three economic principles co-exist. First, the downstream interactive streaming market remains differentiated among listeners with different willingnesses and abilities to pay, based on varied preferences (utility) and disparities in income. Second, streaming of the ''second copy'' of the sound recordings (with embedded musical works) remains physically costless (but generates potential ''opportunity costs''). But, third, streaming revenues have grown substantially. There is no incompatibility or inconsistency in the simultaneity of these economic principles. Each of them must be taken into account and they are in this Initial Ruling.

This economic context refutes the arguments made during oral argument at the D.C. Circuit that the PR II-based benchmark should be rejected *in toto* because it was supposedly ''outdated.'' The heterogeneity of the downstream demand of listeners and the zero physical cost of ''second copies'' are enduring features that affect the upstream market via the principle of derived demand. The substantial growth of streaming revenues, however, necessitated an increase in the headline rate from 10.5% to 15.1% (as phased-in), for the reasons discussed in the Judges' analysis in this Initial Ruling of the interrelationship among: (1) Shapley Value modeling; (2) Nash Bargaining; (3) complementary oligopoly power; and (4) effective competition.

Further, the foregoing analysis also undermines the pre-remand argument made by Copyright Owners that the PR II-based benchmark reflects a market that was not yet ''mature,'' or was only ''experimental.'' Markets are not ''mature'' as opposed to, say, ''adolescent.'' Indeed, the metaphor is strained because all economic models are subject to revision if the salient facts have changed, without rendering the prior models mere ''experiments.'' Markets simultaneously exhibit enduring characteristics—here, heterogeneous customers and zero marginal physical costs and dynamic change—here, significant revenue increases.[113]

And yet, Copyright Owners seek to deny the idea that these principles could exist simultaneously. In an attempt to disqualify the application of the PR II-based benchmark, Copyright Owners complain:

> [W]hile streaming activity and revenues grew under the Phonorecords II royalty rates, the [REDACTED]. For example . . . [REDACTED].

CO Initial Submission at 15–16 (emphasis added).

But as the Services explained, the economic defect in Copyright Owners' analysis, is that it ignores the principle of price discrimination and its beneficial effects:

> [A]s [Professor] Hubbard explained, it is ''meaningless'' to compare growth in streams to growth in royalties in the context of Prime Music in particular because the record showed that Prime Music brings ''new people into the market.'' . . . If not for the flexibility (and beneficial price discrimination) the

[109] The Determination asserts that it includes a price discriminatory feature because a revenue percentage-based rate is itself price discriminatory, in that it does not set royalties on a per-play basis. Determination at 35 n.71. But that ''blunt'' form of price discrimination does not capture the granular discriminatory features that the parties had negotiated. There is no sufficient basis for the Judges to substitute their own blunt conception of the appropriate form and extent of price discrimination for the structure generated in negotiations by the market participants. *See* Dissent at 37.

[110] It bears emphasis that the fact ''second copy'' reproductions are physically costless does not even suggest that the market price should be zero. Rather, in this ''second-best'' economic context, pricing above marginal physical costs is imperative in order for Copyright Owners to recover their ''first copy'' costs, avoid ''opportunity costs,'' and earn profits. *See* Dissent at 36–38.

[111] Copyright Owners also cite data demonstrating the increase in listeners and the number of streams. The Judges find those data to be causal for the key point in rate setting in this proceeding—the significant increase in revenues.

[112] At first blush it may seem that the increase in interactive revenues is not an economic fundament that would support an increase in a percentage-of-revenue based royalty formula. However, as more fully discussed herein, under the Shapley Value approach, the increase in revenues has generated an increased ''Shapley Surplus'' (roughly analogous to interactive streaming industry profits), which the two ''Must Have'' input suppliers (record companies and Copyright Owners) will essentially split equally. If this surplus increases faster than the interactive services' non-content costs (or if those costs remain stable or fall), the increased revenues would flow disproportionately to theses input suppliers, thus causing the increase in revenues to support an increase in the royalty rate, all other things held constant. And, because the ''Must Have'' input suppliers have complementary oligopoly power, the Majority relied on a Shapley model constructed by Spotify's expert, Professor Marx, that adjusted for this market power.

[113] If one were to indulge the ''maturity'' metaphor, the ongoing creative destruction in the streaming industry has only reinforced the fact that, according to one of Copyright Owners' own economic expert witnesses, the interactive streaming market (as of the *Phonorecords III* hearing) was not yet mature, but rather remained ''a relatively new enterprise.'' Watt WRT ¶¶ 39–40. Thus, it is hardly clear from the record that interactive streaming has ''matured'' in a manner that would render anachronistic the enduring marketplace characteristics.

existing Service Provider Revenue definition and rate structure facilitated, the Copyright Owners ''would have gotten zero'' from those new listeners. . . . ''So they're better off by that amount'' of royalty growth. . . . The undisputed fact that [REDACTED]—reflects that the existing rule enables beneficial price discrimination that expands the total royalty pool and benefits Copyright Owners.

Services' Reply at 58–59.

This rebuttal by Professor Hubbard is an example of the important distinction between ''increases in demand'' (when the demand curve shifts outward) and movements ''down the demand curve'' (when sellers use price discrimination to generate more revenue without additional cost to attract buyers with a lower willingness or ability to pay). The parties' otherwise dueling economists agreed on this point. *Compare* 4/3/17 Tr. 4373–74 (Rysman) (Copyright Owners' witness acknowledging that under the current rate regime overall revenues might be increasing because of movements ''down the demand curve'' (*i.e.,* changes in quantity demanded in response to lower prices), rather than because of, or in addition to, an outward shift of the demand curve (*i.e.,* increase in demand at every price)) *with* 3/13/17 Tr. 701 (Katz) (the Services' witness who likewise noted that the present structure enhances variable pricing that allows streaming services ''to work[ ][their]way down the demand curve.'').

Moreover, Copyright Owners baldly cherry-pick the data they present. [REDACTED] CO Initial Submission at 15–16. So, by their own data, presented in their own brief, they acknowledge that [REDACTED]. *See* Services' Reply at 57–58 (Copyright Owners have proven the ''opposite'' of what they intended). This is precisely what beneficial price discrimination is designed to accomplish.[114]

The appropriateness of adopting the price discriminatory rate provisions of the PR II-based benchmark is further underscored by Copyright Owners' candid acknowledgement at the hearing that they were essentially urging the Judges to adopt what is known as the ''Bargaining Room'' approach to rate setting. *See* Dissent at 24 (and record citations therein).[115]

In the present proceeding, the appropriateness, *vel non,* of the Bargaining Room approach boils down to the following:

Copyright Owners emphasize the inability of the Judges (or anyone) to identify present market rates precisely, let alone over the five-year rate period because the compulsory license set by the Judges cannot possibly contemplate every single business model that may develop in the ensuing time. . . . If the statutory rate is set *below* market rates, then the parties will *never* negotiate upward toward the market rates, because the licensees will always prefer to invoke the right to use the licensed work at the below-market statutory rates. However, if the Judges set the statutory rate *above* what they find to be market rates, different licensees who each have a maximum willingness to pay (WTP) *below* such a statutory rate would seek to negotiate lower rates with the licensors. In response to such requests to negotiate, according to this argument, Copyright Owners would respond by negotiating various lower rates for those licensees, provided lower rates were also in the self-interest of Copyright Owners.

Dissent at 24–25 (and record citations therein).

The Judges find no reason to depart from the policy decision in *Phonorecords I* that the rate setting policies made explicit in section 801(b)(1) are best discharged if the Judges eschew the Bargaining Room approach and continue to identify rate structures and rates that reflect the standards set forth in the statutory provision. To supplant the statutory factors with a Bargaining Room approach would essentially be to adopt a purely market-based rate-setting approach that is inconsistent with section 801(b)(1) and with the Judges' application of that statute to set rates, rate structures, and terms consonant with effective competition.

With this background in mind, the Judges turn specifically to the interrelationship between the price discrimination aspects of the rates in the PR–II benchmark and the Bargaining Room approach.

Copyright Owners have demonstrated (albeit tacitly) their understanding that, if the statutory provisions did not contain a price discriminatory rate structure to reflect the varying WTP, *they would have to invent it.* This finding is apparent from their advocacy for the adoption of a Bargaining Room approach to rate-setting. *See, e.g.,* 4/3/17 Tr. 4390, 4431 (Rysman) (lauding bargaining room approach as reflecting ''economical element of *price discrimination* . . . the [licensor] is picking its prices carefully.'') (emphasis added); *id.* at 4431 (explaining that under this approach, when negotiating with Spotify regarding a rate for ad-supported service, ''Must Have'' music publishers would ''have the right . . . to set that price.''); 4/4/17 Tr. 483–45 (Eisenach) (acknowledging Copyright Owners' approach was consistent with Bargaining Room theory because they were seeking rates so high as to force would-be licensees to negotiate for the ''Must Have'' mechanical license.).

Thus, the Judges find there to be no real dispute as to *whether* there is a market-based need for an upstream discriminatory rate structure.[116] Rather, the parties appear to be in disagreement as to *who* shall be in control of the setting of rates, the Judges, through their application of *law,* or Copyright Owners, through the exercise of their complementary oligopoly *power.* The resolution of this choice is clear; the Judges, not the licensors, are statutorily-charged with establishing provisions that are reasonable and otherwise properly reflect the itemized objectives of section 801(b)(1).

Fourth, the PR II-based benchmark reflect a rate structure with an adequate degree of competition, because there

[114] Further, [REDACTED] because: (1) the marginal physical cost of ''second-copy'' streams is zero; (2) royalties were calculated [REDACTED]; and (3) Copyright Owners' original proposed a per-play (*i.e.,* per-stream) metric, which was rejected by all three of the Judges.

[115] The Bargaining Room approach was first proposed for incorporation into the statutory license standard in 1967 by the NMPA, to be included in the predecessor section, later reorganized in section 801(b)(1) that governs this proceeding. *See* Dissent at 22–24 (and citations therein). Ultimately, Congress punted on the Bargaining Room approach, and adopted into law the four-factor language set forth in section 801(b)(1). A subsequent attempt by NMPA to have the Copyright Royalty Tribunal (CRT) (a predecessor to the Judges) adopt the Bargaining Room theory was rejected by the CRT, a rejection that was affirmed on appeal. *See Recording Industry Ass'n. of America* v. *Copyright Royalty Tribunal,* 662 F.2d 1, 37 (D.C. Cir. 1981), *aff'g* Adjustment *of Royalty Payable under Compulsory License for Making and Distributing Phonorecords,* 46 FR 10466, 10478 (1981). *See generally,* F. Greenman & A. Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect,* 1 Cardozo Arts & Ent. L.J. 1, 53, 64 (1982).

[116] The *Majority* recognized this point as well when—regarding the ''increase the total revenue that price discrimination enables—they ask (and answer) rhetorically: ''How could Copyright Owners and their economic experts argue against a rate structure that inures to their benefit as well? The answer is: They do not. . . . [T]hey advocate for a rate set under the bargaining room theory, through which mutually beneficial rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law.'' Determination at 85 & n.153. The Judges also note that Copyright Owners' acknowledgement that they too would set price discriminatory rates and structures is not simply a feature of *this* market. Rather, ''discriminatory pricing . . . is the normal attribute of equilibrium . . . in a broad range of market types and conditions where consumers can be separated into distinct groups with different demand elasticities.'' W. Baumol, *Regulation Misled by Misread Theory: Perfect Competition and Competition-Imposed Price Discrimination* at 2 (2002). *See also* Dissent at 38, n.74. Given the ubiquity of discriminatory pricing, the Judges also find that the adoption into the statutory license of such pricing is not—as Copyright Owners contend—simply the inappropriate favoring of a particular business model, but rather a necessary reflection of the fundamental nature of market demand, particularly, the varied WTP among listeners.

was a balance of bargaining power between the two negotiating industrywide trade associations, offsetting the complementary oligopoly effects in place when a ''Must Have'' licensor bargains separately with each licensee. Recently, the Judges discussed in detail how the presence of countervailing bargaining power generates royalty rates at effectively competitive levels. *See Web V,* 86 FR 59452, 59457 (Oct. 27, 2021).

Further with regard to this fourth point, the parties have been operating over the past ten years under this basic rate structure, with profits accruing to the licensors and admittedly tolerable losses befalling the licensees. Moreover, after experience with these rates and this rate structure in the *Phonorecords I* period, they renewed and expanded this structure for use in the *Phonorecords II* period, when the alternative of a statutory rate proceeding was available to licensors and licensee alike. Their mutual willingness to continue in this manner is important evidence of the workability and reasonableness of this approach.

b. Evidence of Subjective Intent Not Prerequisite to Partial Adoption of the PR II-Based Benchmark [117]

The Judges rely on the PR II-based benchmark as an *objective* benchmark. Thus, the absence of testimony regarding what went through the minds of the negotiators of the *Phonorecords II* agreement (and the predecessor *Phonorecords I* agreement) does not diminish the objective value of this benchmark. The Judges view the provisions of the PR II-based benchmark as they would any benchmark, in the context of the requisite benchmarking elements identified and discussed *supra.* This approach allows the factfinder to analyze the benchmark through the lens of its service in the marketplace as an objective model for the market at issue, the *Phonorecords III* market. *See, e.g.,* 3/13/17 Tr. 550–51, 566 (Katz) (knowledge of why parties negotiated specific provisions is unnecessary, because objective results demonstrate satisfactory performances of market).

Both Professors Katz and Hubbard noted that the current rate structure remains useful, not based on consideration of the parties' subjective understandings at the time of its creation, but because the market has not since changed in a manner that would create a basis for departure. Katz WDT ¶ 80 (''My analysis has identified no changes in industry conditions since then [2012] that would require changing the fundamental structure of the percentage-of-revenue prong.''); 4/13/17 Tr. 5977–78 (Hubbard) (changes in market are ''not uncorrelated with the structure that was in place'' in 2012).[118]

In this regard, it bears emphasis that Copyright Owners' own witness, Dr. Eisenach, relied on several potential approaches that the Majority characterized as benchmarks for his rate analysis, without attempting to examine the subjective intent of the parties who negotiated those agreements. Indeed, the Majority found that the PR II Rates were properly considered as an objective benchmark, in the same manner as Dr. Eisenach's proffered benchmarks:

> The Services do not examine in detail the particular rates within the existing rate structure. Rather, they treat the rates within that structure as benchmarks, *i.e.,* generally indicative of a sufficiently analogous market that has ''baked-in'' relevant economic considerations in arriving at an agreement. Dr. Eisenach did not analyze *why* he chose the levels for the rates and ratios on which he relied as benchmarks or consider the subjective understandings of the parties who negotiated his benchmarks. Similarly, the Services' economists elected to rely on the 2012 rates as objectively useful without further inspection.
>
> This point is not made to be critical of Dr. Eisenach's approach, but rather to show that the Services' reliance on the 2012 settlement as a benchmark shares this similar analytical characteristic, typical and appropriate for the benchmarking method. (The factual wrinkle here is that, hypothetically, the Services could have called witnesses and presented testimony regarding the negotiations that led to the 2012 (and 2008) settlements, but did not, rendering the 2012 benchmark similar to other benchmarks taken from other markets.)

Determination at 55 & n.106.[119]

Copyright Owners also aver that they entered into the *Phonorecords II* settlement simply to avoid litigation costs. Copyright Owners' Reply Brief on Remand at 29. At the hearing, this assertion was presented by David Israelite, NMPA's President. Israelite WRT ¶ 28; 3/29/17 Tr. 3649–52 (Israelite) (claiming NMPA lacked financial position to fund rate litigation). The Services countered by noting that there was no evidence to support Mr. Israelite's testimony in this regard, or how it may have impacted the NMPA decision to participate. And, the Services pointed out, notwithstanding his testimony regarding financial constraints, NMPA had incurred the expense of a year-long negotiation with the Services to seek higher rates, create new service categories in subpart C, and change the TCC calculations. *Id.* at 159, 161–64; 3/29/17 Tr. 3856 (Israelite).

Further, as a general principle, a party's mere assertion that the *Phonorecords II* approach was the product of a settlement that was predicated on the avoidance of litigation costs savings does not invalidate its use as a benchmark in proceedings before the Judges, especially because, by statute, the Judges are authorized to consider such agreements. *See Music Choice* v. *Copyright Royalty Board,* 774 F.3d 1000, 1014–15 (D.C. Cir. 2014) (testimony alleging agreement was reached to avoid litigation costs does not invalidate evidentiary use of that agreement for rate setting purposes, absent other evidence demonstrating settlement was involuntary or otherwise unreasonable.). Thus, the Judges find that the evidentiary record does not support Copyright Owners' position that this ''litigation cost avoidance'' assertion constituted a separate, idiosyncratic value that diminishes the

[117] At the outset, the Judges reject Copyright Owners' contention that the D.C. Circuit found ''validity'' in their assertion that there was merit in Copyright Owners' assertion of the ''subjective intent issue.'' Rather, on this issue, *Johnson* first held: ''[N]owhere does the [ ] Determination explain why evidence of the parties' subjective intent in negotiating the Phonorecords II settlement is a prerequisite to its adoption as a benchmark.'' *Johnson,* 969 F.3d at 387. Then, when Copyright Owners' appellate counsel attempted to cure that failure by making their own ''subjective intent'' argument, the D.C. Circuit responded to that ''subjective intent'' argument with a single word: ''*Perhaps.*'' *Id.* (emphasis added). This does not in any way suggest that *Johnson* found ''validity'' in the ''subjective intent'' argument, but rather was a non-committal response, consistent with the D.C. Circuit's ruling finding that the Determination had not explained this point.

[118] As noted *supra,* the relevant material change since the *Phonorecords II* agreement was reached is the significant growth in streaming revenues. That change is reflected in the Judges' application of the Shapley Value analyses, by which the Judges increased the headline royalty rate by 44%, from 10.5% to 15.1% (phased-in).

[119] Copyright Owners do not deny that they did not offer evidence of subjective intent for Dr. Eisenach's benchmarks. Rather, they assert Dr. Eisenach's reliance on benchmarks without examining the subjective understandings of the negotiators of the benchmarks is irrelevant because: (1) Copyright Owners were not seeking the adoption *in toto* of the rates contained in any specific benchmark cited by Dr. Eisenach; (2) Dr. Eisenach analyzed multiple benchmarks to derive a reasonable range of rates; (3) his benchmarks were not adopted; and (4) his benchmarks and are not at issue on this remand. Copyright Owners Reply Brief on Remand at 28 n.19. But Copyright Owners confuse evidentiary *standards* with evidentiary *application.* Benchmarks are subject to the same evidentiary standards, regardless of the breadth of purpose for which they are proffered and regardless of whether they were adopted or rejected. Further, the fact that Dr. Eisenach's chosen benchmarks are ''not at issue on this remand'' does not render Copyright Owners' reliance on purely objective benchmarks uninformative as to their own understanding of the irrelevancy of the subjective thoughts of benchmark negotiators. *See generally Web IV,* 81 FR 26370 (proposed benchmark adjustment based on alleged ''additional value'' should be supported by ''record evidence . . . to provide a basis for such for such an adjustment.'').

Judges' partial reliance on the PR II Rates in this Initial Ruling.

Copyright Owners also mistakenly rely on the fact that the Services bore the burden of proof regarding the absence of any subjective idiosyncratic factors that hypothetically could have diminished the useful value of the PR II-based benchmark. *Id.* at n.21. The Services indeed bore the burden of *proof* (*i.e., persuasion*) with regard to their proffered benchmark PR II Rates, and they presented adequate objective evidence and testimony that this approach has worked in the marketplace to serve as *prima facie* proof to support the Judges'(partial) use of this benchmark in this remand proceeding. And, as explained above, such subjective intent was not a necessary element of their benchmark proofs. But, with regard to Copyright Owners' *rebuttal* to those proofs, Copyright Owners bore the burden of *production,* to present sufficient evidence and/or testimony that the Judges could rely on to reject the (partial) use of the PR II-based benchmark. This Copyright Owners failed to do.[120]

In fact, given Copyright Owners' reliance on the subjective intent of the parties to a benchmark, the Judges attempted to identify potential subjective evidence of how the capped TCC rates in the PR II-based benchmark [121] were derived, during the examination of Dr. Eisenach at the hearing:

> [JUDGE STRICKLER] Do you discuss, Dr. Eisenach, . . . in your written direct or written rebuttal testimony how the parties arrived . . . at the ratios for sound recording to musical works in [witness interrupts]
>
> [DR. EISENACH] That process is opaque to me, Your Honor.
>
> [JUDGE STRICKLER] Did you [witness interrupts]
>
> [DR. EISENACH] I know—I know there was a 2008 negotiation. I know there was a 2012 negotiation. I wasn't . . . present, and I'm not privy to any of the details.
>
> [JUDGE STRICKLER] You were not informed by your client or by any other source of information as to how they arrived at those particular ratios?
>
> [DR. EISENACH] *When I've asked the question, I've found people chuckle* and—and there doesn't seem to have been too much system—systematic thought that went into it, *but I don't really know that.* I just—when I ask the question, people say: *Nobody really knows.* . . . Someone may know, but that's what I've been told.

4/4/17 Tr. 4611 (Eisenach) (emphasis added). The Judges find it perplexing, to say the least, that Copyright Owners would ''chuckle'' when asked by their expert witness for the very subjective evidence which they claim to be relevant. But of perhaps greater relevance is Dr. Eisenach's further testimony, quoted above, that he was also told by Copyright Owners that ''nobody really knows'' how the parties arrived at those rate ratios. Copyright Owners' ''chuckle,'' in response to its expert's critical inquiry as to the derivation of rates—and that expert's understanding that his client *simply did not know how those rates were derived*—undercut Copyright Owners' claim that subjective understanding of those rates could undermine their usefulness in the benchmark.[122]

c. Substantial Evidence Demonstrates That PR II Rates, Other Than the Headline Rate, Are Not ''Too Low''

As noted *supra,* one reason the D.C. Circuit vacated and remanded the Determination was because it declined to entertain the argument made only by appellee's counsel that ''the prior rates had been set far too low, thus negating the usefulness of the prior settlement as a benchmark.'' *Johnson,* 969 F.3d at 387. The Judges have noted throughout this Initial Ruling their adoption of the Shapley Value modeling analysis undertaken by the Majority, and raised the headline royalty rate by 44% from 10.5% to 15.1% (as phased-in), rendering moot appellate counsel's suggestion regarding the rate level.

Here, the Judges further consider whether other rates within the PR II-based benchmark are reasonable, not only because they are part and parcel of the workable structure of that benchmark, but also to determine if they are supported by record evidence. To put this issue in context, those rates would apply on the second prong of the ''greater-of'' rate structure in the PR II-based benchmark. The first prong in the PR II-based benchmark rates is the 10.5% revenue rate—increased to 15.1% (as phased-in) by this Initial Ruling. The second prong consists of the ''lesser of'' a TCC rate or a per subscriber rate.[123] For certain delivery configurations, these rates also cannot fall below any applicable Mechanical Floor. *See Johnson,* 969 F.3d at 370.[124]

The Services describe the key feature of these non-headline rates as the fostering of beneficial price discrimination, *i.e.,* the adoption of ''different rate levels for different product offering,'' in order [t]to account for consumers' different willingness to pay [WTP] for music. Services' Joint Opening Brief (on Remand) at 21. As an example of how these price discriminatory rates impacted the market, the Services compare and contrast two Amazon offerings, Amazon Music Unlimited (for Echo) and Amazon Prime Music.

Amazon Music Unlimited, with more than 30 million available songs as of the *Phonorecords II* proceeding period, *see* Mirchandani WDT ¶ 41, [REDACTED].[125] By contrast, Amazon Prime Music, calculated as a ''bundled subscription'' configuration, makes available only an abridged repertoire of 2 million songs, see Mirchandani, supra, and [REDACTED]. *See id.* at § 385.13(a)(4).

Thus, Amazon pays [REDACTED] for listening by the more casual consumers who use the limited catalog Prime Music service at no additional charge beyond their Prime membership fee, compared to consumers who want the full repertoire provided by Amazon Music Unlimited on their Echo devices. *See* Services' Joint Opening Brief at 71. These royalty obligations demonstrate the combination of price discrimination, product differentiation and ''derived demand'' in action; that is, the [REDACTED] are derived from the lower demand of consumers of the limited Amazon Prime Music service compared with subscribers to Amazon Music

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[120] As described in this Initial Ruling, the Judges identified this same distinction between the burden of proof and the burden of production to find in favor of Copyright Owners' proffered expert testimony in support of their Nash Bargaining analysis, testimony which constituted *prima facie* proof that was not adequately rebutted by the production of sufficient testimony from the Services' expert economic witnesses.

[121] The ''capped'' TCC rates are elements of the *Phonorecords II* rates.

[122] The Judges also find Copyright Owners' assertion that they did not know how those rates were established is not credible, given that they and their representatives negotiated those rates.

[123] This second prong contains only a TCC rate (*i.e.,* an uncapped rate) for: (1) the ad-supported the service, because there are no subscribers to such a service; and for (2) bundled subscription service, for which there is a $0.25 per month floor but no per-subscriber cap, and Service Revenue for such bundles is calculated pursuant to 37 CFR 385.11 (''Service Revenue'' definition, ¶ 5).

[124] As *Johnson* explained, the CRB Judges ''retained the mechanical floor'' because, like so much of the PR II-based benchmark, it '''appropriately balances the [streaming service providers'] need for the predictability of an All-In rate with publishers' and songwriters' need for a failsafe to ensure that mechanical royalties will not vanish[.]'' *Id.* at 371–72. It is noteworthy that Copyright Owners urged the Judges (successfully) to maintain the Mechanical Floor provisions, which are the product of the *Phonorecords II* (and *Phonorecords I*) negotiations. Thus, it seems apparent that Copyright Owners as well as the Services consider provisions from the negotiated rates and rate structure to be in the nature of benchmarks, although differing as to which elements such be included or excluded. (The Services unsuccessfully argued for the elimination of the Mechanical Floors.) This perspective underscores the correctness of the Judges' decision on remand to treat the PR II-based benchmark as useful.

[125] [REDACTED].

Unlimited on their Echo devices, which in turn drive higher revenues.

It is also important to note that these differential rates on the second prong of the ''greater-of'' structure of the PR II Rates are overridden by the revenue percentage rate on the first prong if that first prong rate generates more revenue. For example, [REDACTED], *see* Dissent at 29 (Table) and 116; *see also* [REDACTED]. With the headline rate now increased on a phased-in basis, the price discriminatory royalty generated by this [REDACTED].

It is noteworthy that *Johnson* affirmed the Majority's setting of other price discriminatory features, *e.g.,* the family and student plan provisions, based on the Judges' reliance on the Services' expert testimony regarding the benefits of ''having a way . . . where low willingness to pay consumers can still access music in a way that still allows more monetization of that provision of that service.'' *Johnson,* 969 F.3d at 392–93. In similar fashion, the multi-tiered rates in the PR II-based benchmark likewise were supported by the same type of testimony; indeed, from expert testimony proffered by both parties, as considered below.

First, Professor Katz notes that the existing rate structure captures two important aspects of the economics of the interactive streaming market: (1) the variable WTP among listeners; and (2) the corollary variable demand for streaming services. *See* 3/13/17 Tr. 586–87 (Katz); *see also* Marx WRT ¶ 239 *et seq.;* 4/7/17 Tr. 5568 (Marx) (noting that the present structure serves differentiated products offered to customer segments with a variety of preferences and WTP). In more formal economic terms, Professor Katz notes that the present structure enhances variable pricing that allows streaming services ''to work [their] way down the demand curve,'' *i.e.,* to engage in price discrimination that expands the market, providing increased revenue to the Copyright Owners as well as the Services. 3/13/17Tr. 701 (Katz).

Second, in similar testimony, Professor Hubbard captures the interrelationship between the economics of this market and the existing rate structure:

> [F]rom an economic perspective, you can think of this market and this industry as being composed of different customer segments by tastes and preferences and willingness to pay. And so no rate structure can really work without understanding that, and no business model can really work without understanding that.
>
> [I]n terms of rate structures, the *Phonorecords II* framework from the previous proceeding does offer a benchmark to start because it provides for differences in distinct product categories in terms of music service offerings, pricing possibilities, and so on. And it has encouraged a very diverse digital music offering set from actual competitors.

3/21/17 Tr. 2175–76 (Hubbard). Moreover, Professor Hubbard [REDACTED] 4/13/17 Tr. 5978 (Hubbard); *see also* Hubbard WDT ¶ 4.7 (the 2012 rate structure provides the ''necessary flexibility to accommodate the underlying economics of Amazon's various digital music service offerings.''). *See also* 3/15/17 Tr. 1176 (Leonard) (notwithstanding changes and growth in the streaming marketplace over current rate period, underlying economic structure of marketplace, which made percent-of-revenue based royalty appropriate, has not changed).

Third, the Services' experts further assert that the multiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. For example, Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (agreeing that rate structure upstream should be derived from need to exploit willingness to pay of various users downstream via percentage of revenue because downstream listeners have varying willingness to pay that should be exploited for mutual benefit of copyright licensees and licensors). Professor Marx further acknowledged that this upstream:downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.* Moreover, Dr. Leonard notes that reliance on the Services to identify segmented demand and develop price discriminatory approaches is appropriate because ''the downstream company is going to have a lot more information about . . . the business, about what makes sense.'' 4/6/17 Tr. 5238 (Leonard).

Regarding a comparison of revenue growth to streaming growth, Professor Hubbard dismisses as economically ''meaningless'' Copyright Owners' argument that they have suffered *relative* economic injury under the current rate structure simply because the increase in their revenues from interactive streaming has been proportionately less than the growth in the number of interactive streams, leading mathematically to a lower implicit or effective per stream royalty rate. That is, he notes there is no evidence to rebut this *prima facie* indication of beneficial price discrimination, *i.e.,* no contrary evidence indicating that, if the Services had sought to increase the price of the services available to these low to zero WTP listeners because of higher royalties, they would have paid the higher price, rather than declined to utilize a royalty-bearing interactive streaming service. *See* 4/13/17 Tr. 5971–73 (Hubbard); *see also Dissent* at 52.

The Services also link their price discrimination argument to the fact that the marginal physical cost of streaming is zero to the need for a flexible rate structure such as now exists. In this regard, Professor Hubbard notes that, because ''[t]he marginal production cost at issue here is—is zero. . . . it's not clear why it's not better to bring new customers into the market on which royalties would be paid and, of course, zero marginal cost incurred.'' 4/13/17 Tr. 5917–18 (Hubbard). *See also* Marx WDT ¶ 97 (''Setting the price of marginal downstream listening at its marginal cost of zero induces more music consumption and variety than per-song or per-album pricing.'').

Professor Marx makes the same argument as to the salutary nature of price discrimination in this context with regard to Spotify's ad-supported approach. Focusing on the first purpose, Spotify is attracting ad-supported listeners who have a relatively low WTP, whether they have low incomes, (a budget constraint) or low interest in music (low ''utility,'' in the parlance of economists). These listeners, and the advertising revenue they generate are real and reflect the WTP of a large swath of all interactive listeners. *See* Marx WRT ¶ 115–16 & Fig. 9 (''While I agree that one aspect of the ad-supported service is to provide an on-ramp to paid services, it also has another important aspect, namely to serve low WTP customers. . . . Copyright Owners' economists err in not calculating the impact of the Copyright Owners' proposal on ad-supported services. Ad-supported services currently make up a majority of subscribers and [REDACTED]% of all streams in the industry.'').

Accordingly, a separate tier for an ad-supported service accounts for the different nature of the downstream listenership, allowing the upstream royalty to be based on that characteristic. This differentiation was essentially acknowledged by Copyright Owners late (*too late,* actually) when they proposed in their post-hearing filing that ''if the Judges intend to include the Spotify ad-supported

service in the rate structure and rate calculations, that they do so by establishing separate *rates and terms* for the ad-supported service. *See* COPCOL (Corrected) ¶ 228 & n.34. But the PR II-benchmark already incorporates separate rates for free/ad-supported services![126]

Another important evidentiary factor buttressing the need for price discriminatory rates and structures was the testimony of the Services' survey expert, Mr. Robert Klein, Chair and co-founder of Applied Marketing Systems, Inc. Mr. Klein surveyed 2,101 people (the Klein Survey) who were listeners to streamed music and found, *inter alia,* that: (1) the majority of listeners would not pay for a monthly streaming subscription; and (2) for those who do subscribe, their demand was elastic, with increases in subscription prices causing overall greater percentage reductions in quantity demanded, moving customers to free, ad-supported and non-streaming alternatives. *See Klein* WRT ¶¶ 60–67. By contrast, Copyright Owners did not present any survey testimony. The Determination fully credited the Klein Survey, finding as follows:

> It is important to note that Copyright Owners' attacks on the Klein Survey are not levelled by any witnesses, nor contradicted by their own survey expert, because Copyright Owners elected not to proffer such an expert in their direct (or rebuttal) cases. Rather, Copyright Owners elected to make a descriptive argument regarding the elasticity of demand among different segments of the market, as opposed to a survey-based or econometric study of price elasticity.
>
> [Although] Copyright Owners attack the Klein Survey on several fronts[,] [t]he arguments made by Copyright Owners are insufficient . . . to seriously weaken the probative value of the Klein Survey. In the end, the Judges are not persuaded by the Copyright Owners' revenue bundling arguments not to adopt a flexible, revenue-based royalty rate.

Determination at 22–23 & n.53; *see also* Dissent at 64–67 (including point-by-point rejection of Copyright Owners' non-expert criticisms of Klein Survey).

The Services also note that the existing rate structure has produced generally positive practical consequences in the marketplace. Their joint accounting expert, Professor Mark Zmijewski, testified that the [REDACTED] from the sale of product under (former) Subpart A since 2014 has been [REDACTED] over the same period. Expert Report of Mark E. Zmijewski February 15, 2017 ¶¶ 38, 40 (Zmijewski WRT); 4/12/17 Tr. 5783 (Zmijewski); *see also* 4/13/17 Tr. 5897 (Hubbard) (''the evidence that I reviewed suggests that the copyright holders have actually benefitted from this structure. . . .'').

More particularly, Professor Zmijewski testified that:

- Total revenues reported by the NMPA for NMPA members from all royalty sources [REDACTED]. Zmijewski WRT ¶ 41.
- This [REDACTED]. *Id.*
- The [REDACTED]. *Id.*
- Mechanical royalty revenue for the sale of downloads and physical phonorecords [REDACTED]. *Id.* ¶ 38.[127]

In sum, the foregoing analysis demonstrates the economic reasonableness and appropriateness of the price discriminatory *Phonorecords II rate structure* and its negotiated safeguards to address the real possibility of revenue diminution. As discussed below, the record evidence also supports royalty *rates* within the PR II-based benchmark.[128]

The PR II-based benchmark contain several alternate rates explicitly calculated as a percentage of payments made by interactive streaming services to the record companies for sound recording rights. *See* Addendum to this Initial Ruling. In the Subpart relating to streaming, the (former) subpart B category, the TCC is 22% for ad-supported services and 21% for portable subscriptions. *Id.; see also* 37 CFR 385.13(b)(2) and (c)(2). These percentage figures correspond to sound recording: musical works royalty ratios of 4.55:1 and 4.76:1, respectively.

With regard to these ratios, Copyright Owners' economic expert witness, Dr. Eisenach, stated: ''In my opinion, the evidence . . . indicates that the relative valuation ratios implied by the current Section 115 compulsory license . . . represent *an upper bound on the relative market valuations* of the sound recording and musical works rights.'' *Id.* ¶ 92 (emphasis added). (As an ''upper bound,'' these ratios would represent the *lower bound on the relative market valuations* of the reciprocal percentage of the value musical works rights relative to sound recording rights, again, 22% and 21%.[129]) Thus, there appears to be consensus between Copyright Owners' witness and the Services (who advocate for applying these rates on the price discriminatory tier of their benchmark) that these rates constitute ''relative *market* valuations'' (even if they are not Dr. Eisenach's preferred market valuations within the bounded zone of such values).

Dr. Eisenach's testimony regarding the ''bounds'' of useful market valuations is noteworthy because his acknowledgement is consonant with judicial precedent. The Judges' setting of reasonable rates often requires them to identify a ''zone of reasonableness,'' within which they identify appropriate statutory rates. *See, e.g., Intercollegiate Broadcasting System, Inc.* v. *Copyright Royalty Board,* 684 F.3d 1332, 1340 (D.C. Cir. 2012) (The CRB Judges' rate setting can necessitate the finding of a ''zone of reasonableness [because] ''[s]tatutory reasonableness is an

[126] Copyright Owners also belatedly proposed that the Judges establish specific functionality limits on a separate ad-supported prong to avoid cannibalization of subscriber-based streaming with fuller functionality. *Id.* [REDACTED].

[127] By contrast, Copyright Owners assert that the appropriate approach would only consider interactive service payment of mechanical royalties, and exclude performance royalties. On that basis, revenue, for the sale of digital downloads and physical phonorecords mechanical royalty revenue [REDACTED] from [REDACTED] in 2014 to [REDACTED] (as noted in (4) above, whereas mechanical royalty from streaming [REDACTED] from [REDACTED] in 2014 to [REDACTED] in 2015. Thus, the [REDACTED] in mechanical royalty revenue from streaming [REDACTED] in mechanical royalty revenue from the sale of digital and physical phonorecords. The Judges do not agree with Copyright Owners. Performance royalty and mechanical royalty payments made by the Services are for perfect complements—neither license has any value to the Services unless they acquire both. Indeed, that is a critical reason why the mechanical rate is calculated on an ''All-In'' basis. Thus, it makes sense to make the comparison in the manner undertaken by Professor Zmijewski.

[128] Again, to be clear, the Judges are substituting the 15.1% revenue rate for the 10.5% revenue rate as the headline rate in the ''greater-of'' structure of the *Phonorecords II* benchmark. Thus, the price discriminatory royalty rates discussed below would apply only if they generated a ''greater'' level of revenue than the headline 15.1% revenue rate. And, although the Mechanical Floor rate is not tied *directly* as an alternative to the ''greater-of'' revenue rate (now 15.1% as phased-in), it is not a floor that ignores the effect of that ''greater of'' rate. For example, assume the popular standalone portable subscription streaming service that people access on their mobile phones would pay an ''All-In'' musical works royalty of 15.1% based on the application of the two ''greater-of'' prongs. However, assume also the ''Performance Royalty'' that must be subtracted is 12%. That would leave 3.1% of service revenue attributable to the mechanical right. However, if that revenue rate of 3.1% yielded mechanical royalty revenue that was less than the royalty revenue generated by the applicable monthly mechanical floor of $0.50 per subscriber, then the mechanical floor would control. This application, like any other application of the mechanical floor, does not diminish the value of the 15.1% right, but rather limits *its reduction* under the ''All-In'' calculation. Recall also that the Determination, Dissent and *Johnson* do not disturb the All-In and Mechanical Floor features of the *Phonorecords II* benchmark.) And finally, with regard to the actual per subscriber monetary values in the mechanical floors, no party suggested changes from rate levels in the PR II-based benchmark, including in the mechanical floor rates. The Judges recognize, as did Dr. Katz, Pandora's economic expert witness, that alternate values might have been preferable for rates contained in the PR II-based benchmark, but none were in the record. *See* 4/15/17 Tr. 5056–58 (Katz).

[129] 1 ÷ 4.55 = .219, or 22% (rounded); 1 ÷ 4.76 = .210 (21%).

abstract quality represented by an area rather than a pinpoint.'').

The 21% and 22% TCC rates within section 115 identified by Dr. Eisenach as generating the ''lower bound on the relative market valuations'' imply certain approximate percent-of-revenue rates, *i.e.,* percent of total service revenue (not percent of sound recording revenue). *See Dissent* at 91, n.133 (sound recording rates clustered between [REDACTED]% and [REDACTED]% of revenue). For example, if the sound recording royalty rate for interactive streaming is [REDACTED]% of revenue, then the musical works rate would be calculated as 0.21 × [REDACTED], which equals [REDACTED]%, (or as .22 × [REDACTED] which equals [REDACTED]%). At the low end of the range, if the sound recording royalty rate is [REDACTED]%, then, applying these TCC figures, the implied musical work royalty rate would be calculated as [REDACTED]% (.21 × [REDACTED]) or [REDACTED]% (.22 × [REDACTED]).[130]

It is important to emphasize and detail the context of these price discriminatory rates. These capped TCC rates are on the ''greater of prong'' that is compared with the headline 15.1% revenue rate (phased-in) that the Judges are also adopting in this Initial Ruling. As phased in, the headline rate is greater than all the capped TCC-based rates identified in Dr. Eisenach's testimony, *supra,* [REDACTED]. For 2019, the phased-in headline percentage rate, 12.3%, is [REDACTED] the [REDACTED]% and [REDACTED]% revenue rates derived if the sound recording rates was [REDACTED]%. For 2018, the phased-in headline percentage rate, 11.4%, is [REDACTED] all the rates derived from the capped TCC rates Dr. Eisenach identified as ''market valuations'' (albeit the lower bound in his opinion). But that is of no negative consequence for Copyright Owners, because they would get paid on the ''greater-of'' metric (capped TCC or headline rate) under the *Phonorecords II*-based rate structure the Judges are adopting (For the portable subscriptions, even though the 80 cents/subscriber ''lesser-of'' portion of the non-headline prong would apply on that prong if it was lower than the capped TCC rate, the actual rate could not be lower than the phased-in headline rate.)

Dr. Eisenach also examined direct agreements between record companies and interactive streaming services that contain rates for sound recordings and mechanical royalties, respectively. *See, e.g., id.* ¶¶ at 84–91. In such cases, the ratio of sound-recording to musical-works royalties ranged tightly between [REDACTED] and [REDACTED], closely tracking the regulatory ratios implicit in the section 115 TCC. *Id.* ¶ 92. (The [REDACTED] ratio equates to a TCC rate of [REDACTED]%, and the [REDACTED] ratio equates to a mechanical rate of [REDACTED]%.). He concluded, as he did with regard to the actual section 115 license rates: ''In my opinion, the evidence presented . . . indicates that the relative valuation ratios implied by the . . . negotiations under [the statutory] shadow—ranging from [REDACTED] [[REDACTED]%] to [REDACTED] [[REDACTED]%]—represent an *upper bound on the relative market valuations of the sound recording and musical works rights.*'' Eisenach WDT ¶ 92 (emphasis added).

Dr. Eisenach also identified several additional useful benchmarks. First, he identified what was coined the ''Pandora Opt-Out Agreement'' benchmark,[131] which reflected a ratio of [REDACTED] of sound-recordings to musical-works in a comparable benchmark setting. This ratio translates to a TCC percent of [REDACTED]%. With sound recording royalty rates of approximately [REDACTED]% to [REDACTED]%, this TCC reflects an effective percentage of total revenue equal to [REDACTED]% to [REDACTED]%.

Second, Dr. Eisenach identified YouTube agreements with music publishers that relate to the combination of a commercial sound recording and a ''static image.'' The YouTube agreements contain an explicit royalty of [REDACTED].[132] That [REDACTED]% royalty is a denominator in the ratio concept utilized by Dr. Eisenach, and the numerator is the [REDACTED] sound recording royalty paid to the record companies. YouTube had agreed to pay [REDACTED]% of its revenues, and had agreed to pay [REDACTED] and other record companies [REDACTED]% of revenues. The [REDACTED] ratio reduces to [REDACTED], implying a TCC ([REDACTED]) of [REDACTED]%. The [REDACTED] ratio reduces to [REDACTED], implying a TCC ([REDACTED]) of [REDACTED]%. *See* Dissent at 101–102.

These additional rates identified in Dr. Eisenach's testimony further confirm the reasonableness of the non-headline rates within the PR II-based benchmark.

Finally, the Judges look at the effective rates paid by Spotify, the largest interactive streaming service in terms of in terms of the number of subscriber-months and the number of plays. *See* Marx WRT ¶¶ 37–38 & Figs. 8 & 9. Under the PR II based benchmark, Spotify paid on its *subscription* service an effective ''All-In'' royalty rate of [REDACTED]% of its total revenues. *See* Dissent at 80, 115, 149 (and record citations therein). Spotify paid this effective percent-of-revenue rate [REDACTED]. *See id.* at 29 (Table).

Turning to Spotify's free/ad-supported offering (and as noted *supra*), Spotify paid royalties under the PR II Rates at an effective ''All-In'' royalty rate of [REDACTED]%. Spotify paid this effective percent-of-revenue rate [REDACTED]. *See id.* When Spotify's two tiers are blended and averaged, the effective percent-of-revenue rate is [REDACTED]% of revenue. *See id.* at 116. The average rate has salience in this proceeding because Spotify's two

[130] Dr. Eisenach's identification of the 21%–22% TCC as within the bounds of market valuations may appear surprising at first in light of the higher 26.2% uncapped TCC rate pursued (unsuccessfully) on remand by Copyright Owners. But in the context of his testimony, Dr. Eisenach's opinion is understandable. The former headline rate of 10.5%, when sound recording rates ranged from approximately [REDACTED]% to [REDACTED]% of streaming revenues, yielded TCC rates between [REDACTED]% and [REDACTED]%. Thus, Dr. Eisenach was identifying a market valuation [REDACTED] (at his lower bound) between [REDACTED]% (the difference between 21% and [REDACTED]%) and [REDACTED]% (the difference between 22% and [REDACTED]%). Again, for context, this Initial Ruling raises the percentage rate by *44%* when fully phased-in (based on the experts' Shapley analyses, significantly above the TCC rates advocated by Dr. Eisenach, even assuming the [REDACTED]%–[REDACTED]% sound recording rates on which he relied.

[131] Pandora was only a noninteractive service at that time, and thus only paid the performance right royalty, not the mechanical right royalty, for the right to use musical works. Because the parties agree that the performance right and the mechanical right are perfect complements, Pandora's payments for the performance right are thus relevant and probative, as they reflect the full value of the musical works royalty to a noninteractive service. These factors became relevant because major music publishers had negotiated direct licensing agreements with Pandora for its *noninteractive* service covering the period from 2012 through 2018. Eisenach WDT ¶ 103. They negotiated these direct agreements after certain publishers had decided to ''opt-out,'' *i.e.,* to withdraw their digital music performance rights from PROs, and asserted the right to negotiate directly with a digital streaming service. Pandora thus negotiated several such ''Opt-Out'' Agreements with an understanding that the rates contained in those direct agreements might not be subject to rate court review and thus could reflect market-based rates. Given this unique circumstance, and given that the markets and parties involved in the Pandora Opt-Out agreements are somewhat comparable to the markets and parties at issue in this proceeding, Dr. Eisenach concluded that *these agreements provided* ''significant insight into the relative value of the sound recording and musical works rights in this proceeding.'' *Id.* (emphasis added). (The Judges did not adopt Dr. Eisenach's speculation that this performance royalty would continue to grow after 2018. *See* Determination at 51; Dissent at 102–103.)

[132] Dr. Eisenach preferred to use YouTube agreements that included [REDACTED], but the Judges relied on [REDACTED] as more comparative. Determination at 50; Dissent at 102.

tiers are interrelated, in that free/ad-supported listeners constitute a pool of potential converts to the subscription tier under this ''freemium'' model, even as this offering generates royalties under the PR II-based benchmark.

d. Copyright Owners' Concern Regarding Revenue Diminution Is Insufficient To Reject the PR II-Based Benchmark

Copyright Owners argue that what the Services tout as beneficial price discrimination generates an ''incredible'' level of revenue diminution, including displacement, resulting in a ''major problem'' that reduces reportable revenues and thus the royalty base. *See, e.g.,* 3/7/22 Tr. 193 (Copyright Owners' counsel). This argument is based upon documents and evidence that demonstrated the following:

- [REDACTED];
- [REDACTED].
- [REDACTED];
- [REDACTED];
- [REDACTED];
- [REDACTED]
- [REDACTED];
- [REDACTED];
- [REDACTED]; and
- Copyright Owners' expert, Dr. Rysman, testified that interactive services often elect to forgo current profit maximization, *e.g.,* by charging lower prices, in order to build a customer base and greater long-run profitability or value, from selling music and non-music products or services to its customers.

CO Initial Submission at 40–42 (and record citations herein).

The Services' economic experts do not ignore the fact that there can be revenue attribution problems when interactive streaming is combined with other products or services. They acknowledge that, even absent any wrongful intent with regard to the identification and measurement of revenue, attribution of revenue across product/service lines of various services can be difficult and imprecise. *See, e.g.,* 4/5/17 Tr. 5000 (Katz) (problem of measuring revenue ''certainly a factor that goes into thinking about reasonableness.'').

However, Professor Katz testified that the existing rate structure agreed to by the parties accommodates these bundling, deferral, and displacement issues via the use of an alternative rate prong that would be triggered if the royalty revenue resulting from the headline rate of 10.5% of streaming revenue fell below the royalty revenue generated by that second prong. Katz WDT ¶¶ 82–83; 3/13/17 Tr. 670 (Katz). Moreover, Professor Katz concluded that, because the marketplace appears to be functioning (in the sense that publishers are earning profits and new and existing interactive streaming services continue to operate despite accounting losses), these revenue-measurement issues are being adequately handled by the alternative rate prong, even if an altered second prong might work better. *Id.* at 738–39. More generally, Professor Katz further noted that, the existing rates within the PR II-based benchmark were performing well, and even if alternative minima might be preferable, no such alternative rates were in the record. *See* 4/15/17 Tr. 5056–58 (Katz) (under the PR II-based benchmark ''the industry . . . was performing well,'' but ''if someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined,''). But Copyright Owners did not propose alternative rates or minima within the PR II-based benchmark, but instead urged the Judges to disregard the benchmark *writ large.* Accordingly, there were no alternative rates or minima in the record.

Professor Katz further noted that the PR II-based benchmark rates were established when ''ecosystem'' entities such as Yahoo—akin to Amazon, Apple, and Google—were in the marketplace. 4/5/17 Tr. 5055–57 (Katz); see also Determination at 31 (and record citations therein) (noting the presence of Microsoft as well as Yahoo as licensees in the interactive market during the *Phonorecords II* negotiations).

More broadly, the Services' position regarding the use of the two prongs and their alternate rates to ameliorate the revenue-measurement problems is summed up by Professor Katz as follows:

> [T]he primary reason [for the two rate prongs] . . . is because of the measurement issues that can come up when having royalties based on a . . . percentage of revenues because there can be issues about how to appropriately assign revenues to a service. And so I think the minim[a] can play an important role when those—you know, when those measurement problems are severe, you can turn to the minimum instead. . . . [W]hat I have in mind, right, is that what would happen if you could imagine an entrepreneur coming along and saying we want to have a service and have some incredibly low price and not a very good monetization model, where a copyright owner would say—in an effectively competitive market, would say, wait a minute, I don't want to license to you on those terms. It's—I just think the possibility of getting a return is so low, I'm not going to do it, even though you, as an entrepreneur, are willing to try this. I as the copyright owner want some sort of, you know, return on it. And that's what the minimum also helps to do.

3/13/17 Tr. 599 (Katz.); *see also* 3/20/17 Tr. 1900–01 (Marx) (minima protect against revenue measurement problems); 4/7/17 Tr. 5584 (Marx) (statutory minima play ''two roles''—*protecting the Copyright Owners* from ''revenue mismeasurement'' by creating the ''greater of'' prong,'' but incorporating per subscriber rate prong in ''lesser of'' component *to protect services* from the record companies' use of their market power to engage in ''manipulation of the sound recording royalties'' on which the TCC prong is calculated).

After considering the record, the Judges determine that the Majority had not found—as Copyright Owners claim—that the activities and strategies by the Services were ''incredible'' or a ''major problem. Rather, the Majority's characterization was measured, stating repeatedly that the Services engaged ''*to some extent*'' in revenue diminution because they ''*might* focus on long-term profit maximization to promote their long-term growth strategy, which occurs ''even absent wrongful intent.'' Determination at 20–21, 36, 90; *accord,* Dissent at 59. In fact, the Majority specifically stated: ''The Judges agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'' *Id.* at 21 (emphasis added). The Majority (and the Dissent) thus acknowledged the reasonableness of both sides of this issue, recognizing both the Services' use of price discriminatory approaches that can lower per user or per-stream revenues but grow royalties, market share and revenue, as well as Copyright Owners' concomitant desire to protect themselves from reductions in the royalty revenue base, however limited in extent, that would only serve to diminish royalties.

One way the input supplier can avoid this impact is to refuse to accept a percent of revenue form of payment and move to a fixed per-unit input price. This is what Copyright Owners originally and unsuccessfully sought in this proceeding, subject to a bargaining room approach by which they could switch back to the old approach (or any other approach) through purely market-based negotiations, unbounded by the statutory and regulatory standards of ''fairness'' and ''effective competition.'' *See* Dissent at 60.

The Judges must reconcile the parties' competing considerations. A way by which they are both accommodated is through a pricing structure with

alternate rate prongs and floors, below which the royalty revenue cannot fall. This is precisely the bargain struck between Copyright Owners and services in 2008 and 2012, and that has been the rate structure through 2017. And, because the Majority and the Dissent found that revenue diminution occurred only ''to an extent,'' rather than in the pervasive (sweeping'') manner averred by Copyright Owners, there is no sufficient reason in the record to depart from the bargained-for multi-tiered rate structure in *Phonorecords II* that allows for price discrimination but tempers its impact on royalties through the use of minima and floors.

e. Copyright Owners' Claim of ''Inherent'' Economic Value Is Belied by the Record, Including Their Own Arguments

Pre-remand, Copyright Owners approached this rate setting process with an overarching premise: A musical work has an ''inherent value'' that must be reflected in the royalty rates. As the NMPA's president, Mr. Israelite testified, when asked how ''inherent'' value is defined:

> [W]hoever owns an individual copyright is the one to define it. I think that would be the most appropriate definition of it. What someone is willing to license it for would be that inherent value to that owner . . . That would be market value.

3/29/17 Tr. 3707 (Israelite).

If the market for musical works was as atomistic as the above quote assumes, the songwriter of an individual musical work could indeed set his or her own royalty rate, and refuse to license to any streaming service or other distributor who refused to pay that royalty. But that is not how the licensing market works.[133] Songwriters typically assign their licensing rights to music publishers (to avoid ruinous transaction costs). These music publishers control huge ''Must Have'' repertoires that are offered under blanket licenses to streaming services. (The musical works market of course is subject to a compulsory license, but this is precisely how the unregulated market works for the licensing of sound recordings by labels to interactive streaming services.) It is acknowledged even by Copyright Owners' own expert witness, Professor Watt that the creation of these large collectives generates market power that necessitates rate regulation. *See* R. Watt, *Copyright and Economic Theory: Friends or Foes* at 163, 190 (2000) (quoted in Dissent at 35).

Further, this ''inherent'' market value notion is antiquated as a matter of economics. Although an individual Copyright Owner can announce his or her ''asking'' royalty, that is not sufficient to generate a ''market'' royalty, unless and until a licensee agrees to pay it. In market-based economics. that is to say, the economic consensus that has governed economics since the ''marginal revolution'' in the mid to late 19th century, value is ascertained through the intersection of supply and demand, with the price established at the margin representing the market value of the good or service bought and sold.[134] If there is no demand for a product, be it a musical work or anything else, it has no economic value. Even though costs have been incurred to produce the product, those costs cannot be recovered (or profit earned) absent a sufficient WTP in the market. And, as noted *supra,* the product being offered and at issue here is comprised of ''second copies'' of sound recordings (with embedded musical works), which are costless to reproduce for streaming purposes. Of course, these ''second copies'' do have actual value when they are in demand, and the royalties that their licensing generates must cover: (1) the first copy (creative) costs; (2) the ''opportunity cost'' (measured by the next best alternative for royalty earnings if the ''second copies'' could have been supplied through another distribution channel that paid higher royalties to attract the end-user/consumer at issue); and (3) profits to induce the creation of musical works.

Second, the fact that Copyright Owners originally proposed a per-subscriber alternative rate to their per-play rate itself belies their conviction that some ''inherent'' economic value exists. When the metric of value switches from ''per-play'' to ''per-subscriber,'' the focus of value likewise shifts from an emphasis on producer value to consumer value. That is, if there is truly an ''inherent'' value for a product or service, that singular value cannot divide into two distinct values with the ''greater-of'' the two controlling. Such an argument gives away the game, so to speak, demonstrating, perhaps unsurprisingly, that economic arguments (not unlike legal advocacy) are often situational—designed to support maximalist positions and the exercise of market power, however acquired. *See also* Determination at 28 n.64 (rejecting the ''inherent value'' argument).

f. PR II-Based Benchmark Not ''Too Complex''

Copyright Owners and the Majority complained that the PR II-based benchmark is too complex. *See* Copyright Owners' PFF ¶ 12 (criticizing complexity of PR II Rates as lacking ''transparency''); Determination at 36 (characterizing parties' negotiated, renewed, and expanded rate structure as Rube-Goldberg-esque in complexity and impenetrability.'')

After considering this issue on remand, the Judges disagree. If some songwriters or lyricists have been confused by their royalty statements, their confusion of course should be resolved. However, one of the benefits of a collective is that it possesses the expertise and resources to identify and explain how royalties are computed and distributed. Moreover, this claim of complexity cannot serve as a basis to override the multi-part negotiated benchmark that the parties, through their respective trade associations, negotiated and implemented. As the Dissent stated: ''There is no good reason why the rate structure that is consonant with the parties' ten-year history and with the relevant economic model should be sacrificed on the slender

[133] The record does not include evidence of self-marketing by songwriters through social media or via negotiation of individual royalty contracts by the exercise of overwhelming star power, whether through traditional payment mechanisms or new methods, such as the murky mechanism of non-fungible tokens (NFTs). The absence of incidents of such self-marketing from the record evidence in this proceeding suggests that they likely constitute but a small segment of the songwriter/publisher market. Accordingly, such self-marketing and individual negotiations do not impact the Judges' setting of statutory rates in this proceeding.

[134] As one scholar has summarized the 19th century transition from classical to neoclassical economics: ''By the early 1870s, economics reached a tipping point, and it ushered in a revolution in thought, signaling the beginning of the ''modern,'' or ''neoclassical'' era. Marginalists flipped classical economics on its head. Instead of focusing on the production side of economics, they turned to consumption. It is the satisfaction of the wants of consumers that matters for value, not the labor required for production. What established the overall value of a good is the value fetched by the final unit of that item on the market. As more units of a good are produced, the marginal value of the last unit tends to decrease. . . . According to marginal utility, the consumer, not the producer, therefore drives the valuation process.'' J. Wasserman, *The Marginal Revolutionaries* at 28 (2019). This transformation reflected the abandonment of the ''labor theory of value''—the cornerstone of Marxian economics. *See* E.R. Canterbury, *A Brief History of Economics* at 111 (2001) (''Marx's devotion to a labor theory of value was complete.''). It initially appears as irony that Copyright Owners espouse a Marxian approach to value while preaching the virtues of unregulated markets. The initial whiff of irony dissipates when one appreciates that a collective licensor with the market power of control over a ''Must Have'' input has every incentive to urge a pricing or valuation method that takes the focus away from the force of consumer demand in an effectively competitive market, which is a hallmark of neoclassical economics.

argument that ''simpler is better than complicated.'' Dissent at 88.[135]

Further, section 801(b)(1) does not identify ''simplicity'' as a statutory goal for the setting of rates, rate structure, and terms. Although there is certainly no need for gratuitous complexity, the price discriminatory structure and the associated levels of rates in the PR II-based benchmark that were eliminated by the Majority (while maintaining all the remaining complexity) were most certainly not gratuitous, but rather designed, after negotiations, to establish a structure that would expand the revenues and royalties to the benefit of Copyright Owners and Services alike, while also protecting Copyright Owners from potential revenue diminution by the Services. Moreover, when the market itself is complex—in that the WTP across consumer groups is heterogeneous and the offerings reflect that fact—it is unsurprising that the regulatory provisions would resemble the complex terms in a commercial agreement negotiated in such a setting. For the Judges to demand simplicity in this context would be to sacrifice the specificity that an effectively competitive market requires. *See* Dissent at 88 (rejecting the simplicity argument by invoking the advice attributed to Albert Einstein that ''[e]verything should be made as simple as possible, *but no simpler.*''

g. So-Called Statutory ''Shadow'' Does Not Diminish Value of the PR II-Based Benchmark Rates

Copyright Owners maintain that the rates in the PR II-based benchmark are infirm because, like any benchmark for which a statutory rate is the default, they are not actual market rates. That is, such a rate is said to exist in the so-called ''shadow'' of the statutory rate. *See* Dissent at 70 (and citations therein).

The Judges reject this argument for several reasons. First, the argument is undercut by the explicit language of section 115 of the Copyright Act, which states: ''In addition to the objectives set forth in section 801(b)(1), in establishing such rates and terms, the Copyright Royalty Judges may consider rates and terms under voluntary license agreements described in subparagraphs (B) and (C).'' 17 U.S.C. 115(c)(3)(D). Subparagraphs (B) and (C), respectively, refer to agreements on ''the terms and rates of royalty payments under this section'' by ''persons entitled to obtain a compulsory license under [17 U.S.C. 115(a)(1)]; and ''licenses'' covering ''digital phonorecord deliveries.'' *Id.* Thus, it is beyond dispute that Congress has authorized the Judges, in their discretion, to consider such agreements as evidence, irrespective of—or perhaps because of—the shadow cast by the compulsory license. Thus, the appropriate question is *how much weight* the Judges, in their discretion, should afford such benchmarks in any particular proceeding.

There is no basis to find, as Copyright Owners suggest, that statutorily-based or influenced benchmarks, including specifically the PR II-based benchmark in this proceeding, are *per se* inferior to other benchmarks or alternative economic evidence (*e.g.,* from models, surveys or experiments) that may be unaffected by the shadow. Those other benchmarks or forms of evidence will also be subject to their own imperfections and incompatibilities with the target market and must be identified and weighed accordingly.[136] Thus, the Judges must not only consider (i) the importance, *vel non,* of any potential so-called ''shadow-based'' distortionary effects from a benchmark derived from a *regulated* statutory benchmark market, but also (ii) how any such purported ''shadow'' effects compare to any distortions generated by other proffered benchmarks and competing alternative economic evidence, *e.g.,* distortions based on complementary oligopoly power, bargaining constraints and product differentiation in other benchmarks, models, surveys or experiments.[137]

The Services' experts discount the foregoing shadow-based criticism. Moreover, the Services laud a statutorily-influenced benchmark in general, and the specific PR II-based benchmark in particular, because the latter reflects more equal bargaining power between licensors and licensees. In this regard, one of the Services' economic expert witnesses, Professor Katz, points out that rates set voluntarily by the parties in a settlement under the ''shadow'' provide two important benefits. First, with a statutory rate-setting proceeding as a backstop, large licensors cannot credibly threaten to ''hold out'' and ''walk away'' from the negotiations without an agreement, thereby negating their ability to use their ''must have'' status to obtain rates above effectively competitive levels. Second, when, as here, such negotiations are conducted with *all the parties* at the figurative table—including here, trade associations—no single party has disproportionate market power in the negotiations. *See* 3/13/17 Tr. 661 (Katz).

The Judges agree that settlement agreements reached in the statutory shadow are useful. Although imperfect when considered in *isolation,* in that the statutory proceeding is the default backstop, in *context* they negate the power of any entity simply to refuse to strike a deal. The negation of that power blunts the complementary oligopoly power of licensors of ''Must Have'' repertoires (whether musical works or sound recordings), making a benchmark agreement reached in the so-called ''shadow'' advantageous in establishing an effectively competitive rate. *See Web IV, supra,* 26,316, 26,330–31 (May 2, 2016) (noting counterbalancing effect of statutory license in establishing effectively competitive rates). Further, when such settlement agreements are industrywide, they tend to eliminate disproportionate market power, *See* Dissent at 72; *Web III,* 79 FR 23102, 23111 (Apr. 25, 2014), *aff'd Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.,* Case No. 14–1098 (D.C. Cir. Aug. 11, 2015) (relying on two settlement agreements).

Nonetheless, Copyright Owners are correct to note that, hypothetically, some licenses might have otherwise been negotiated at rates higher than the settlement rate that was affected by the so-called shadow. But that is simply the tradeoff that the statutory scheme makes in its identification of settlement rates as evidentiary benchmarks. Such a theoretical problem cannot serve to override the salutary aspects of benchmark settlement agreements. *See Web IV, supra* at 26,630 (rejecting same argument as speculative and ''too untethered from the facts to be predictive or useful in adjusting for the supposed shadow of the existing statutory rate.'').

Lastly, with regard to a benchmark affected by the so-called ''shadow,'' the Judges find that, with regard to the application of the itemized factors in

[135] Copyright Owners' concern for transparency has apparently evaporated in connection with its eagerness to adopt the proffered uncapped TCC rates. Under that approach, the definition of revenue, the handling of bundled products and the exclusion of certain consideration from the royalty base will remain opaque to songwriters—and to the Judges.

[136] It has been famously and wisely said that ''all models are wrong, but some are useful.'' G. Box & N. Draper, *Empirical Model-Building* at 424 (1987). Benchmarks, Shapley, and Nash models, surveys and experiments are all models, in that ''[a] model is a representation of something beyond itself . . . being used as a representative of that something, and in prompting questions of resemblance between the model and that something . . . substitute systems . . . directly examined . . . to indirectly acquire information about their target systems.''). U. Maki, *Models are Experiments, Experiments are Models,* 12 J. Econ. Meth. 303 (2005).

[137] It is also important to note that the reasonable rate and rate structure identified under the section 801(b)(1) standard (before considering the four itemized statutory factors) need not be a market-based rate, as discussed *infra.*

section 801(b)(1), they have the same duty to independently weigh those factors as they do for all otherwise reasonable rates. Thus, the Judges reject the idea that rates and terms reached through a settlement must be understood to supersede—or can be *assumed* to embody—the Judges' current thinking as to the application of the statutory elements set forth in section 801(b)(1). The Judges are obliged to conduct the four-factor analysis anew when considering a previously adopted settlement in a subsequent proceeding—and they do so *infra.* Of course, if on such further analysis, the Judges find that the provisions in an otherwise useful benchmark agreement (including those in a benchmark influenced by the so-called ''shadow'') *do* appropriately reflect the four itemized statutory factors in section 801(b)(1), then the Judges may adopt the provisions of that settlement without a factor-based adjustment.

h. Conclusion Regarding PR II-Based Benchmark

Accordingly, the Judges find the PR II Rates to be a useful benchmark. However, this benchmark is modified by the Judges' substitution of the 15.1% headline percentage rate for the 10.5% headline percentage rate in the benchmark.

D. Precedent Permits Judges To Apply Elements of PR II Rates, Rate Structure and Terms Even if Those Are Not Proffered as Benchmarks

The D.C. Circuit has previously held that the Judges have the authority to adopt elements from the existing rate provisions, if they find that those prevailing provisions better satisfy the statutory requisites than any other proposed structures and rates discernible from the record evidence. *Music Choice* v. *Copyright Royalty Bd.,* 774 F.3d 1000, 1009 (D.C. Cir. 2014). This authority exists even when no party has proffered those provisions in the form of a benchmark.

In *Music Choice* (concerning the setting of satellite radio royalty rates under the same section 801(b)(1) standard), the CRB Judges rejected the parties' proffered benchmarks and instead relied on a percent-of-revenue rate (13%) that was neither a benchmark nor even the prior statutory rate, but merely ''a component of a prior determination.'' *Id.* at 1009. The licensor-party, SoundExchange, argued, like Copyright Owners here, that this component of a prior rate was ''stale,'' ''outdated,'' or ''obsolete.'' Rejecting this argument as ''erroneous,'' the D.C. Circuit stated that ''the Judges did not consider the 13% rate as a current benchmark,'' but rather used it to ''bridge the gap'' caused by the inadequacies of the parties' rejected benchmarks. *Id.* In so doing, the D.C. Circuit held that the Judges properly resolved ''serious problems'' with the licensor's proposal, even as it had ''partially credited it'' and also ''used permissible indicia of reasonableness to help fix the rate.'' *Id.*

Music Choice is highly instructive. Here, on remand, the Judges adopt a modified version of the prior rate structure and rates in *Phonorecords II.* The fact that it was also proffered as a benchmark, in another modified form by the Services, does not render *Music Choice* inapposite. Rather, because the *Phonorecords II* provisions were proffered as benchmark evidence, these provisions were placed squarely into the record, allowing the parties and the Judges to address the relative merits. *A fortiori, Music Choice* underscores the propriety of the Judges approach in this proceeding. That is, even if the Services had not proffered this approach as a benchmark, *Music Choice* allows the *Phonorecords II* approach to serve as a guidepost for establishing the rates and rate structure in this proceeding.

Further, here the Judges are adopting actual elements from the prior rate provisions, rather than, as in *Music Choice,* a mere ''component'' used to generate the prior rate. *A fortiori* yet again, *Music Choice* allows the Judges to prudently utilize the prior rate and rate structure regulations to synthesize a determination in this proceeding. The analogous nature of *Music Choice* is also seen in the Judges' use in the present case of the ''headline'' 15.1% revenue rate proposed by Copyright Owners on remand *combined with* elements from the PR–II regulatory provisions, including its price discriminatory rates. In *Music Choice,* the Judges likewise ''partially credited'' the licensor's proposal, which, as noted *supra,* the D.C. Circuit affirmed.

Finally, the Judges take note that *Music Choice* also addressed the Judges' findings regarding the setting of another statutory license, for Preexisting Subscription Services (PSS), by using a rate in a settlement from a prior period. This context is also analogous here, because Copyright Owners object to the use of the *Phonorecords II* rate structure and rates as the product of a settlement. It is instructive to consider how the arguments of the licensor (SoundExchange) in *Music Choice* mirror those of Copyright Owners in this proceeding:

- SoundExchange notes that this rate ''is *the product of settlement negotiations* that occurred in *SDARS I* between Music Choice and SoundExchange.''
- SoundExchange argues that the Judges arbitrarily rejected . . . more recent data points in favor of the ''outdated'' settlement rate.
- SoundExchange maintains that the Judges conceded that the prevailing rate had limited value, as the settlement rate ''was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate.''
- SoundExchange also argues that simply reciting that ''nothing in the record persuades the Judges'' that the prevailing rate is unreasonable . . . does not show that [it] is reasonable, or that it is supported by the written record.
- [G]iven the lack of creditable benchmarks in the record, the Judges did not err when they used the prevailing rate as the starting point of their Section 801(b) analysis.
- The Copyright Act contemplates that the Judges would . . . consider ''prior determinations'' and rates established ''under voluntary license agreements.''
- [T]he Judges did not err when relying on the settlement rate. The Judges conceded that the settlement rate does not represent a market rate. . . . But . . . the relevant portion of the Copyright Act does not use the term ''market rates,'' nor does it require that the term '''reasonable rates'' be defined as market rates. . . . The Act authorizes the Judges to consider rates set ''under voluntary license agreements.''
- Music Choice complains that it agreed to a higher rate to avoid litigation costs, but has not introduced evidence that the settlement was involuntary or otherwise unreasonable. It was not arbitrary, then, for the Judges to consider the voluntary settlement rate.

Music Choice, 774 F.3d at 1012–15. These aspects of *Music Choice* are highly instructive, considering the Judges' parallel findings regarding the same and similar arguments as discussed *supra* regarding prior settlement agreements and the so-called ''shadow'' of the statutory rates.

In sum, *Music Choice* provides ample support for the conclusion that, even if the Services had not proffered their PR II-based benchmark, the Judges would have acted well within their authority to give the same weight to the PR II rates and structure as they have in this Initial Ruling.[138]

[138] This ruling is in no way conflicts with the Judges' duty to set rates, rate structures, and terms *de novo* in each rate proceeding, as discussed supra.

E. Four Itemized Factors in Section 801(b)(1)

The Judges have considered the application of the four itemized statutory factors A through D, in connection with their application of the 15.1% revenue rate and their partial use of the PR II-based benchmark.

1. Factor A

The Judges have explained *supra* that price discrimination is a ''win-win'' for Copyright Owners and the Services. By serving low WTP listeners, it brings in new listeners and subscribers who increase royalty payments as well as revenues. Any licensor would prefer to increase its royalties, rather than ''leave money on the table,'' and a rate structure that effects such an increase (through the concept of ''derived demand'') is appropriate. Moreover, for purposes of applying Factor A, a rate structure that increases royalties, *ceteris paribus,* would induce more production of musical works, a result that Copyright Owners should desire.

This point appears to raise a question: How could Copyright Owners and their economic experts object to a rate structure that inures to their benefit as well? The answer is: They do not object. They are not economic naifs. As stated *supra,* they advocate for a rate set under the bargaining room theory, through which rate structures can still be negotiated, but not subject to the ''reasonable rate'' and itemized factor analysis required by law. In those negotiations, as Dr. Eisenach candidly acknowledged, Copyright Owners would have a different threat point to use in order to obtain better rates and terms. 4/4/17 Tr. 4845–46 (Eisenach).

Second, given a heterogeneous downstream WTP, it would not be more profitable simply to equate ''availability'' with a higher rate. As noted *supra,* any product that is priced beyond the WTP of a significant portion of the public is *unavailable* to that segment.[139] Royalties that are aligned with the varying WTP of different classes of listeners will make downstream price discrimination more affordable to the services, driving new revenue and royalties—precisely as the PR II-based benchmark allows.[140] In this regard, Copyright Owners have taken a cramped and unrealistic view of such incentives. In particular, the Judges disagree with Copyright Owners' expert economic witness, Professor Rysman, who startlingly asserted in response to a hypothetical from the bench that even a $10,000 per month subscription price would increase ''availability.'' 4/3/17 Tr. 4397 (Rysman).

The Judges find Professor Rysman misapprehends the nature of a price signal. If the price is so high as to eliminate or reduce total revenue to creators, in no way will higher rates simply induce the supply of creative works over time. Indeed, even monopolists do not seek the highest price possible, but rather seek to maximize profits. *See* E. Mansfield & G. Yohe, *Microeconomics* at 362–63 (11th ed. 2004) (''Monopolies maximize profits by producing where marginal cost equals marginal revenue.''). Thus, even monopolists, who have the most market power, are constrained in their pricing by the demand curve and the marginal revenue it creates. Simply put, although a higher royalty *rate* might have an immediate superficial appeal, if the consequence will be lower revenues, the high per-play rate would reveal itself as a form of fool's gold.

In sum, the Judges find that the Factor A objective of ''maximizing the availability of creative works'' is furthered by an upstream rate structure that contains multiple royalty rates reflective of and derived from downstream variable WTP, because it will facilitate beneficial price discrimination. Such price discrimination allows for access to be afforded ''down the demand curve,'' making musical works available to more members of the public. However, there is no evidence to suggest that the price discriminatory rates should be changed, in order to address the connection between price discrimination and the objective of Factor (A). Accordingly, the Judges find no basis to adjust either the rate structure or the rates based on Factor (A).

2. Factors B and C

The concepts of ''fair income,'' ''fair return'' and recompense for costs and other contributions was considered in connection with the setting of the 15.1% revenue rate. In that context, the Judges analyzed the Shapley Value modeling that was designed to generate ''fair'' rates that allowed the parties to recover their costs and to share the surplus (over and above costs) in a manner that: (1) prevented the ''Must Have'' Input Suppliers (the record companies and Copyright Owners) from using the essential aspect of their inputs to engage in hold-up by threatening to withhold their respective repertoires; and (2) allocated surplus shares according to each party's contribution to the surplus (as calculated though the ''arrival orderings'' in the Shapley model).[141]

The PR II-based benchmark was the product of an *industrywide* negotiation, with the music publishers represented by the NMPA and the interactive streaming services represented by DiMA, their respective trade associations. As explained in the Dissent, *supra,* at pp. 137–39, when an industrywide settlement is reached, particularly when the default procedure is a contested rate proceeding before the Judges, it contains the same benefits with regard to the avoidance of the ''hold-out'' effect and the equalizing of bargaining power as produced by Professor Marx's Shapley value modeling. *See* 3/13/17 Tr. 577 (Katz) (''I think of the shadow as balancing the bargaining power between the two

The *de novo* process requires the Judges to weigh new evidence regarding potential new rates, rate structures, and terms, but that is not inconsistent with the Judges' ability, as explicated by the D.C. Circuit in *Music Choice,* to adopt prior rates, rate structures, and terms in whole or in part if, in their discretion, the new evidence is deficient. *See Music Choice, supra,* at 1012 (''The Judges were under no obligation to salvage benchmarks they found to have fundamental problems.'').

[139] The concept of willingness-to-pay (WTP) as used by economists is an antiseptic phrase, because it includes not merely people who do not value a music streaming subscription highly, but also individuals and families who are ''income constrained'' (yet another antiseptic phrase, read ''low income'' people and families) who lack the ''ability-to-pay'' for an interactive subscription. That segment of the population likely reflects a significant portion of the nation, because ''40% of Americans would struggle to come up with even $400 to pay for an unexpected bill,'' let alone pay for a music streaming service. See *https://www.minneapolisfed.org/article/2021/what-a-400-dollar-emergency-expense-tells-us-bout-the-economy.* When the royalty rates paid by interactive services enable streaming services to satisfy the demand of these low-income consumers (through the principle of ''derived demand'') that segment of American society can enjoy the benefits of listening to interactive streamed music, even if the offerings they can afford lack the large catalogs and ''bells and whistles'' of a pricier service.

[140] To be sure, royalties will not increase in equal proportions with increases in the number of streams or listeners, but that is a feature of price discrimination, not a bug. The goal is to generate revenues from low WTP listeners who otherwise would be lost as sources of revenues and royalties to both the interactive services and Copyright Owners.

[141] As noted elsewhere in this Initial Ruling, Professor Marx, Spotify's economic expert witness, reduced the relative market power of the input suppliers in her model which she claimed would be consonant with the ''fairness'' objectives in Factor B. On behalf of Copyright Owners, Professor Watt disagreed, arguing that the Shapley approach takes the existing market power as reflective of the parties' market contributions, and thus needs no adjustment. The Majority utilized Professor Marx's Shapley-based calculation of a total royalty payment of [REDACTED]% of service revenue in setting a 15.1% revenue rate (phased-in), which the Judges are adopting in this Initial Ruling. The Majority also used Professor Marx's calculation to find that Factors B and C were satisfied without further adjustment. *See* Determination at 68 & n.120, 75, 86–87. But this issue is not relevant to the present discussion of Factors B and C with regard to the application of the PR II-based benchmark.

parties.''); Katz CWRT 136, n.236 (''there are market forces that promote the achievement of the statutory objectives in private agreements, such as the 2012 Settlement, when the parties are equally matched (it was an industry-wide negotiation) and the negotiations are conducted in the shadow of a pending rate-setting proceeding that can be expected to set reasonable rates in the event that the private parties do not reach agreement.'').

Accordingly, this benchmark already incorporates the dynamics of a negotiation between parties with mutually countervailing power (although those dynamics required updating of the headline rate to 15.1% to account for the higher revenues, as undertaken by the Majority's Shapley analysis). *See Web V,* 86 FR 59452, 59456 (Oct. 27, 2021) (''the licensor-side complementary oligopoly power could be ameliorated by the ''*countervailing power*'' of a licensee'').

Therefore, the Judges do not make any adjustment in their application of the PR II-based benchmark pursuant to Factors B and C.

3. Factor D

As noted *supra,* the Judges understand that a Factor D adjustment is warranted if the rate the Judges would otherwise establish

> directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.

Determination at 87.

There is no record evidence to suggest that the Services' PR II-based benchmark, as utilized by the Judges in this Initial Ruling, would create the requisite ''adverse impact'' to trigger Factor D. The Services certainly do not assert that their own proffered benchmark would be disruptive. With regard to Copyright Owners, the Judges cannot identify any aspect of the PR II-based benchmark that would cause the type of disruption that can serve as an adjustment under the statutory language of Factor D or the Judges' application of same, as quoted above. The Judges understand Copyright Owners' complaint to be principally that [REDACTED] during the *Phonorecords II* period, [REDACTED] the number of musical works streamed via sound recordings performed on interactive services. However, that is most certainly not any sort of disruption, let alone a disruption cognizable under section 801(b)(1) and under the Judges' application of that provision.

F. Subpart C Offerings Covered by Foregoing Analysis

The *Phonorecords II* parties also negotiated several new service types—paid locker services, purchased content locker services, mixed service bundles, music bundles and limited offerings. These service configurations were described in subpart C of 37 CFR 385 under the *Phonorecords II* regulatory provisions.[142] Parness WDT ¶ 13; Levine WDT ¶¶ 38–39; Israelite WDT ¶¶ 28–30. These negotiations spanned more than a year. *See* 3/29/17 Tr. 3652–55 (Israelite) (involved protracted bargaining, in which NMPA rejected some categories, while others were accepted and became part of subpart C). *Id.* at 3654–56. The parties ultimately agreed on a structure for subpart C that resembled the subpart B structure, including a headline percentage of revenue royalty rate and per-subscriber and TCC minima. Parness WDT ¶ 14; *see also* 37 CFR 385.22. As with the bundling negotiations relating to subpart B, the parties negotiated and created a bundled service category under subpart C (with certain adjustments to the definition of ''revenue.'') 3/8/17 Tr. 161–64 (Levine); 37 CFR 385.21.

Copyright Owners urge the elimination of the subpart C provisions as essentially obsolete because locker services for ''purchased content'' (new download purchases) and for ''paid'' downloads (already owned) have largely disappeared, as listeners transitioned away from ownership models to access models. *See* 3/8/17 Tr. 159–160 (Levine); 3/16/17 Tr. 1458–1461 (Mirchandani); Mirchandani WDT ¶ 33; 3/22/17 Tr. 2523 (Dorn). Copyright Owners also re-assert the same arguments with respect to subpart C as they have for interactive streaming in subpart B. *See* CORPFF–JS at p.2.

The Services argue that Copyright Owners do not point to any evidence to show that locker services have *completely* disappeared, emphasizing that Apple and Amazon continue to offer locker service. Joyce WDT ¶ 5; Mirchandani WDT ¶¶ 16–17; 3/22/17 Tr. 2523–25 (Dorn); Ramaprasad WDT, Table 3. More generally, the Services urge the Judges to use the subpart C rate structure as the benchmark for rates in the forthcoming period for the same reasons as they urge the use of the subpart B rates as an appropriate benchmark. *See* Mirchandani WDT ¶¶ 58–62.

The Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings, for the reasons set forth in the Dissent at 118–119. That means, however, that the various ''headline'' rates for these subpart C offerings must also adjust to 15.1%,[143] whereas the alternative rates (identified in subpart C as ''minima'' and ''subminima)'' rates shall remain unchanged.

IV. Change in Definition of Service Revenue for Bundles [144]

The Judges analyze the definition of ''Service Revenue'' for bundled offerings in the context of the partial adoption of the PR II-based benchmark. As discussed *supra,* the Judges have found that the PR II-based benchmark is a useful benchmark, particularly because of its features that incentivize beneficial downstream price discrimination that generates more listeners, revenues, and royalties.

A. Background

In their Initial Determination, the Judges adopted a definition of ''Service Revenue'' (*i.e.,* a royalty base) for a ''Bundle'' [145] that provided, in pertinent part:

> Service Revenue shall be the revenue recognized from End Users for the Bundle less the standalone published price for End Users for each of the other component(s) of the Bundle . . .

Initial Determination, Attachment A at 7 (§ 382.2 therein).[146]

[142] The interactive steaming (and limited download) provisions that are the principal subject of this proceeding were contained in subpart B of the *Phonorecords II* (and *Phonorecords I*) regulations. (These subparts were reorganized pursuant to the now vacated Determination.)

[143] Accordingly, in the PR II-based benchmark, the subpart C ''headline'' rates that shall adjust to 15.1% are: 11.35% for Mixed Service Bundles; 11.35% for Music Bundles; 10.5% for Limited Offerings; 12% for Paid Locker Services; and 12% for Purchased Content Locker Services. *See* 37 CFR 385.22(a)(1) (*Step 1*); 385.23(a)(1) through (5).

[144] Judge Strickler disagrees with the *procedural* analysis of a different majority by which they readopt the Bundled Revenue definition from the Initial Determination, and he dissents on that specific issue. However, Judge Strickler concurs and joins with the Majority regarding the *substantive* re-adoption of that definition from the Initial Determination. Judge Strickler has drafted a separate opinion on this Bundled Revenue issue.

[145] For interactive streaming, the Judges' Initial Determination defined a ''bundle'' (in pertinent part) as an offering which combined the delivery of streamed music: ''together with one or more non-music services . . . or non-music products . . . as part of one transaction without pricing for the music services or music products separate from the whole offering. . . .'' Initial Determination, Attachment A at 2 (§ 385.2 therein).

[146] The definition added: ''[I]f there is no standalone published price for a component of the Bundle, then the Service shall use the average

After the Judges issued their Initial Determination, Copyright Owners submitted a Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms which disclaimed any intent to seek rehearing, but sought ''clarification or correction'' of certain regulatory terms to conform them to what Copyright Owners claimed to be the apparent intent of the Initial Determination. (Motion for Clarification).[147] Copyright Owners purported to bring their motion under the Judges' general regulations governing motions. *See* 37 CFR 303.3 and 303.4 (formerly codified at 37 CFR 350.3 and 305.4).

The Motion for Clarification argued, among other things, that the definition of Service Revenue as applied to bundled offerings should be reworked. Copyright Owners argued that defining the revenue as the total price of the bundle, minus the standalone published prices for the non-streaming offerings in the bundle, undervalued the revenue created by the streaming offerings. They proposed that ''Service Revenue'' for bundled offerings be defined as the standalone price of the offering (or comparable offerings).

The Services objected to Copyright Owners' styling of their motion as something other than a motion for rehearing. The Services also objected that Copyright Owners had not previously proposed a definition of ''Service Revenue'' for bundled offerings, and that their ''late-proposed'' definition was unsupported by the record.

On October 29, 2018, the Judges issued an Order concluding neither party had met the exceptional standard for granting rehearing motions,[148] stating that the parties had failed to present ''even a *prima facie* case for rehearing under the applicable standard''. Amended Order Granting in Part and Denying in Part Motions for Rehearing (Order on Rehearing) (Jan. 4, 2019).[149]

The Judges explained that they nevertheless found it appropriate to resolve the issues that the parties had raised. Order on Rehearing at 2. The Judges added that, to the extent such resolution could be considered a rehearing under 17 U.S.C. 803(c)(2), the Judges resolved the motions on the papers without oral argument. *Id.*

Regarding the definition of ''Service Revenue'' for bundled offerings, the Judges summarized the parties' competing arguments:

> Copyright Owners presented evidence that the existing approach led, *in some cases,* to an inappropriately low revenue base—but did so in service to their argument that the Judges should reject revenue-based royalty structures. *They did not present evidence to support a different measure of bundled revenue* because their rate proposal was not revenue-based. The Services rely on the fact that the approach to bundled revenue in the extant regulations is derived from the 2012 Settlement. The Judges have, however, *declined to rely on the 2012 Settlement as a benchmark,* as the basis for the rate structure, or, therefore, as regulatory guidance.
>
> The Services have observed *correctly* that the evidentiary records in *Web IV* and *SDARS III* differ from the record in this proceeding.[150]

Order on Rehearing at 17 (emphasis added).

Despite these arguments, the Judges found that neither party presented evidence adequate to support the approach advocated in post-determination filings, because ''the 'economic indeterminacy' problem inherent in bundling'' remained unresolved.'' *Id.*[151] The Judges stated that the Services were the party in possession of the relevant information, and concluded that the Services bore the burden of providing evidence that might mitigate the ''indeterminacy problem'' inherent in bundling. Because the Judges concluded that the Services had not met that burden, they ruled that they must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners proposed. As a result, the Judges discarded the formula in the Initial Determination and ruled, instead, that streaming service providers will use their own standalone price (or comparable) for the music component (not to exceed the value of the entire bundle) when allocating bundled revenue. *Id.* at 16–18.

Consistent with the Judges' Order on Rehearing, the Judges' replaced the definition of ''Service Revenue'' for a ''Bundle'' that they had included in the Initial Determination with a new definition in the Determination. The final definition provided, in pertinent part:

> Service Revenue shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities . . . [or] if there is no [such] standalone price, then the average standalone . . . price . . . for the most closely comparable product or service . . . or . . . the average of standalone prices for comparables.

Determination, Attachment A at 8.

The Services, Copyright Owners and George Johnson appealed the Judges' Determination to the D.C. Circuit. *See Johnson,* 969 F.3d 363. The Services challenged both the Judges' legal authority and the substantive soundness of the decision to reformulate the definition of ''Service Revenue'' for bundled offerings, after the Judges had issued the Initial Determination.

The D.C. Circuit examined several authorities under which the Judges may revisit and amend a determination. It addressed the three ways identified in the statute: ''(i) order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A); (ii) correct 'technical or clerical errors,' *id.* § 803(c)(4); and (iii) 'modify the terms, but not the rates' of a royalty payment, 'in response to unforeseen circumstances that would frustrate the proper implementation of [the] determination.' '' *Johnson,* 969 F.3d at 390. The D.C. Circuit found that the Judges' reformulation of the definition of ''Service Revenue'' fit none of those categories.

The D.C. Circuit noted that the Judges were explicit that they did not treat the Motion for Clarification as a motion for rehearing under 17 U.S.C. 803(c)(2). *Id.* Furthermore, the D.C. Circuit noted the Judges' own findings that the Motion for Clarification did not meet the exceptional standard for granting rehearing motions under section 803(c)(2) and that the Copyright Owners failed to make even a *prima facie* case under the rehearing standard.

In *Johnson,* the D.C. Circuit found that the change to the definition of Service Revenue for bundled offerings was not an exercise of the Judges' authority under section 803(c)(4) to ''correct any technical or clerical errors in the determination[.]'' 17 U.S.C. 803(c)(4).

standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.'' *Id.* at 7–8.

[147] Streaming Services submitted a motion for rehearing that was limited to fixing clerical errors and clarifying existing ambiguities in the proposed regulatory terms appended to the Initial Determination.

[148] The standard is set forth in the Order on Rehearing at 2 n.3. The Judges discuss and apply this standard *infra,* pursuant to *Johnson,* and in the context of this remand proceeding.

[149] Judge Strickler, who had dissented from the Initial Determination and the Determinations, did not join in this Order on Rehearing.

[150] In Web IV and SDARS III, unlike under the Phonorecords II-based benchmark, there were no minima or floors to provide licensors with royalties in the event bundled offerings would otherwise fail to generate royalties.

[151] The ''economic indeterminacy'' problem was described in SDARS III: ''Such bundling [for full quotation, see eCRB no. 27063 n.140].'' *SDARS III,* 83 FR 65264. As discussed in this Initial Ruling, this indeterminacy problem was addressed by the Phonorecords II-based benchmark through negotiated alternative royalty provisions for bundled offerings.

The D.C. Circuit observed the substantive nature of the change to the definition and determined that there was nothing technical or clerical about the amendment. The D.C. Circuit found that the Judges did not even purport to modify the terms in response to unforeseen circumstances that would frustrate the proper implementation of the Initial Determination. The D.C. Circuit observed that the Judges never mentioned section 803(c)(4) or unforeseen circumstances as the basis for revamping the Service Revenue definition.

Beyond the explicit statutory authorities for amendments to determinations, the D.C. Circuit addressed arguments for inherent authority to make *sua sponte* any appropriate substantive or fundamental changes after the Initial Determination. The D.C. Circuit foreclosed reliance on inherent authority, finding that Congress's decision to limit rehearing to exceptional cases, and to confine other *post hoc* amendments to cases involving technical or clerical errors, would be a nullity if the Judges also had plenary authority to revise their determinations whenever they thought appropriate. The D.C. Circuit noted that the Judges' decision to amend the definition said nothing of the sort, and prior decisions are silent on that topic.

In sum, the D.C. Circuit found that the Judges failed to explain the legal authority for reformulating the definition of ''Service Revenue.'' In relevant part, the D.C. Circuit ruled

> we must vacate the [ ] Determination's bundled offering Service Revenue definition and remand for the [Judges] . . . either to provide 'a fuller explanation of the agency's reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.

Id. at 392 (citing *Regents,* 140 S.Ct. at 1908).

Because the D.C. Circuit determined that the Judges failed to identify any legal authority for adopting the new Service Revenue definition, it found no occasion to address the Streaming Services' separate argument that the definition was arbitrary, capricious, or unsupported by substantial evidence. *Id.*

The Services and Copyright Owners agreed that the Judges should resolve the definitional issue based on the existing record, after receiving two rounds of additional briefing from the parties.[152] *See* Services' Proposal for Remand Proceedings (Dec. 10, 2020) (Services' Proposal) at 5–6, 9–10; Proposal of the Copyright Owners for Conduct and Resolution of the Remand (Public) (Dec. 10, 2020) (Copyright Owners' Proposal) at 4–6. The Judges issued an Order Regarding Proceedings on Remand, which, in part, opened briefing on the issue of the adoption of a revised definition of ''service revenue'' for bundled offerings between issuing the Initial Determination and the Determination. Order Regarding Proceedings on Remand (Dec. 15, 2020). The Judges received the following relevant briefing.

- CO Initial Submission
- Services' Initial Submission
- CO Reply
- Services' Reply

On December 9, 2021, the Judges requested additional briefing. Dec. 9 Order. The Dec. 9 Order sought additional briefing setting forth the parties' views on whether this proceeding constitutes the type of new agency action addressed by the D.C. Circuit, which would allow adoption of a Service Revenue definition without limitation to the definition expressed in the Initial Determination. Additionally, the Judges requested additional evidence that the parties might offer to support adoption of the Service Revenue definitions expressed in either the Initial Determination or the Determination. In response to the Dec. 9 Order, the Judges received the following relevant briefing.

- CO Additional Submission
- Services' Additional Submission

On February 9, 2022, the Judges solicited further briefing on ''Whether the D.C. Circuit's *Johnson* decision permitting the Judges to engage in new agency action in this remand proceeding allows the Judges to engage in new agency action through a reconsideration of Copyright Owners' February 12, 2018 Motion for Clarification as a Motion for 'rehearing' pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1.'' *Sua Sponte* Order Regarding Additional Briefing (Feb. 9 Order). In response to the Feb. 9 Order, the Judges received the following relevant briefing.

- Copyright Owners' Brief Responding to Judges' February 9, 2022 *Sua Sponte* Order Regarding Additional Briefing on New Agency Action Question, and Replying to Services' New Agency Action Arguments in their Joint Supplemental Brief Addressing the Judges' Working Proposal (in Additional Materials Rebuttal Submission of Copyright Owners at Tab B) (Feb. 24, 2022) (''CO Further Briefing'')
- Services' Joint Response to the Judges' February 9, 2022 *Sua Sponte* Order Regarding Additional Briefing and Rebuttal Regarding ''New Agency Action'' (Feb. 24, 2022) (''Services' Further Briefing'')

B. Authority for Modification to the Initial Determination

1. Copyright Owners' Position

Copyright Owners assert that this remand proceeding offers a straightforward path to take new agency action and that the law makes clear that new agency action can consist of issuing a new determination on remand. CO Initial Submission at 71. Copyright Owners maintain that:

> [T]the new agency action here is a determination after remand proceedings, the Board is largely free to chart its own procedural course, and the Board has done so in its December 15 Order. The Board is not required to undertake any of the procedural steps set forth in 17 U.S.C. 803(b) in order to take such ''new agency action.'' See 17 U.S.C. 803(d)(3) (requiring only that on remand further proceedings be taken ''in accordance with subsection (a)''); 37 CFR 351.15; *Intercollegiate Broad. Sys., Inc.,* 796 F.3d at 125 (''[N]either the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'') The Circuit's instruction that the action be ''accompanied by the appropriate procedures[,]'' *Johnson,* 969 F.3d at 392, does not dictate what those ''appropriate procedures'' must be but instead plainly refers to these flexible rules. See also *Oceana, Inc.,* 321 F. Supp. 3d at 136 (explaining that when remanding to an agency, a court generally ''may not dictate to the agency the methods, procedures, or time dimension, for its reconsideration'').

CO Initial Submission at 71, FN 33.

Copyright Owners acknowledge the Services' position that the asserted procedural error is an ''absence of authority'' that can never be cured. *Id.* at 74 (citing Services' Proposal for Remand Proceedings at 10). They note that the D.C. Circuit did not say the Judges lacked the authority to revisit the service revenue definition for bundles on remand. Nor, they observe, did it say the Judges have no authority to review the record evidence and the parties' arguments and reach the same conclusion or a different conclusion on remand. Copyright Owners opine that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. But instead, they note, the D.C. Circuit remanded and said the

[152] As indicated below, during the remand proceedings, the Judges solicited two rounds of additional briefing addressing specific issues.

Judges could take new agency action precisely to cure the asserted procedural defect. Copyright Owners assert that the remand allowed the parties to present the record evidence and their arguments so that the Judges can address the definition ''afresh'' in the remand determination. *Id.* at 74.

Copyright Owners argue that 17 U.S.C. 803(d)(3) states only that proceedings on remand must be in accordance with 17 U.S.C. 803(a). They contend that remand proceedings need not be confined to procedures the Services claim are too late in the game for the Judges to follow. The Copyright Owners point to the D.C. Circuit's ruling in *Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.,* that ''neither the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'' 796 F.3d 111, 125 (D.C. Cir. 2015) (citing 17 U.S.C. 803(a), (d)(3)). Accordingly, they argue, the Judges can reaffirm the adopted bundled service revenue definition following their review of the parties' submissions without regard to section 803(c)(2) or 803(c)(4). CO Reply at 65–66.[153]

Copyright Owners further argue that the Judges may properly justify the changed definition under section 803(c) as a fuller explanation of the agency's reasoning at the time it was made. They urge that the Judges could explain that, especially in light of the evidence of how the Services misused the prior definition to make service revenue completely disappear, carrying over the prior bundle service revenue from *Phonorecords II* into the Initial Determination was unintended and inadvertent.[154] CO Reply at 69. Copyright Owners also assert that the Judges could explain that Copyright Owners had, in their Motion for Clarification, identified an ''exceptional case'' under section 803(c)(2) because the prior definition failed to comport with Judges' precedent and economic principles, and was unsupported by evidence.[155] In addition,

Copyright Owners note that the Judges reheard the evidence and legal arguments as presented in the parties' briefs on the issue and, as a result, may choose to adopt the revised definition. Copyright Owners maintain that for the Judges to do so would not be impermissible *post-hoc* reasoning, because the D.C. Circuit remanded precisely because the Judges did not provide any reason in the Determination for revising the bundle revenue definition. CO Reply at 69–71.

2. Services' Position

The Services assert that the D.C. Circuit found only ''three ways in which the Board can revise Initial Determinations'' and that the Judges had failed to establish that the change to the service revenue definition fit any of those three categories. Services' Initial Submission at 64–65 (citing *Johnson* at 390).

According to the Services the *first* way the Judges may revise an Initial Determination is to ''order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A).'' Services' Initial Submission at 65 (citing *Johnson* at 390).[156] The Services argue that the D.C. Circuit held in *Johnson* that the Judges' ''material revision of the 'Service Revenue' definition for bundled offerings does not fall within the Board's rehearing authority under section 803(c)(2)(A)'' because ''the Board itself . . . was explicit that it 'did not treat the [Copyright Owners'] motion[ ]' . . . 'as [a] motion[ ] for rehearing under 17 U.S.C. 803(c)(2).' '' The D.C. Circuit also noted that ''as the Board found, the Copyright Owners' motion did 'not meet [the] exceptional standard for granting rehearing motions' under section 803(c)(2).'' *Id.* (citing *Johnson* at 390). The Services assert that the Judges were not able to make ''a volte-face'' and justify on appeal their revision to the definition as an exercise of rehearing authority. As the D.C. Circuit held, agency action must be justified by ''reasons invoked by the agency at the time it took the challenged action,'' and post-hoc rationalizations are insufficient. *Id.* (citing *Johnson* at 390).

The Services add their view that the Judges cannot revisit the decision to deny rehearing without engaging in impermissible *post-hoc* reasoning. They note that the Supreme Court has explained that, while an agency may ''elaborate later'' on its ''initial explanation'' of the reason (or reasons) for its action, it ''may not provide new ones.'' Services' Initial Submission at 66 (citing *e.g., Regents,* 140 S. Ct. at 1908). The Services offer that the Judges, having stated that they did not consider the Copyright Owners' motion to revise the definition to be a motion for rehearing, cannot now conclude that the motion qualified as one for rehearing and that the Judges in fact engaged in rehearing. Id.

The Services add that under section 803(c)(2)(A), the Judges can only use their rehearing authority '' 'in exceptional cases' in response to a party's motion.'' *Id.* (citing *Johnson* at 390). The Services argue that the Motion for Clarification cannot be found to have satisfied that standard. The Copyright Owners did not argue that their motion satisfied the ''exceptional cases'' standard before the Judges or the D.C. Circuit, and have therefore waived that argument. *Id.*

According to the Services, the *second* way the Judges may revise an Initial Determination, *viz.* action to correct a technical or clerical error under section 803(c)(4), cannot be used now to justify any modification of the Service Revenue definition in the Initial Determination. The Services note that the D.C. Circuit held specifically that the Judges' change to the Service Revenue definition could not be construed as correcting a technical or clerical error because it involved a substantive rewrite of the Service revenue definition. *Id.* at 67 (citing *Johnson* at 391).

The Services aver that the *third* way the Judges may revise the terms in an Initial Determination is in response to unforeseen circumstances that would frustrate the proper implementation of the determination. *Id.* at 67. The Services note that the D.C. Circuit held in *Johnson* that this authority did not justify the Judges' change to the Service Revenue definition because the Judges did not invoke this authority and ''the need to ground the original definition in the record'' could not credibly be described as ''an unforeseen circumstance.'' *Id.* (citing *Johnson* at 391).

The Services also note that the D.C. Circuit rejected the argument that the Judges have ''inherent authority'' to make changes to the Initial

[153] Copyright Owners reiterate this argument in the CO Additional Submission. Copyright Owners added that the parties in this remand were afforded the opportunity for further briefing and, if they wished, to submit additional evidence on this issue, thus providing broader opportunity for submission than in *Fisher* v. *Pension Benefit Guaranty Corp.,* 994 F.3d 664, 670 (D.C. Cir. 2021), in which the D.C. Circuit upheld new agency action after remand even though the agency did not provide appellant the opportunity to submit new briefing or exhibits. CO Additional Submission at 35–36; 38.

[154] Copyright Owners assert that the definition in the Initial Determination conflicted with, the Board's findings in the Initial Determination, including its findings that the adopted rates and terms would afford copyright owners a fair return for their creative works, thereby satisfying factor B of the 801(b) standard and thus needed to be revised so as to not ''frustrate the proper implementation of'' the Final Determination. CO Reply at 69 (citing 17 U.S.C. 801(b) and 803(c)(4)).

[155] In response to an Order by the Judges, Copyright Owners provided additional briefing regarding reconsideration of the motion for clarification as a motion for ''rehearing'' which is addressed separately *infra.*

[156] In response to an Order by the Judges, the Services provided additional briefing regarding reconsideration of the motion for clarification as a motion for ''rehearing'' which is addressed separately *infra.*

Determination. The D.C. Circuit explained that the specific restrictions Congress placed on the Judges' authority in section 803 ''would be a nullity if the Board also had plenary authority to revise its determinations whenever it thought appropriate.'' *Id.* (citing *Johnson* at 391–92). The Services add that even if the Judges offered a new source of authority capable of justifying substantive changes to the Service Revenue definition now, the Judges would be unable to rely on this ''uninvoked authority'' without engaging in impermissible *post-hoc* reasoning. *Id.*

The Services counter Copyright Owners' position that the Judges need not respond to the error the D.C. Circuit identified with this aspect of the Determination and that the Judges' ''new agency action'' may consist of issuing a new determination on remand. The Services argue that failure to address the legal and factual issues on which the D.C. Circuit remanded would violate the D.C. Circuit's order and would result in a second remand. The Services surmise that the issue of authority to make the changes to the Initial Determination are particularly important in this context, where the D.C. Circuit recognized that the Copyright Act places limits on the Judges' authority to alter an initial determination by defining conditions for rehearing and the types of changes that are permitted absent a rehearing. In this regard, the Services maintain that the Judges cannot do on remand what they lacked authority to do in the first instance. The Services assert that the Judges must resolve the legal question whether there is authority to alter the revenue definition in the Initial Determination. They urge that the remanded issue is not what the substance of the service revenue definition should be as a matter of first impression, but instead is whether the Judges have properly exercised authority to alter the Initial Determination's definition. Services Reply at 52–54.[157]

The Services assert that the Judges have two paths available to them: (1) to provide a ''fuller explanation'' of the prior conclusion that the Judges had legal authority to revise the Service Revenue definition in the Initial Determination or (2) answer that threshold question through new agency action. The Services maintain that, if they pursue the ''fuller explanation'' path, the Judges are limited to elaborating on what they said previously, and that they cannot add new reasons they did not initially provide. With regard to what may constitute new agency action, the Services assert that path gives the Judges freedom to consider new reasons that the Copyright Act provided the Judges with the authority to make this change to the Initial Determination. The Services argue, however, that undertaking a new agency action does not, as Copyright Owners claim, obviate the need for the Judges to identify proper legal authority before substantively changing the Initial Determination, such authorities being limited to the authority of section 803(c)(4) or the rehearing authority of section 803(c)(2). *Id.* at 54–55.

The Services address Copyright Owners' position that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. The Services urge that the D.C. Circuit could not reverse because the Department of Justice raised for the first time on appeal new justifications for the Judges' decision to change the Initial Determination. Instead, the Services maintain, the D.C. Circuit had to remand and give the Judges the opportunity to address the Department of Justice's new justifications in the first instance, as the D.C. Circuit could not rule them out given the posture of the appeal. *Id.* at 56.

In the Services' Additional Submission, they concede that this remand proceeding is new agency action and that the Judges have provided the parties with sufficient procedural opportunities to present any new evidence and raise any additional arguments regarding the question the D.C. Circuit remanded. Services' Additional Submission at 38. But the Services still insist that the Judges may not alter the Service Revenue definition without first identifying legal authority in the Copyright Act for modifying the Initial Determination. In the Services' view the new agency action avenue provided by the D.C. Circuit merely offers a singular path beyond the Judges' ability to offer a ''fuller explanation'' of their previous reasoning for revisiting the definition in the Rehearing Order. According to the Services' argument, the new agency action provided for in this remand only offers the additional opportunity to offer new reasons supporting any legal authority for altering the Initial Determination's Service Revenue definition, beyond those that were raised in the appeal. Services' Additional Submission at 38–42

C. Reconsideration of Motion for Clarification as Motion for ''Rehearing'' [158]

1. Copyright Owners' Position

Copyright Owners argue that the Judges have the authority to engage in new agency action in this remand proceeding through a reconsideration of the Motion for Clarification as a motion for rehearing, pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1. Copyright Owners urge, however, that proceeding in that fashion would add an entirely unnecessary and complicating step. They again suggest that there is no need to reconsider or recharacterize the Motion for Clarification as a motion for rehearing because the remand itself affords the opportunity for the Judges to take new agency action, which, as in a rehearing, permits them to reconsider evidence and arguments, but, unlike a rehearing, is not limited by the constraints of section 803(c)(2). CO Further Briefing, Tab B at 7–8.

Copyright Owners posit that if the Judges engage in new agency action to reconsider the Motion for Clarification as a motion for rehearing under 803(c), and to decide that motion based on all of the evidence in the record supporting the adopted bundle revenue definition and showing the prior bundle revenue definition to be unsupported and unreasonable, they may properly do so. They assert that the while they did not make a request for rehearing on the face of the Motion for Clarification, that is not the same as a finding that the standard could not have been met. The Judges may consider whether, based on the evidence in the record, the rehearing standard has been satisfied on this remand. In Copyright Owners' view, the Judges could conclude, revisiting on remand the question of whether the rehearing standard has now been met, that Copyright Owners have satisfied the ''exceptional case'' standard for granting rehearing motions under

[157] The Services agree that this remand proceeding qualifies as ''new agency action'' but again urge that failure to address the legal and factual issues on which the court remanded would nonetheless violate the D.C. Circuit's order. Services' Additional Submission at 38–42.

[158] The Judges consider the briefs filed in response to the Feb. 9, 2022 Order only to the extent that they are responsive to the Feb. 9, 2022 Order, which requested briefing on the specific matter of whether the D.C. Circuit's *Johnson* decision permitting the Judges to engage in new agency action in this remand proceeding allows the Judges to engage in new agency action through a reconsideration of Copyright Owners' February 12, 2018 Motion for Clarification as a Motion for ''rehearing,'' pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1.

section 803(c)(2). Copyright Owners note that if the Judges do engage in new agency action that reconsiders the Motion for Clarification as a motion for rehearing, the Judges should fully explain their reasoning. *Id.* Tab B at 8–10.[159]

2. Services' Position

The Services assert that the Judges cannot invoke their rehearing authority by construing the Motion for Clarification as a rehearing motion. They maintain that the D.C. Circuit expressly found that the revision of the Service Revenue definition for bundled offerings does not fall within the Judges' rehearing authority under section 803(c)(2)(A). The Services assert that Copyright Owners did not satisfy either prong of section 803(c)(2)(A), which authorizes rehearing only ''upon motion of a participant'' and ''in exceptional cases.'' They note that the D.C. Circuit agreed with the Judges' decision not to treat Copyright Owners' motion as one for rehearing and that the D.C. Circuit also agreed with the Judges' further finding that ''Copyright Owners' motion did not meet the exceptional standard for granting rehearing motions.'' Services' Further Briefing at 7 (citing *Johnson* at 390).

The Services add their view that the Judges are bound by the D.C. Circuit's conclusions on this issue. They maintain that because the Judges' section 803(c)(2)(A) rehearing authority is among the grounds that *Johnson* addressed and determined, the Judges cannot rely on that authority on remand. *Id.* at 8–9. The Services urge that the Judges already correctly concluded that the Motion for Clarification was not a motion for rehearing, and note that Copyright Owners never presented their motion as one for rehearing. The Services add that because Copyright Owners did not challenge that decision on appeal, it is too late for them to do so now.[160] *Id.* at 9–10.

The Services argue that Copyright Owners' Motion did not make any attempt to satisfy the exceptional cases standard set out in 17 U.S.C. 803(c)(2)(A). They argue that Copyright Owners did not purport to identify any new evidence, new legal authority, or even a substantive error in the Judges' reasoning in the Initial Determination, but instead the motion asserted that the Judges' inclusion of the definition of service revenue in the Initial Determination was supposedly inadvertent. The Services add that Copyright Owners did not identify any specific evidence in the *Phonorecords III* record or any aspect of the Initial Determination that suggested the inclusion of this definition was a mistake. *Id.* at 10.

The Services point out that Copyright Owners' motion did not comply with the procedural requirements for a motion for rehearing. They then urge that the Judges cannot invoke their section 803(c)(2)(A) authority by rewriting a participant's motion to say it is seeking rehearing when that participant specifically and unambiguously disclaimed any intent to seek rehearing. *Id.* at 11.

The Services note that the Judges previous conclusion that even if the Motion for Clarification had requested rehearing, that motion would not and does not meet that exceptional standard for granting rehearing and failed to make even a *prima facie* case for rehearing. The Services observe that the Judges apply a strict standard to rehearing motions to prevent parties from using the rehearing process to seek a second bite at the apple by advancing theories and arguments that could have been advanced earlier during the proceeding. *Id.* at 12. The Services reiterate their view that Copyright Owners' motion did not point to any evidence in the *Phonorecords III* record at all, and, that the only evidence in the *Phonorecords III* record concerning bundles supports the longstanding definition of Service Revenue which has been effective in encouraging the Services to offer bundles that benefit Copyright Owners by growing the market for music streaming services. *Id.* at 14.

The Services finally assert that this is not an extraordinary case where a party has identified an error that, if left uncorrected, would result in manifest injustice. *Id.* at 15–16. The Services conclude by urging that given this procedural history and the unchanged state of the record since the initial hearing, any claim that Copyright Owners have somehow now satisfied the exceptional case standard would be clear error. *Id.* at 17.

D. Record Evidence Regarding Definition of Service Revenue

1. Copyright Owners' Position

Copyright Owners assert that the prior bundle revenue definition (published in the Initial Determination) failed to address the '' 'economic indeterminacy' problem inherent in bundling'' appropriately and in a way consistent with Judges' precedent. CO Initial Submission at 75 (citing Order on Rehearing at 16–18). Copyright Owners proceeded to cite several portions of testimony from the Services' economic experts who acknowledged this problem. *Id.* They then point to hearing testimony in which Copyright Owners repeatedly raised the ''economic indeterminacy'' problem and demonstrated what they characterized as the absurd results to which the prior definition had led. *Id.* at 76. They point out that under the prior definition, service revenue for bundled subscriptions started with revenues recognized from the bundle (*i.e.,* the price paid by the subscriber) and subtracted ''the standalone published price'' for all non-music components of the bundle. [REDACTED]. *Id.*

Copyright Owners point out that the Judges already found with respect to other licenses that such an approach is not only fundamentally unfair, but ''absurd.'' *Id.* (citing 81 FR 26316, 26382 (May 2, 2016) (webcaster licenses)); *see also* 83 FR 65210, 65264 (Dec. 19, 2018) (SDARS licenses) (rejecting proposed deductions by service for bundle revenues because of the ''acknowledged 'economic indeterminacy' problem inherent in bundling''). The Copyright Owners concur with the Judges' correct conclusion that the same reasoning applies to *Phonorecords III. Id.* at 76–77 (citing Order on Rehearing at 18) (''the 'economic indeterminacy' problem inherent in bundling is common to all three proceedings.''). The Copyright Owners offer that Spotify conceded to this flaw in the definition in the Initial Determination, but offered an alternative that contained the same loophole. *Id.* at 77–78.

Copyright Owners point out that the proponent of a term bears the burden of proof as to adoption. The Judges made clear that the licensee who wishes to offer bundles must bear the burden of providing evidence that might mitigate the acknowledged economic indeterminacy problem inherent in bundling, because any such evidence would be in its possession, not in the possession of the licensors. *Id.* at 79 (citing *SDARS III* Determination, 83 FR 65210, 65264) (''bundling [is] undertaken to increase [the Services']

[159] With regard to the obligation to fully explain their reasoning for any reconsideration, the Copyright Owners point to *United Food & Com. Workers Union, Loc. No. 663* v. *U.S. Department of Agriculture.,* 532 F. Supp. 3d 741, 769 (D. Minn. 2021) (''When an agency takes a new course of action, it must 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.' ''), quoting *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (emphasis in original).

[160] In fact, the issue of whether to recharacterize the Motion for Clarification as a motion for rehearing is not one raised by Copyright Owners, but by the Judges *sua sponte.* The Services' estoppel argument as to the Copyright Owners cannot apply to the Judges' action.

revenues and it would be reasonable to assume that [the Services have] information relevant to the economic allocation of the bundled revenue.''). The Copyright Owners contend they presented unrebutted evidence showing the unreasonableness of the Services' proposed definition while the Services offered no evidence to support their definition. *Id.* at 78, 79 (citing Order on Rehearing at 18). Copyright Owners maintain that no Service offered evidence concerning the separate values of the constituent parts of the bundles, or any other evidence concerning the economic allocation of bundled revenue, let alone the reasonableness of the definition in the Initial Determination. *Id.* at 80. Copyright Owners assert that in the absence of evidence to support the proposed definition, the Judges may adopt or fashion a definition of service revenue for bundled offerings that comports with the record evidence, which is precisely what the Judges did and can, through new agency action, do again. *Id.* at 81.

Copyright Owners dispute the Services' assertion that there is support for the *Phonorecords II* approach to bundles in the record of this proceeding. Instead, Copyright Owners argue, the Services' purported evidence at most supports the benefits of the practice or strategy of bundling. They maintain that the strategy of bundling covered music services with other products or services has nothing to do with whether the Services should be free to reduce the revenue allocable to music to zero. They offer that the definition in the Initial Determination has nothing to do with such benefits, and that those benefits may be equally served by a definition that ensures value is apportioned to the music component in the bundle. CO Reply at 73–76.

2. Services' Position

The Services argue that the evidence in the existing written record addressing bundles shows both that this definition is supported by the *Phonorecords II* benchmark and that it has proven, industry-wide benefits. Services' Initial Submission at 68. They offer that the Copyright Owners did not propose an alternative definition of service revenue until after the Judges issued the Initial Determination and that any definition they propose now would fail the basic requirement that the Judges must adopt rules ''on the basis of a written record.'' *Id.* (citing 17 U.S.C. 803(a)(1) and 803(c)(3)).

Addressing the merits of the definition contained in the Initial Determination, the Services argue that it best serves the goals of the Copyright Act; that as a bright-line, easily administered rule, it continues the broad industry agreement from *Phonorecords II.* The Services contend the prior definition increases output and incentivizes beneficial price discrimination to reach listeners who would otherwise not pay for music. They argue that the record evidence confirms that the prior treatment of bundles enabled experimentation and variation in the distribution of music with long-term benefits for all parties. They state that Copyright Owners' argument that Services [REDACTED] also demonstrates the broad benefits of the definition of Service Revenue in *Phonorecords II* because the record showed that arrangement enabled funneling of many of listeners into full-priced, full-catalog services—such treatment of bundles enabled the flexibility and price discrimination that yielded beneficial growth of the royalty pool.[161] The Services allege that Copyright Owners also ignore the extensive royalties that were generated. They add that with the per-subscriber minimum guarantees that the Copyright Owners will still be paid a fair royalty. The Services then cite several portions of testimony from various Services' economic experts who point out the realization of an expanded royalty pool, which the Services offer as proving a functioning marketplace. *Id.* at 68–74.[162]

The Services then assert that no other definition of service revenue for bundles that has been before the Judges combines both the administrative simplicity of the Initial Determination's definition and the broad price discrimination benefits of promoting discounted bundles. They maintain that while neither the Services nor Copyright Owners submitted evidence specifically addressing the way that customers, Services, or Copyright Owners might value the component parts of bundles, such subjective valuations are unnecessary for the Judges to find ample support for the *Phonorecords II* approach to bundles in the record. *Id.* at 75–76.

The Services also argue that while the Judges' decision in *SDARS III* did involve valuation of the music and non-music components of a bundle, the resolution in *SDARS III* is inapposite because, here, the rate structure has a way of ensuring that Copyright Owners are fairly compensated for bundles: the statutory minimum payment. Services Reply at 62.

E. Analysis and Conclusions Regarding Definition

1. Remand Proceeding as New Agency Action

Having considered the entirety of the record of this proceeding, a majority of the Judges (Definition Majority) conclude that this remand constitutes ''new agency action'' and meets all of the criteria to qualify as new agency action. The Judges thus have the opportunity to consider the issue afresh consistent with their procedural rules regarding remands.

The Definition Majority finds that it is unnecessary to attempt to distinguish new ''agency action'' from ''new agency action.'' Neither approach is endorsed clearly by the varied judicial interpretations of a new agency action. *See* R.J. Krotoszynski, Jr., *Administrative Law Discussion Forum: ''History Belongs to the Winners'': the Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action,* 58 Admin. L. Rev. 995 (Fall 2006). As noted by Judge Bazelon, the D.C. Circuit ''believed in process-based review, [but] he argued that it was improper for judges to prescribe specific procedures.'' *Id.* at 1001. Judge Bazelon's remand orders focused on providing ''genuine opportunities to participate in a meaningful way'' and ''genuine dialogue'' with interested parties, while leaving the agency ''free to decide which specific procedures to undertake.'' *Id.*

Several reported cases point to new action as an alternative to a fuller explanation. But few define ''new agency action'' other than to say, as did the *Johnson* court, that the agency must take it ''accompanied by the [unspecified] appropriate procedures.'' *Johnson,* 969 F.3d at 392. Parties to the original action, already familiar with the issue and the factual and legal background, recognized that the D.C. Circuit identified the adoption of a modified definition in the Determination as one of three issues on remand. In repeated rounds of remand submissions, both the Services and the Copyright Owners included the definition issue. The Judges were not satisfied with the parties' lack of focus on the issue, however, and ordered expressly further briefing on the new agency action issue and sub-issues relating to the adoption of a definition of Service Revenue as it relates to

[161] Notably, the Services do not deny that the former definition did, in fact, [REDACTED].

[162] The Services' Reply reiterates this point and offers that the testimony cited by the Copyright Owners also shows why the Initial Determination's Service Revenue definition works for bundles and grows royalties. Services Reply at 57–58.

bundled service offerings. *See* (Dec. 9 Order) at 4; *Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2022).

New agency action is not synonymous with justification, or confirmation, of the prior action. New agency action is a procedural mechanism for reconsideration of the record, reopening the record for additional evidence and argument, and adoption of a conclusion based on the expanded record. In this instance, the presentations, written and oral, of participants on remand, together with a re-examination of the original record, support reversion to the definition originally announced in the Initial Determination. Ultimately, given repeated opportunities for legal analysis on the issue, both sides agreed that the remand proceeding itself, with ample notice and multiple opportunities for input was sufficient to constitute new agency action. *See* CO Further Briefing at 3, 7.

The Services argued, however, that notwithstanding this appropriate new agency action, the Judges remained without authority to adopt the revised definition as a term governing the royalty rates determined in this proceeding. Their arguments regarding procedures undertaken in the Determination are superseded by the Judges' conduct of extensive remand proceedings.[163] The gravamen of the Administrative Procedure Act is transparency in agency [164] rulemaking. Agencies must publish notice of their intentions, provide opportunities for interested parties to comment and object, and finalize regulations only after reconciling objections with the policies and purposes of proposed regulations. The adjudication of this remand proceeding was conducted openly. Interested parties had ample opportunity to object, to comment, and to brief legal and factual issues relating to the Judges' approach to promulgating an appropriate definition of bundled service revenue.

The present analytic approach merely takes the position that the Judges engaged in new agency action by conducting a fully open and broadly explored remand proceeding. Unlike a rehearing or exercise of continuing jurisdiction, this remand proceeding is not limited by the constraints of sections 803(c)(2) or 803(c)(4). Contrary to the Services' assertion, the Judges address the issue on which the D.C. Circuit remanded, the need to exercise authority within the lines drawn by the authorizing statute. This remand proceeding does not, therefore, violate the D.C. Circuit's order.

The *Johnson* opinion clearly states the two paths by which the Judges may address the issues presented to them on remand; they may either (1) provide ''a fuller explanation of the agency's reasoning at the time of the agency action[,]'' *or* (2) to take ''new agency action'' accompanied by the appropriate procedures. *Johnson,* 369 F.3d at 392. The Judges chose to pursue the second option: this new agency action. The Judges reiterate: the Services concede that, through this proceeding the Judges have provided the participants with adequate procedural opportunities to present any new evidence on the proper Service Revenue definition for bundles. The Judges also acknowledge, but disagree with, the Services' position that that they must return to the issues as they were presented after issuance of the Initial Determination, regardless of the admittedly complete and valid remand procedure, which constitutes new agency action.

The Judges (the majority on this issue) determine that any confining action on remand to the provisions of sections 803(c)(2)(A) or 803(c)(4) would misconstrue the clear expression of the ''new agency action'' alternative presented by the D.C. Circuit,[165] as well as chapter 8 of title 17. As the Copyright Owners correctly observed, in a remand proceeding, the Judges are not required to undertake any of the procedural steps set forth in section 803(b) nor are the Judges compelled to consider or be limited by sections 803(c)(2)(A) or 803(c)(4). The statute only requires that the Judges' remand proceedings are in accordance with section 803(a).[166]

The D.C. Circuit observed that the Judges have ''considerable freedom to determine [their] own procedures.'' *SoundExchange* v. *CRB,* 904 F.3d 41 at 61. The D.C. Circuit also cautions that such flexibility must be exercised within the lines drawn by the authorizing statute. Here, the Judges operate within the lines drawn with respect to remand proceedings set forth in chapter 8 of title 17.

2. ''Fuller Explanation'' of Modification to Initial Determination

Case law regarding development of a ''fuller explanation'' of an agency's action emphasizes that the agency cannot adopt *post hoc* reasoning on the same record. *See, e.g., SEC* v. *Chenery Corp.,* 332 U.S. 194, 201 (1947) (after remand, agency bound to ''deal with the problem afresh . . . .''). Certainly, adopting a *post hoc* argument of appellate counsel, just because it offers a rationale for the agency's original action is impermissible.[167] On the other hand, if the record in the initial proceeding is sufficiently robust to support a reinterpretation or additional reasoning, the agency may justify its initial action with that ''fuller explanation'' without considering any new evidence. *See, Fisher* v. *Pension Benefit Guar. Corp.,* 468 F.Supp.3d 7, 20 (D.C.D.C. 2020), aff'd *Fisher* v. *Pension Benefit Guar. Corp.,* 994 R.3d 664 (D.C. Cir. 2021), rehearing *en banc denied, Fisher* v. *Pension Ben. Guar. Corp.,* 2021 U.S. App. LEXIS 18793 (D.C. Cir., June 23, 2021) (requirement of new evidence a ''novel proposition of law'' without precedent). On remand, an agency may elaborate on its prior reasoning, but it may not provide new reasons for the original decision. *Fisher,* 994 F.3d at 669. If the Judges had chosen in this remand to rest on their Determination regarding the service revenue definition, they might have done so only if they could elaborate on the existing record.[168] In the alternative, the Judges issue a new decision after new agency action. *Id.*

The Judges, having engaged in new agency action to settle on the definition of service revenue for bundled offerings, do not find a need to address the statutory avenues or the confines that are provided for rehearing or continuing jurisdiction, nor do the Judges pursue the propriety of reconsideration of the

[163] Furthermore, the issue of the Judges' authority to take an action in issuing the Determination is moot. The Judges, after new agency action, have chosen not to defend the definition in the Determination but rather to conclude, following that new agency action, that the definition in the Initial Determination is more appropriate in these circumstances. Whether the Judges had the authority in the first instance is not at issue, as they are not repeating the former action.

[164] The proceedings of the Copyright Royalty Board (CRB) are subject to the standards of the Administrative Procedure Act. *See* 17 U.S.C. 803(a)(1).

[165] The case that the D.C. Circuit points to for the new agency action path clarifies that ''An agency taking this [new agency action] route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.'' *Regents,* 140 S. Ct. at 1908).

[166] ''The court [United States Court of Appeals for the District of Columbia Circuit] may also vacate the determination of the Copyright Royalty Judges and remand the case to the Copyright Royalty Judges for further proceedings in accordance with subsection (a).'' 17 U.S.C. 803(d)(3).

[167] A rationalization is not *post hoc* simply because it is iterated by counsel. Denomination of a rationalization as *post hoc* is a matter of timing, not of the offeror.

[168] In this instance, had the Judges decided to keep the definition in the Determination, they probably could have given a fuller explanation based on the record in the underlying proceeding. Because the Judges have opted to rely on the fresh-look approach in the ''new agency action'' alternative and because the prior definition is appropriate given adoption of the PR II rate structure, development of that fuller explanation based on the record is unnecessary.

Motion for Clarification as a motion for rehearing.[169]

3. Substantive Analysis of Dueling Definitions of Bundled Revenue

The fundamental difference between the impact of the two alternative definitions is simply stated:

Under the Initial Determination: downstream bundling and its price discriminatory effect *would* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle;

Under the Determination: downstream bundling and its price discriminatory effect *would not* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle.

To explain this difference, the Judges find it helpful to describe (as in the Determination and Dissent) how bundling facilitates price discrimination and how lower royalties for bundled streaming services incentivize such bundling.

Price discrimination occurs when a seller offers different units of output at different prices. *See, e.g.,* H. Varian, *Intermediate Economics* at 462 (8th ed. 2010). The benefit to the seller arises from attempting to ''charge each customer the maximum price that the customer is willing to pay for each unit bought.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 401 (8th ed. 2013). For all goods, and intellectual property goods such as copyrights in particular,[170] the social benefit is that price discrimination more closely matches the quantity sold with the competitive quantity as the seller or licensor better aligns the price with the WTP of different categories of buyers or licensees. *See* W. Fisher, *Reconstructing the Fair Use Doctrine,* 101 Harv. L. Rev. 1659, 1701 (1988).

A seller can engage in price discrimination in several ways. One form is known as ''second-degree price discrimination,'' by which buyers self-sort the packages and quantities they purchase.[171] *See* W. Adams & J. Yellen, *Commodity Bundling and the Burden of Mo*nopoly, 90 Q. J. Econ. 470, 476 (1976) (the profitability of bundling ''stem[s] from its ability to sort customers into groups with different reservation price [WTP] characteristics.''). Bundling, *i.e.,* the ''practice of selling two or more products as a package,'' *Pindyck & Rubinfeld, supra* at 419, is thus a type of second-degree price discrimination. *See* A. Boik & H. Takahashi, *Fighting Bundles: The Effects of Competition on Second Degree Price Competition,* 12 a.m. Econ. J. 156, 157 (2020).

The applicability of these basic economic principles was understood and explained by the parties' experts at the hearing. *See, e.g.,* 3/15/17 Tr. 1224–25 (Leonard) (Google's economic expert testifying that price discrimination through bundling is ''very, very common . . . even by pretty competitively positioned firms . . . to sort out customers into willingness-to-pay groups.''); 3/30/17 Tr. 3983 (Gans) (Copyright Owners' economic expert acknowledging that bundling is a form of price discrimination); *see also* Dissent at 69 (same).

How does this downstream (retail level) benefit of price discrimination impact the setting of upstream royalty rates? As the Majority explained (in summarizing the Services' expert testimony) the linkage is explained by the economic concept of ''derived demand'':

> [M]ultiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (rate structure upstream should be derived from need to exploit WTP of users downstream via a percentage of revenue). This upstream to downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.; see* P. Krugman & R. Wells, *Microeconomics* at 511 (2d ed. 2009) (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice'').
>
> Determination at 19; *accord* Dissent at 32 (noting that ''the upstream demand of the interactive streaming services for musical works (and the sound recordings in which they are embodied)—known as ''factors'' of production or ''inputs''—is derived from the downstream demand of listeners to and users of the interactive streaming services . . . This interdependency causes upstream demand to be characterized as ''derived demand.'').

In the present proceeding, the PR II-based benchmark embodies the parties' negotiated definition of Bundled Revenue for purposes of calculating royalties on bundled interactive offerings. This is definition in the Initial Determination. Copyright Owners' preferred definition for Bundled Revenue—the Determination's definition—would not only ignore this agreed-upon definition, but would also de-link the royalty rate from the WTP of purchasers of bundles.[172] The Judges recognize that Copyright Owners have expressed concern the Services could use such bundling in order to diminish revenue otherwise payable on a higher royalty tier. However, the Majority noted that the evidence indicated such diminishment only occurred ''in some cases.'' Clarification Order at 17. Thus, the Judges find that eliminating the incentive for price discrimination via bundling would be a disproportionate response and inconsistent with the broad price discriminatory PR II-based benchmark they find useful in this proceeding.

Expert testimony in this regard is ''substantial evidence'' on which the Judges can rely. For example, the D.C. Circuit also relied in *Johnson* on the testimony of the same witness, Spotify's economic expert witness, Professor Marx, who explained how a downstream ''lower willingness (or ability) to pay'' among some cohorts of consumers supports definitional terms, for student and family subscribers, that lower royalty rates in order to further ''economic efficiency'' in a manner that

[169] The Judges also find no need to consider any inherent authority that may remain for consideration.

[170] Streamed copies of intellectual property, such as musical works and sound recordings, have a marginal production cost of essentially zero, making price discrimination particularly beneficial, because charging any positive price, even to a buyer with the lowest WTP, still exceeds the zero marginal production costs. *See* Dissent at *passim.*

[171] ''First-degree'' price discrimination is a hypothetical construct by which a seller can identify the WTP of every buyer. ''Third-degree'' price discrimination occurs when the seller offers different prices to buyers based on their different characteristics (*e.g.,* a senior citizen discount). *See Pindyck & Rubinfeld, supra,* at 402, 404–05.

[172] To see the incentivizing effect of the link between the royalty level and variable WTP, consider the following example. Assume a hypothetical bundle consists of a subscription to the ''Acme'' interactive music streaming service and the sports service NFL Sunday Ticket. Assume also that Acme and NFL Sunday Ticket have standalone monthly subscription prices of $9.99/month and $149.99/month respectively, so that purchasing both separately would cost $159.98/month. But assume the bundle price is only $140/month. Acme's purpose in bundling its interactive music streaming service subscription offering with NFL Sunday Ticket would be to attract customers who had a WTP for the standalone Acme service below $9.99/month, but a WTP at or above the $140/month for the bundle.

Under the definition in the Determination, royalties would be paid on the standalone $9.99/month Acme price. But the purpose of the bundling was to attract subscribers *who would not pay the standalone $9.99/month price,* so no such would-be subscribers would sign-up, and *no royalties would be generated by them.*

By contrast, under the Initial Determination, the standalone price of NFL Sunday Ticket, $159.98/month, would be subtracted from the $140/month bundle price. Although that would preclude a payment of royalties on a *revenue* prong, *royalties still would be paid, under a different tier or on the mechanical floor.*

''still allows more monetization of that provision of that service.'' *Johnson* at 392–93. Broadening her lens, Professor Marx also explained that this price discriminatory approach is appropriate ''across all types of services and subscribers,'' as in ''[t]he current law [and in the PR II-based benchmark]'' which ''accommodates . . . ad-supported services . . . and '*bundled services'* through different rate provisions.'' Marx WRT ¶ 41 (emphasis added). *See also* 3/21/17 2182–83 (Hubbard) (Amazon's expert witness testifying that ''Prime Music, which is *bundled* with an Amazon Prime service . . . sort[s] out customers' willingness to pay, with an idea of trying to maximize the number of customers,'' and agreeing that this approach constitutes ''sorting by way of bundling.'') (emphasis added). Further, Professor Hubbard opined that, given the revenue attribution ''measurement problem'' associated with bundled products, the ''Phonorecords II'' approach ''with the different categories and the minima . . . address this sort of problem [in] a very good way.'' 3/15/17 Tr. 1221 (Hubbard).

As in the case of family and student price discrimination, the beneficial effect of such differential pricing was supported by industry witnesses as well as expert witnesses. *See, e.g.,* Mirchandani WDT ¶ 71 (Amazon executive citing the Phonorecords II-based benchmark provisions regarding bundling that ''allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music [REDACTED]''). In sum, the same type of witness testimony that the D.C. Circuit found sufficient to support price discriminatory student and family plans also supports the use of the price discriminatory bundled definition contained in the Initial Determination.

Given the overall benefits from price discrimination, at first blush it is curious that Copyright Owners would risk ''leaving money on the table'' by removing the royalty-based incentive for price discrimination via bundling. The Judges have identified this problem earlier in this Initial Ruling, in connection with the broader issue of the overall beneficial price discriminatory structure of the PR II-based benchmark. As the Judges noted in that general price discrimination context, Copyright Owners' own expert economic witnesses acknowledged that they would not irrationally ''leave money on the table.'' In fact, Copyright owners' aim, according to that testimony, is to create an unregulated space—per the Bargaining Room theory—and to use their complementary oligopoly power to negotiate price discriminatory rates (in bundles or otherwise), which would free them from the section 801(b)(1) requirements of reasonableness and fairness.

The Judges further find that their prior ruling on this issue in *SDARS III* is distinguishable. There, a proffered bundled revenue definition eliminated the payment of any royalty at all. Copyright Owners quite correctly describe that result as ''absurd,'' but that is not the result here. Rather, in the present case, the parties' negotiated an approach that the Judges adopted in the Initial Determination requiring royalties to be paid on interactive services bundled with other products or services.

Even more distinguishable is Copyright Owners' assertion that *Web IV* provides support for their preferred definition of service revenue. The argument is immediately suspect, because *Web IV* involved per-play royalty rates—not percent-of-revenue rates, making the definition of revenue wholly inapposite. Further, the discussion of the price of an ''ice cream cone'' in *Web IV*—on which Copyright Owners rely—had nothing to do with bundling or isolating the WTP for different products or services. Rather, there the Judges criticized a bizarre argument made by a licensee (who had a quantity discount for plays steered in its direction), that was tantamount to arguing that if a vendor sells one ice cream cone for $1.06 but a buyer could buy two for $1.06, that the market price of an ice cream cone is thus only $.06. This argument was indeed fallacious, because the price of an ice cream cone would be the average of the total cost for the two cones, *i.e.,* $.53/cone. Here, the issue is how to address the WTP of different classes of buyers with heterogeneous WTP, not the pricing of a discount for all purchasers buying the same quantity. The parties utilized the Bundled Revenue definition from the PR II-based benchmark (and in the Initial Determination) to address the indeterminacy inherent in the variable WTP among purchasers of the bundles, by setting floors and minima, rather than attempt to sort out the WTP of individual (or individual blocs) of subscribers.[173]

[173] Accordingly, Copyright Owners' assertion that the Services did not satisfy their burden of proof with regard to the Bundled Revenue definition misses the point. The Services' burden was to show the reasonableness of utilizing the Bundled Revenue definition in the PR II-based benchmark, not to show that their proffered approach measured the WTP of individual subscribers (or blocs of subscribers). Such an alternative approach might have had merit but no alternative approach was presented to the Judges.

For the foregoing reasons, the Judges find that the definition in the Initial Determination (unlike the definition in the Determination) is consistent with the Judges' other substantive rulings herein. That is, just as the Majority abandoned its Bundled Revenue definition in its Initial Determination because it refused to credit the PR II-based benchmark (even as ''guidance''), the Judges here do partially rely on the PR II-based benchmark, and thus find that it supports the Bundled Revenue definition contained in the Initial Determination.

4. Application of Four Itemized Statutory Factors

As the forgoing analysis explains, bundling is a form of price discrimination. Accordingly, the Judges' explanation of how price discriminatory rates in the PR II-based benchmark interrelate with the Factor (A) through (D) objectives in section 801(b)(1) are equally applicable here. Accordingly, the Judges adopt by reference their discussion of those four factors set forth *supra* in connection with the PR II-based benchmark, and find that there is no basis pursuant to those four factors to adjust the PR II-based benchmark definition of Bundled Revenue.

V. Conclusion

On the basis of the foregoing analyses, and in consideration of the entirety of the record, the Judges make the following determination relating to the issues on remand from the D.C. Circuit.

To be clear, the Judges are not declaring that an alternative Bundled Revenue definition and/or alternative rates and structures for bundle, might not have been preferable. *See* 4/15/17 Tr. 5056–58 (Katz) (''[I]f someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined''); *see also* 3/15/17 Tr. 1227–28 (Leonard) (Google's economic expert testifying that ''if somebody had . . . suggest[ed] . . . a different sort of bucket that should be created . . . that's a good idea.''). But Copyright Owners did not propose such alternatives at the hearing, and the alternative in their Motion for Clarification simply eviscerated the ''derived demand''-based link between royalties and bundled offerings. As the Judges have noted *supra,* in the words of Judge Patricia Wald, all judges are cabined by the record evidence introduced by the parties. Therefore (in the absence of a way in which to synthesize the parties' proposals in a manner that does not ''blindside'' the parties) the Judges must choose between the proposals that are in the record, not potentially superior proposals that are not in the record. Here, the Judges favor the Bundled Revenue definition in the Initial Determination that was negotiated by the parties, incentivizes price discrimination and pays royalties on the bundled music, over the substituted definition in the Determination pursued by Copyright Owners that would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power, and without regard to the statutory requirements of a ''reasonable rate'' and a ''fair income'' for the Services.

As noted at the outset, the headline rate for all offerings throughout the *Phonorecords III* period shall be as follows:

2018–2022 ALL-IN HEADLINE ROYALTY RATES

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%

In all other respects, the rates and rate structure of the PR II-based benchmark shall be effective as the rates and structure throughout the *Phonorecords III* period.

The definition of Service Revenue for bundled offerings throughout the *Phonorecords III* period shall be the definition contained in the Initial Determination.

VI. Order

In light of the foregoing analyses and conclusions, the Judges hereby *order* that the participants in this remand proceeding prepare and submit regulatory provisions consistent with this ruling.[174] The participants shall file agreed regulatory language within ten days of the date of this ruling.

The Judges *further order* that if the participants cannot agree on a joint submission, the Judges will accept separate submissions respectively from (1) Copyright Owners and (2) Services, jointly. In absence of an agreed submission, the participants shall file separate submissions not later than 15 days after the date of this ruling.[175]

The Judges *further order* that parties shall not file, and the Judges shall not consider, briefing or legal argument beyond necessary explanatory notes to the proposed language, section by section, not to exceed 250 words per proposed section.[176] The Judges specifically admonish the parties that they shall not use these submissions as a basis to object to this Initial Ruling, either explicitly or implicitly by proposing regulatory provisions inconsistent with this Initial Ruling.

The Judges *further order* that, within 30 days of the date of this Initial Ruling and the attendant dissenting documents, the parties shall file an agreed redacted version of this Initial Ruling, and the dissents, for *public* viewing.

After the Judges have reviewed the parties' regulatory submissions, the Judges shall adopt and format the necessary regulatory language format terms relevant to this ruling and issue a *restricted* Initial Determination after Remand, which shall embody their determination of rates and terms. The parties will have an opportunity to suggest redactions from the Initial Determination after Remand before it is issued as a public version.

The parties shall not file any motions seeking rehearing or reconsideration of this Initial Ruling. Subsequent to the Judges' issuance of their Initial Determination after Remand as identified in the immediately preceding paragraph, any party may file a Motion for Rehearing within 15 days of the issuance of said Initial Determination after Remand.

After ruling on any and all Motions for Rehearing as identified in the immediately preceding paragraph, the Judges shall issue a Final Determination after Remand.

So ordered.

Issue Date: July 1, 2022.

Stephen S. Ruwe,

Copyright Royalty Judge.

David R. Strickler,

Copyright Royalty Judge.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

ADDENDUM TO FINAL RULING AND ORDER

Offering	% of Service provider revenue (percent)	TCC % or TCC amount	"Mechanical-only" royalty floor
Standalone Non-Portable Subscription Offering—Streaming Only.	10.5	The lesser of 22% of TCC for the Accounting Period or 50 cents per subscriber per month.	15 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed.	10.5	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month.	30 cents per subscriber per month.
Standalone Portable Subscription Offering	10.5	The lesser of 21% of TCC for the Accounting Period or 80 cents per subscriber per month.	50 cents per subscriber per month.
Bundled Subscription Offering	10.5	21% of TCC for the Accounting Period	25 cents per month for each Active Subscriber during that month.
Mixed Service Bundle	11.35	21% of TCC for the Accounting Period	n/a.
Limited Offering	10.5	21% of TCC for the Accounting Period	n/a.
Paid Locker Service	12	20.65% of TCC for the Accounting Period	n/a.
Purchased Content Locker Service	12	22% of TCC for the Accounting Period	n/a.
Free nonsubscription/ad-supported services free of any charge to the End User.	10.5	22% of TCC for the Accounting Period	n/a.

[174] The Judges adopt this process in order to avoid a dispute regarding the regulatory provisions issued in connection with their ruling. Because this is a remanded proceeding, the Judges are not restricted to the procedures that would control in an original proceeding, and are exercising their authority to ''make any necessary procedural . . . rulings in any proceeding under this chapter.'' 17 U.S.C. 801(c).

[175] In their agreed upon or separate submissions, the parties shall address the issue identified in note 135 *infra,* regarding Copyright Owners' assertion that the Services omitted from their proposed subpart C rates a portion of the *Phonorecords II* rates.

[176] A section of the regulations is designated by a number following the decimal after the part number, for example, § 385.5. The regulations relevant to this proceeding are found in part 385.

B. Order 43 on Phonorecords III Regulatory Provisions (Public Version With Federal Register Naming and Formatting Conventions)

Introduction

The present Order concerns a single issue in dispute among the parties [177] regarding regulatory language implementing the Judges' Initial Ruling and Order after Remand (''Initial Ruling'') entered in this proceeding.[178] Subsequent to filing dueling submissions (*see* footnote 2 *infra*), the parties filed a Joint Submission, informing the Judges that they had ''agree[d] on all of the regulatory language'' except for certain rate percentages contained in Table 2 of the proposed § 385.21. Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 1 (Nov. 30, 2022) (''Joint Submission'') (eCRB no. 27337).

The Regulatory Language in Dispute

The dispute between the parties is whether the Judges should adopt in the Phonorecords III regulations: (1) the several ''Total Content Cost'' (''TCC'') rates [179] set forth in the Phonorecords II-based benchmark; or (2) the single 26.2% TCC rate discussed in the Initial Ruling. This dispute relates to nine offerings made by interactive streaming services, as detailed below:

Offering	Copyright owners' proposal (percent)	Services' proposal
Standalone Non-Portable Subscription Offering—Streaming Only.	26.2	The lesser of 22% of TCC for the Accounting Period or 50 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed	26.2	The lesser of 21% of TCC for the Accounting Period or 50 cents per subscriber per month.
Standalone Portable Subscription Offering	26.2	The lesser of 21% of TCC for the Accounting Period or 80 cents per subscriber per month.
Bundled Subscription Offering	26.2	21% of TCC for the Accounting Period.
Free nonsubscription/ad-supported services free of any charge to the End User.	26.2	22% of TCC for the Accounting Period.
Mixed Service Bundle	26.2	21% of TCC for the Accounting Period.
Purchased Content Locker Service	26.2	22% of TCC for the Accounting Period.
Limited Offering	26.2	21% of TCC for the Accounting Period.
Paid Locker Service	26.2	20.65% of TCC for the Accounting Period.

Sources: Offering column text from Exhibit A to Joint Submission . . . Regarding Regulatory Provisions Following Initial Ruling and Order (after Remand) at 17 (Nov. 30, 2022) (eCRB no. 27338); Services' Proposal column text from Services' Joint Submission of Regulatory Provisions Ex. A at 11 (July 18, 2022) (eCRB no. 27005).

The Issue

At a high level, the remaining regulatory issue is the following:

Whether a 26.2% TCC rate identified in the hearing record, and discussed both on appeal and on remand by the D.C. Circuit, should substitute for TCC rates in the Phonorecords III period, or whether these uncapped TCC rates should be set at the specific levels ranging between 20.65% and 22% set forth in the Phonorecords II-based benchmark adopted by the Judges in the Initial Ruling.

To frame, address, and rule on this issue, in this Order the Judges place the parties' dispute in the context of the prior rulings by the D.C. Circuit and the Judges in connection with this proceeding.

Background

On January 5, 2016, the Judges initiated proceedings to determine the appropriate mechanical license royalty rates and terms for the January 1, 2018 to December 31, 2022 period. *See* Notice Announcing Commencement of Proceedings in Phonorecords III, 81 FR 255 (Jan. 5, 2016). After the parties filed their written and rebuttal testimonies and engaged in discovery, they participated in a five-week evidentiary hearing presided over by the Judges. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords, 84 FR 1918, 1920, 1923–1925 (Feb. 5, 2019).[180]

In the Majority Opinion, the Judges adopted a ''greater-of'' royalty rate structure for the mechanical license, which contained a TCC rate applicable to all categories of offerings.[181] *See* 84 FR 1963; *see also Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 372 (D.C. Cir. 2020) (summarizing the Majority Opinion). More particularly, the Majority adopted the following rates and rate structure:

[177] The parties who have joined on this dispute (through filings after the issuance of the Initial Ruling) are the National Music Publishers' Association and Nashville Songwriters Association International (collectively, ''Copyright Owners'') and *Amazon.com* Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the ''Services''). (Copyright Owners have informed the Judges that another party, George Johnson, joins in Copyright Owners' position with respect to the issue considered in this Order.)

[178] The Judges instructed the parties to ''prepare and submit regulatory provisions consistent with this ruling.'' Initial Ruling and Order after Remand at 114 (July 1, 2022) (eCRB nos. 26938, 27063). The Judges further instructed that, ''if the participants cannot agree on a joint submission, the Judges will accept separate submissions respectively from (1) Copyright Owners and (2) Services, jointly.'' *Id.* The parties did not initially file an agreed-upon joint submission as to regulatory provisions, but rather filed the permitted separate submissions.

[179] TCC is defined in the Initial Ruling as ''a shorthand reference to the extant regulatory language describing generally the amount paid by a service to a record company for the section 114 right to perform digitally a sound recording.'' Initial Ruling at 4 n.8 (citations omitted).

[180] The Determination was not unanimous. Judge David Strickler dissented from the Majority's setting of the TCC rate, and he proposed that the appropriate rates should essentially be those proposed in the Phonorecords II-based benchmark proposed by several of the Services. Thus, for clarity, this Order refers to the ''Majority Opinion'' and the ''Dissenting Opinion,'' rather than the ''Final Determination,'' when discussing the respective opinions.

[181] The other prong in the ''greater-of'' rate structure is the percent-of-revenue generated by the interactive streaming service, *i.e.,* ''service revenue.''

2018–2022 ALL-IN ROYALTY RATES: THE GREATER OF:

	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of TCC	22.0%	23.1%	24.1%	25.2%	26.2%

Majority Opinion at 1918, 1960.

The Services appealed.[182] Among their arguments were the assertions—pertinent to this Order—that the Majority: (i) violated the Services' procedural right to fair notice by choosing a structure that was not advanced by any party; (ii) acted arbitrarily and capriciously by simultaneously combining a TCC prong (phased-in to 26.2% of TCC) with an increase in the percentages on the revenue prong (phased-in to 15.1%); and (iii) failed to reasonably explain its rejection of the Phonorecords II settlement as a benchmark. *Johnson, supra,* at 376, 380–81.[183]

Copyright Owners argued in opposition that: (i) the Services' procedural rights were not violated because ''every component'' of the Majority's approach was contained in the hearing record; (ii) the Majority's rate and rate structure rulings were well-reasoned, factually supported and, therefore, not arbitrary and capricious; and (iii) sufficient reasons existed in the record to support the Majority's rejection of the Phonorecords II-based benchmark. *Johnson, supra,* at 382–383; 387.

The D.C. Circuit vacated and remanded. More particularly, *Johnson* holds as follows:

1. The Majority Determination ''failed to provide adequate notice of the drastically modified rate structure [they] ultimately adopted,'' which was beyond ''a reasonable range of contemplated outcomes'' in ''the parties' pre-hearing proposals, the arguments made at the evidentiary hearing, and the preexisting rate structures.'' *Johnson* at 381–82. Accordingly, as to this issue, ''[i]f the [Judges] wish[ ] to pursue [their] novel rate structure, [they] will need to reopen the evidentiary record.'' *Id.* at 383.

2. The appellate issue of whether the Majority's adoption of the (phased-in) 26.2% TCC royalty rate was ''arbitrary and capricious'' could not be addressed—given the absence of ''adequate notice'' cited in point (1) above. *Id.*

3. The Majority's derivation, calculation *and application* of the royalty rate of 15.1% on the revenue prong was proper.[184] The D.C. Circuit explained that, as to *this* issue, the Majority had engaged in the ''type of line-drawing and reasoned weighing of the evidence [that] falls squarely within the [Judges'] wheelhouse as an expert administrative agency.'' *Johnson* at 386. More particularly, the D.C. Circuit approved of the Judges' reliance on ''substantial evidence'' in the form of expert testimony to set the 15.1% service revenue rate. *Johnson,* at 384–85 (emphasis added). *See also id.* at 388 (finding ''substantial evidence'' for the Judges' finding that an increase in the mechanical royalty rate was necessary to address a ''marked decline in mechanical royalty income. . . .'').

4. The Majority's rejection of the Phonorecords II-based benchmark is remanded because the D.C. Circuit ''cannot discern the basis on which the [Judges] rejected the Phonorecords II rates as a benchmark in [their] analysis, that issue is remanded to the [Judges] for a reasoned analysis.'' *Johnson* at 387.

On remand, the Judges adopted procedures that mainly followed the parties' requests. More particularly, the Judges followed the D.C. Circuit's directive and reopened the evidentiary record to receive evidence and testimony relating to the TCC issues. *See* Order Regarding Proceedings on Remand at 2 (Dec. 15, 2020). The post-remand supplementary record added: (1) rate evidence for the 33-months from January 2018 through September 2020, when the parties operated under the Majority's new (but subsequently vacated) regulations including the TCC rates; and (2) new testimony from economic expert witnesses on behalf of Copyright Owners and the Services. *See* Initial Ruling, *passim.* However, none of the post-remand evidence submitted and relied upon by the parties *specifically* addressed as a separate issue the rates for the nine offerings that are the subject of the present Order.

On July 1, 2022, the Judges issued their Initial Ruling[185]—applying *Johnson* and considering the entire record developed pre-remand and post-remand. In their Initial Ruling, the Judges made several findings that bear upon the issue at hand, *viz.,* whether to adopt in the Phonorecords III regulations the 26.2% TCC rate or the TCC rates (ranging from 20.65% to 22%) from the Phonorecords II-based benchmark. In particular, in the Initial Ruling, the Judges stated the following:

1. The Phonorecords II-based benchmark incorporates price discriminatory features for product differentiation as between: (a) subscription and ad-supported services; (b) portable and non-portable services; and (c) unbundled and bundled services. *See* Initial Ruling at 67–68 (noting the salutary price discriminatory nature of the Phonorecords II-based benchmark).

2. The Phonorecords II-based benchmark ''reflect[s] a rate structure with an adequate degree of competition, because there was a balance of bargaining power [''countervailing power''] between the two negotiating industrywide trade associations, offsetting the complementary oligopoly effects in place when a ''Must Have'' licensor bargains separately with each licensee.'' Initial Ruling at 69.

3. Based upon the available record evidence, the Judges find . . . the Services' Phonorecords II-based benchmark . . . ''more than sufficient to satisfy the legal requisites for application, as well as a practical benchmark, when used in conjunction with the 15.1% headline revenue rate advocated by Copyright Owners.'' Initial Ruling at 59.

4. ''Substantial evidence demonstrates that the Phonorecords II-based benchmark rates, other than the headline rate, are not 'too low.' '' Initial Ruling at 73.

5. A Copyright Owner expert witness opined that ''the evidence . . . indicates that the relative valuation ratios implied by the current Section 115 compulsory license [*i.e.,* the Phonorecords II-based benchmark] implies a ''*lower bound on the relative market valuations* of the reciprocal percentage of the value musical works rights relative to sound recording rights [*i.e.,* TCC rates] [of] 22% and 21%.'' Initial Ruling at 78 (emphasis therein).

6. The royalty rates and terms within subpart C of the Phonorecords II-based benchmark—*which include the rates and term for the offerings at issue in this Order*—

[182] The Copyright Owners and George Johnson also appealed; all three parties' appeals were consolidated by the D.C. Circuit. *Johnson* at 375.

[183] The annual phased-in rates are set forth in the Table *supra.*

[184] The italicization of the word ''application'' serves to foreshadow a critical point discussed *infra:* The D.C. Circuit did not affirm any application of the 26.2% TCC rate, *except* for the use of that 26.2% rate as an *input* derived from a specific dataset, to set the 15.1% service revenue-based royalty rate. *Johnson, supra,* at 385–86; *see also* at 386 n.11.

[185] The findings and conclusions in the Initial Ruling were adopted by a majority of the Judges, but two Judges filed separate opinions. *See* Initial Ruling at 2 n.5. One Judge, former Chief Judge Suzanne Barnett, dissented from the Majority's adoption in the Initial Ruling regarding the *Phonorecords II* rate structure (section II of the Initial Ruling), though not from the exception to that benchmark with regard to the headline rate of 15.1% and the imposition of a cap on the TCC rate prong. *See* Chief Judge Barnett's ''Dissent re Benchmark'' (July 1, 2022) (eCRB no. 26943). The other opinion was issued by Judge Strickler, who dissented from the *reasoning* relating to the adoption of the definition of Service Revenue (section V), but concurred in the *adoption* of that definition. *See* Judge Strickler's ''Dissent in Part as to Section IV of the Initial Ruling and Order after Remand'' (July 1, 2022) (eCRB no. 26965).

are expressly ''covered by [the] foregoing analysis.'' Initial Ruling at 93. In rejecting all of Copyright Owners' arguments for different treatment of Phonorecords II-based benchmark rates in Subpart C therein, the Judges declined to adopt Copyright Owners' ''re-assert[ion] [of] the same arguments with respect to subpart C'' that Copyright Owners advanced in opposing the Phonorecords II-based benchmark ''for interactive streaming in subpart B.'' *See* Initial Ruling at 93–94 (''The Judges find no reason on remand to treat the subpart C offerings differently than the manner in which they are treating the subpart B interactive streaming offerings . . . . That means, however, that the various ''headline'' rates for these subpart C offerings must also adjust to 15.1%, 131 *whereas the alternative rates (identified in subpart C as* ''*minima*'' *and* ''*submininma*'') *rates shall remain unchanged*.'') (emphasis added).

7. The D.C. Circuit had affirmed that: (a) the ''headline'' percentage royalty rate (not a TCC rate) of 10.5% was too low; and (b) that the Majority had not improperly exercised its authority when it increased that revenue royalty rate to 15.1% (as phased-in over the five-year rate term). Accordingly, on remand, the Judges maintained the 15.1% (phased-in) percentage royalty rate. *See, e.g.,* Initial Ruling at 4, 17.

8. The D.C. Circuit affirmed the Majority's *derivation and calculation* of the 26.2% TCC rate for use as an input in calculating the 15.1% (phased-in) service revenue percentage royalty rate. However, *Johnson* vacated and remanded the Majority's *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19–20.

For these reasons, the Judges decided in the Interim Ruling that: (1) the overall Phonorecords II rates comprise a ''useful benchmark,'' when the 15.1% headline percentage rate replaces the 10.5% headline percentage rate for the offerings in Subparts B and C of the Phonorecords II-based benchmark; and (2) ''[t]he (phased-in) 26.2% rate [is] unreasonable.'' Initial Ruling at 50 n.77; 88; and 93–94.

Procedures Following the Post-Remand Initial Ruling

In the Initial Ruling, the Judges directed the parties to attempt to submit jointly agreed-upon regulatory provisions implementing the Initial Ruling, for the Judges to consider. The Judges further ruled that, if the parties could not agree on all the regulatory language, they should make separate submissions regarding regulatory provisions in dispute. *See* Initial Ruling at 114.

The parties agreed to many regulatory provisions but disagreed as to several such provisions. Accordingly, they filed separate submissions and respective replies, regarding the regulatory provisions. Services' Joint Submission of Regulatory Provisions (July 18, 2022); Copyright Owners' Submission of Regulatory Provisions to Implement the Initial Ruling (July 18, 2022); Services' Joint Response to Copyright Owners' Submission of Regulatory Provisions (Aug. 5, 2022); Copyright Owners' Response to Judges' July 27, 2022 Order Soliciting Responses Regarding Regulatory Provisions (Aug. 5, 2022).

The Judges considered those submissions and entered an order addressing the disputed regulatory provisions. *See* Corrected Order regarding Regulatory Provisions following Initial Ruling and Order (After Remand) (Nov. 10, 2022) (''November 10th Order'').[186]

In the November 10th Order, the Judges directed the parties once more to file a joint submission ''of regulatory provisions that embody the rulings set forth in *Johnson,* the Initial Ruling and this [November 10th] Order, and any aspects of the [Majority] Determination (pre-remand) that the parties understand to remain effective after the foregoing rulings.'' November 10th Order at 31.

On November 30, 2022, the parties made the Joint Submission (as also identified at the outset of the present Order), in which they provided joint regulatory language no longer in dispute that applied the binding rulings of the Judges and the D.C. Circuit. However, as also noted above, the parties identified the single issue in dispute that relates to the nine service offerings described *supra*.[187]

The Parties' Respective Arguments in Their November 30th Joint Submission

Copyright Owners' Arguments

According to Copyright Owners, the Initial Ruling ''appears to plainly acknowledge that, in light of *Johnson,* the derivation and calculation of the (phased-in) 26.2% TCC rate percentage cannot be changed.'' Joint Submission at 6. More particularly, Copyright Owners aver that, according to the Judges' Initial Ruling, ''the D.C. Circuit affirmed the Majority's derivation and calculation of the 26.[2]% . . . TCC rate'' and further that ''both rate prongs''—the service revenue rate and the TCC rate—were ''derived from the same analyses.'' Initial Ruling at 19; Joint Submission at 6–7 (quoting Initial Ruling at 19 (emphasis removed)). Further to this point, Copyright Owners rely on the Judges' additional language in the Initial Ruling that the pre-remand Final Determination's ''*derivation and calculation* of the TCC rate [*i.e.,* the 26.2% rate] . . . is not subject to further consideration on remand by the Judges.'' Joint Submission at 7 (quoting Initial Ruling at 20 (emphasis in Initial Ruling)).[188]

According to Copyright Owners, the foregoing points are consistent with the limited scope of the remand, which ''was not opened for new evidence concerning TCC rate percentages.'' Joint Submission at 7 (citations omitted). Accordingly, Copyright Owners emphasize that ''there is no evidence in the record after remand to support changing the (phased-in) 26.2% TCC rate percentage.'' Joint Submission at 7. Copyright Owners—characterizing the former Phonorecords II TCC rates now at issue as newly derived and calculated—maintain that these ''new'' TCC rate percentages therefore are ''foreclosed'' by the Initial Ruling and post-remand orders cited above. Joint Submission at 7–8.

Copyright Owners also assert that the TCC rate at issue here—''was not appealed by the Services or challenged during the remand, nor called into question by the Circuit in *Johnson*.'' Joint Submission at 8 (emphasis removed). The absence of an appeal as to this issue, according to Copyright Owners, means that the only TCC rate supported by *Johnson* is the 26.2% TCC rate. Joint Submission at 8.

The Services' Arguments

According to the Services, the Judges should adopt in the regulations the TCC percentage rates—ranging from 20.65% to 22%—because those rates are contained in the Phonorecords II-based benchmark adopted by the Judges and thus essentially have been ''expressly set out by the Judges'' in two prior decisions. Joint Submission at 2 (citing Initial Ruling at 2; November 10th Order at 6 n.13). In light of these prior Orders, the Services characterize *Copyright Owners' position as the new argument,* improperly seeking regulatory provisions that ''reflect the 26.2% rate

[186] The November 10th Order corrected an otherwise substantively identical order issued two days earlier, on November 8, 2023, which had inadvertently included a small amount of text. See November 10th Order at 1.

[187] On January 10, 2023, Spotify USA Inc., *Amazon.com* Services LLC, Google LLC, Pandora Media, LLC, National Music Publishers' Association, Inc. and the Nashville Songwriters Association International filed a joint Motion (eCRB no. 27418) requesting modification of the previously proposed language for 37 CFR 385.3, which governs fees owed for late payment. There was no opposition to the January 10, 2023 joint Motion. The Judges find good cause to adopt the modified language, which provides that ''where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.''

[188] However, Copyright Owners disregard the Initial Ruling's observation that *Johnson* vacated and remanded the Majority's *application and inclusion* of the 26.2% TCC rate. Initial Ruling at 19.

previously imposed by the [M]ajority in the now-vacated pre-remand Final Determination.'' *Id.*

More pointedly, the Services argue that the Judges' Initial Ruling already expressly considered and rejected application of the 26.2% TCC rate. *Id.* (citations omitted). Further, the Services maintain that it is because the Judges rejected the 26.2% TCC rate in the Initial Ruling that the Judges had no need to ''substantively address the topic of TCC rates'' in their November 10th Order. *Id.* at 4.

The Services further maintain that ''*Johnson* does not compel the Judges to simply reinstate their original pre-remand TCC rates.'' *Id.* To this point, the Services rely on the Judges' post-remand finding that, although the error made by the Majority in adopting the 26.2% TCC rate in the pre-appeal Phonorecords III Determination was procedural, the ''consequence . . . was *substantive.*'' *Id.* (emphasis herein).

For the above reasons, the Services maintain that the Judges could not possibly be required on remand to adopt an express 26.2% in any portion of the Phonorecords III regulations.

Turning from their argument that the 26.2% TCC rate was rejected by the Judges, the Services focus on the Judges' finding in the post-remand Initial Ruling that the ''*Phonorecords II* benchmark . . . is the 'better of the benchmarks proposed by the parties . . . one that satisfies the requirements of 17 U.S.C. 801(b)(1) in all respects,' '' Joint Submission at 5 (quoting Initial Ruling at 2). Because the Phonorecords II benchmark includes the TCC rates now at issue—ranging from 20.65% to 22%—the Services maintain that those rates should properly be included in the Phonorecords III regulations. *Id.*[189]

The Judges' Analysis and Ruling

Having considered the parties' submissions, the Initial Ruling and all other pertinent material, the Judges rule that the 26.2% TCC rate cannot and shall not be applied in the regulatory provisions now at issue. Rather, the Judges rule that the TCC rates set forth in the Phonorecords II-based benchmark shall be applied in the nine regulatory provisions now at issue, because they are consistent with and give effect to the Judges' Initial Ruling. The more particular bases for this ruling are set forth below.

Most fundamentally, the Judges note at the outset that in the Initial Ruling they expressly *did not apply* the 26.2% TCC rate in any manner other than as an input—using that TCC rate only as the D.C. Circuit directed—to calculate the 15.1% of service-revenue royalty rate. *See, e.g.,* Initial Ruling at 41 (''[A] careful reading of the remand testimony by Copyright Owners' economists, Professors Watt and Spulber, reveals that *neither of them actually testifies that there is sufficient theoretical and empirical evidence to support the . . . 26.2% TCC rate . . . .*'') (emphasis in original). *See also id.* at 40–41 n.69 (contrasting the improper application of the 26.2% TCC as a separate statutory rate from the use of the 26.2% TCC rate as input from a ''bargaining model'' solely to increase the service revenue rate to 15.1%.).[190]

In this regard, the Initial Ruling has relied upon the clear distinction made in *Johnson* between the 15.1% service revenue rate and the 26.2% TCC rate. *Compare Johnson, supra,* at 385 (affirming the Majority's *application* of the ''revenue rate of 15.1%'' as ''the type of line-drawing and reasoned weighing of the evidence falls squarely within the[ir] wheelhouse as an expert administrative agency'') *with id.* at 382–83 (vacating the Majority's decision for ''significantly hiking the TCC rate to 26.2% from approximately 17% to 22%'' without allowing the Services an opportunity to address the issue—an error that was even ''worse'' than the elimination of caps on certain other TCC offerings.).

Further, the offerings now at issue were contained in the Phonorecords II-based benchmark, and the Judges' application of that benchmark in the Initial Ruling is unambiguous: Other than the new and increased headline rate of 15.1%, ''the rates and rate structure of the *Phonorecords II*-based benchmark proposed by the Services . . .) shall constitute the rates and rate structure for the *Phonorecords III* period.'' Initial Ruling at 2. Accordingly, with regard to the single remaining issue, pertaining to the nine offerings listed *supra,* the regulatory provisions proposed by the Services in the Joint Submission are fully consistent with the Initial Ruling.

By contrast, Copyright Owners' proposed language introduces a change in the Phonorecords II-based benchmark rates that was never the subject of an evidentiary proceeding pre-or post-remand, whether through live or written testimony. But perhaps more importantly, as a matter of *substance,* Copyright Owners' proposed regulatory provisions are inconsistent with the language and a key purpose of the Initial Ruling, which is to adopt the Phonorecords II-based benchmark rates, the basis of which were generated consensually by the parties, through negotiations between industrywide trade associations, which prevented unwarranted and disproportionate complementary oligopoly market power from affecting the royalty rates. See Initial Ruling at 69–70.[191]

[189] The Services also argue that Copyright Owners' assertion *at this time* that the 26.2% TCC rate should substitute for the Phonorecords II-based benchmark rates is *procedurally* untimely and improper. The Judges only partially agree with Services' argument in this regard. If Copyright Owners had wanted to timely make this argument, they should have done so during the post-remand period *before* the Judges entered their Initial Ruling (or, of course, during the initial proceeding pre-appeal). In that sense, Copyright Owners failed to avail themselves procedurally of the right to make this substantive challenge. However, the Judges have afforded the parties the procedural right to propose regulatory language that they claim would implement the Initial Ruling; a procedural right exercised by both parties, as evidenced by, for example, their arguments in the Joint Submission. In that narrow sense, Copyright Owners' present argument is not procedurally improper. As a matter of *substance* though, as explained in ''The Judges Analysis and Ruling'' *infra,* the Judges have considered herein Copyright Owners' present arguments and found them inconsistent with the Initial Ruling.

Finally, with regard to subsequent substantive challenges to the Initial Ruling, the parties correctly understand that such challenges can be made after the Judges issue their post-remand ''Initial Determination'' (a statutorily-mandated ruling). *See* Joint Submission at 9 (Services agreeing with Copyright Owners' understanding that they continue to properly ''reserve all rights with respect to the Initial Ruling, any implementing regulations and any Initial and Final Determination, including the right to challenge any of the foregoing.'').

[190] The Services claim that this distinction constitutes a semantic twisting of words. *See* Joint Submission at 7. The Judges reject that characterization. Rather, their ruling is substantive, not semantic, because they have relied upon the testimony of several economic expert witnesses, including one of Copyright Owners' own economic experts, who identified five reasons that the Judges found to preclude adoption of the 26.2% TCC rate as a separate statutory rate. *See, e.g.,* Initial Ruling at 41. Moreover, not a single economist who testified at the hearing proposed that the Judges adopt the 26.2% TCC rate as a statutory rate, *see* Initial Ruling at 38, further supporting the Judges' adoption in the Initial Ruling of the consensual negotiated TCC rates contained in the Phonorecords II-based benchmark for the nine offerings at issue.

[191] The Judges also note that their adoption of these 20.65% through 22% TCC rates in the Phonorecords II-based benchmark—because they are lower than the 26.2% rate proposed by Copyright Owners—is consistent with their rationale for adopting that benchmark. As the Judges explained *repeatedly and throughout the Initial Ruling,* their adoption of the Phonorecords II-based benchmark purposefully incorporates into the Phonorecords III regulations the beneficial price discriminatory features that are hallmarks of that benchmark. *See, e.g.,* Initial Ruling at 65 n.98 (''[T]the granular discriminatory features that the parties had negotiated . . . reflect an ''appropriate form and extent of price discrimination . . . .'' The Judges emphasized this point repeatedly. *See generally* Initial Ruling, *passim.*

Further, as the Services note, Copyright Owners themselves—even when advocating for an otherwise across-the-board 26.2% TCC prong—had continued to propose the 20.65% to 22% TCC rates for the nine offerings at issue now. *See* Copyright Owners' Submission of Regulatory Provisions to

The Judges also reject Copyright Owners' argument that by maintaining the 20.65% through 22% TCC rates in the Phonorecords II-based benchmark they would be violating their prior rulings regarding the scope of the remand. Citing to the Judges' Order Regarding Proceedings on Remand at 1 (eCRB no. 23390) (''Remand Order''), Copyright Owners state in their Joint Submission that that the remand ''was not opened for new evidence concerning TCC rate percentages.'' Joint Submission at 7. But the decision to re-open the existing, and robust, evidentiary record only as to rate *structure,* did not limit the *scope* of the remand itself, nor consideration of evidence from the underlying proceeding.

Moreover, the Judges find no language in either the Remand Order or the Remand Scheduling Order, and no other basis, that would support Copyright Owners' characterization of the 20.65% through 22% TCC rates in the Phonorecords III-based benchmark as new evidence, given that they were expressly included in that benchmark which had been proffered at the hearing *prior to the remand.*

Further, the present issue of whether the regulatory provisions implementing the Initial Ruling should apply the Phonorecords II-based benchmark TCC rates or the 26.2% TCC rate is *not* a dispute regarding the derivation or calculation of a *new* TCC rate. The Phonorecords II-based benchmark rates are self-evidently *not new rates,* because they existed in that *prior* benchmark. Moreover, the present dispute relates to whether the language and reasoning in the Initial Ruling are consistent with maintaining the rates contained in the Phonorecords II-based benchmark for the nine offerings at issue, or whether the Initial Ruling calls for abandoning those benchmark rates and replacing them with the 26.2% TCC rate proffered by Copyright Owners. As explained *supra,* the 26.2% TCC rate was properly utilized by the Majority as an *input* (combined with other evidence) in order to calculate the 15.1% service revenue royalty rate. The record reflects no other context in which the 26.2% TCC rate can be utilized, let alone must be utilized. Indeed, as explained *supra,* the record reflects the Judges' rejection of the 26.2% TCC rate as a stand-alone statutory royalty rate.

The Judges also reject Copyright Owners' argument that the Services somehow waived their argument for maintaining the 20.65% through 22% TCC Phonorecords II-based benchmark rates. More particularly, Copyright Owners incorrectly assert that these rates were ''not appealed by the Services. . . .'' Joint Submission at 8. Rather, the D.C. Circuit stated unambiguously: ''[T]he Streaming Services object to the [Judges'] . . . rejection of the Phonorecords II . . . settlement[ ] as [a] rate benchmark[ ].'' *Johnson,* 969 F.3d at 384; *see also id.* at 386 (''The Streaming Services argue . . . that the [Judges] arbitrarily rejected . . . [a] potential rate benchmark[ ] . . . the Phonorecords II settlement—without adequate explanation.'').

Moreover, the D.C. Circuit repeatedly noted that it was vacating and remanding the Majority's Determination with regard to, *inter alia,* the Majority's improper decision to reject the Phonorecords II-based benchmark *writ large, i.e.,* without qualification by the appellate panel that some parts of that proffered benchmark might have been correctly rejected. *See Johnson,* 969 F.3d at 367, 376, 381, 387. Obviously, virtually all the elements of the Phonorecords II-based benchmark—including the offerings now at issue—were appealed, and not waived, foregone or forfeited by the Services.

Likewise, Copyright Owners are wrong in their claim that the Services had never ''challenged'' these rate issues ''during the remand.'' Joint Submission at 8. Rather, the Services argued on remand for the Phonorecords II-based benchmark to be applied *comprehensively,* without itemizing every element of that proffered benchmark. *See* Services' Joint Opening Brief (post-remand) at 19–44 (Apr. 1, 2021) (detailing why ''the Services' proposal based on the *Phonorecords II* settlement is reasonable . . . .''); *see also* Services' . . . Submission of Regulatory Provisions at 2 (July 18, 2022) (''Services' July 18th Submission'') (''[T]he Services have faithfully implemented the task at hand—to use the rates and rate structure of the ''Phonorecords II-based benchmark'' proposed by the Services during the remand proceeding . . . .'').[192]

Finally, the Judges find and conclude that their ruling in this Order sets forth reasonable rates satisfying the four objectives in the then-applicable (but now superseded) statutory rate standard contained in 17 U.S.C. 801(b)(1).[193] First, with regard to Factor (A),[194] the Judges recognize and follow the D.C. Circuit's ruling that the Majority's decision to increase in the ''headline'' service revenue royalty rate by 44% from 10.5% to 15.1% was supported by substantial evidence. *Johnson* at 387–88.

Further with regard to Factor (A), the Judges understand their analysis and reasoning in the Initial Ruling—applying the Phonorecords II-based benchmark and thus rejecting the 26.2% TCC rate—to be applicable to the present dispute regarding the adoption of regulations to implement the Initial Ruling. Accordingly, the Judges adopt by reference herein their analysis and reasoning set forth at pages 90–91 of the Initial Ruling. For those reasons, the Judges decide, as they did in the Initial Ruling, that there is no basis for yet a *further* increase in the royalty rate based on Factor (A), finding ''no evidence to suggest that the price discriminatory rates should be changed, in order to address the connection between price discrimination and the objective of Factor (A).'' *Id.* at 91.

Next, in considering Factors (B) and (C),[195] the Judges' Initial Ruling adopts the Majority's reasoning that the 15.1% service revenue royalty rate provided a ''*fair* allocation of revenue between copyright owners and services'' and it would be ''substantively unwarranted to engage in any new consideration on remand of the impact, if any, of Factors

Implement the Initial Ruling at 15–16) (July 18, 2022); see also Joint Submission at 6.

[192] The decision in *Johnson* could be construed as rejecting *one* element of the Phonorecords II-based benchmark, viz., the 10.5% headline rate, because the appellate panel affirmed the higher Majority's adoption of the (phased-in) 15.1% headline royalty revenue rate. The Initial Ruling is consistent with that ruling, and this rate is not now in dispute. *See* Services' July 18th Submission at 2 (the Services acknowledge that in their proposed regulatory provisions they ''replac[ed] the headline rate'' of 10.5% with the headline royalty rate ''set by the Judges [15.1%] in the Initial Ruling.'').

[193] The D.C. Circuit expressly declined to adopt most of the Majority's application of the explicit statutory objectives. As to Factor (A), regarding the objective of ''maximiz[ing] the availability of creative works to the public,'' the D.C. Circuit held that the Majority's finding that ''an increase in the royalty rates for mechanical licenses was necessary to ensure the continued viability of songwriting as a profession'' was ''supported by substantial evidence.'' *Johnson* at 387–388. However, with regard to the remaining statutory factors, *Johnson* instead vacated and remanded consideration of those matters to the Judges. *See Johnson* at 389. The Initial Ruling after remand considered these statutory objectives in detail. *See* Initial Ruling at 90–93. (The parties made no express argument regarding the application of these statutory objectives in their Joint Submission.).

[194] Factor (A) provides that rates shall be calculated to achieve the objective of ''maximize[ing] the availability of creative works to the public.'' 17 U.S.C. 801(b)(1)(A).

[195] The Factor (B) objectives (providing a ''fair return'' and a ''fair income'' to the licensors and licensees respectively) and Factor (C) objectives reflecting their relative roles in making the streamed music available to the public) are typically considered jointly, because of their overlapping concerns. *See* Initial Ruling at 15 n.31 (citing *Johnson,* 969 at 388). In this Order, the Judges likewise jointly address Factors (B) and (C).

(B) and (C) on the otherwise reasonable 15.1% revenue rate.'' *Id.* at 15–16.

In their Joint Submission, the parties have presented no arguments specifically addressing how Factors (B) or (C) might support their proposed TCC rates now at issue. Examining the record, the Judges find and conclude that maintaining the Phonorecords II-based rates ranging from 20.65% to 22% embodies the fairness associated with rates negotiated between industrywide trade associations wielding relatively comparable bargaining power, as discussed *supra* and in the Initial Ruling.[196] This notion of fairness is embodied in the determination of the reasonable rate and, as can be the case, when one of the four itemized statutory objectives of section 801(b)(1) is bound-up and appropriately addressed within the broader context of setting a reasonable rate, no further adjustment is necessary through an invocation of an itemized statutory factor. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) 84 FR 1918, 1955, 2015 (Feb. 5, 2019) (Majority and Dissenting Opinions agreeing that ''to the extent market factors may implicitly address any (or all) of the four itemized factors, the reasonable, market-based rates may remain unadjusted.'').

Finally, the Judges see no reason to alter their adoption of the Phonorecords II-based benchmark rates for the nine offerings at issue in this Order based upon the final listed statutory objective, Factor (D).[197] In the Joint Submission, Copyright Owners did not make an express argument relating to this factor (nor did the Services). Independently considering the potential application of Factor (D), the Judges find no evidence that the continuation of the Phonorecords II-based benchmark rates for the offerings at issue in this Order would cause any disruption that Factor (D) is intended to address. Further, as noted *supra,* the Judges have phased-in an *increase* in the headline service revenue royalty rate from 10.5% to 15.1%—a 44% increase—rendering unreasonable any argument that the present decision to maintain the Phonorecords II-based TCC rates is ''disruptive'' to Copyright Owners under the statutory Factor (D) standard.

Moreover, the Judges reassert their point in the Initial Ruling that there is no need to independently consider any potential disruption under the Factor (D) standard because the Judges have already found an application of that rate to be unreasonable. *See* Initial Ruling at 50 n.77. Further, the D.C. Circuit was aware of the existence of the 20.65% to 22% TCC rates in the Phonorecords II-based benchmark for these nine offerings now at issue, and not only declined to affirm the Majority's increase in those rates to 26.2%—a significant increase of 19% to 27% [198]—but also condemned that increase. *See Johnson* at 383 (''Worse still . . .the [Judges] also raised the total content cost [TCC] rate to 26.2%. . . .That rate previously fell between approximately 17% and 22%''). Nothing in the record suggest that the Judges can or should utilize the narrow statutory ''disruption'' standard in Factor (D) of section 801(b)(1) as a basis to override the position of the D.C. Circuit or the Judges' analysis in the Initial Ruling as to the inapplicability of the proffered 26.2% royalty rate.

Order

For the foregoing reasons, the Judges shall adopt in the regulatory provisions [199] the several ''Total Content Cost'' (''TCC'') rates set forth in the Phonorecords II-based benchmark as proposed by the Services.[200]

Within two days of the date of issuance of this Restricted Order, the parties shall file an agreed proposed redacted version for public viewing.

Issue Date: April 26, 2023.

David P. Shaw
Chief Copyright Royalty Judge

[196] In this regard, the Judges agree with the Services' argument. *See* Initial Ruling at 61 (summarizing the Services' position as to Factors (B) and (C)).

[197] ''Factor (D) . . . instructs the Judges to consider the 'competing priority' of 'minimiz[ing] any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'" Initial Ruling at 16. More particularly, ''disruption'' potentially remediable under Factor (D) requires that the contemplated rate ''directly produce[ ] an adverse impact that is substantial, immediate and in the short-run because there is insufficient time for either [party] to adequately adapt to the changed circumstance produced by the rate change . . . .'' Initial Ruling at 53–54.

[198] An increase from 20.65% to 26.2% is a 5.55 percentage point increase, which is an increase of 27% (rounded). An increase from 22% to 26.2% is a 4.2 percentage point increase, which is an increase of 19% (rounded).

[199] As addressed herein, the Judges find good cause to adopt the joint proposal for modified language regarding late fees, in 37 CFR 385.3.

[200] The Initial Determination shall issue forthwith.

C. Dissent in Part as to Section IV of the Initial Ruling and Order After Remand by Judge David R. Strickler [201] (Redacted Version With Federal Register Naming and Formatting Conventions)

I. The Contours of This Partial Dissent

I respectfully Dissent from Section IV of the Initial Ruling and Order after Remand (Initial Ruling). As explained herein, I conclude that the D.C. Circuit's rulings in *Johnson* preclude the Judges from engaging in ''new 'agency action.' '' [202] See *Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 386 (D.C. Cir. 2020). Accordingly, I cannot join with the present Majority in its determination that this remand proceeding constitutes ''new 'agency action' '' consistent with *Johnson.* That argument is circular and renders useless the D.C. Circuit's careful analysis of the procedures that are and are not available to the Judges after they have issued their Initial Determination.

As further explained herein, the argument is *circular* because it begins with the D.C. Circuit's ruling that the Determination [203] was improper because it invented a new procedure to change

[201] I am concurring in the Majority's *substantive* re-adoption of the Bundled Service Revenue definition from the Initial Determination. As explained herein, I disagree with the Majority regarding the *procedural* manner in which the Judges may reach this result. Thus, it would be more accurate to describe this ''Dissent'' as a ''Concurring Opinion'', or an ''Opinion Concurring in Part and Dissenting in Part.'' However, the Copyright Act does not expressly authorize Judges to issue a ''concurring opinion,'' but rather references the issuance of a ''dissenting opinion.'' *See* 17 U.S.C. 803(a)(3). Accordingly, I identify this opinion as a ''Dissent in Part as to Section IV of the Initial Ruling and Order after Remand.''

[202] I place the phrase *agency action* within quotation marks inside the broader phrase *new agency action* to avoid potential ambiguity and inconsistency with the directives in *Johnson.* There, the D.C. Circuit held that the Judges cannot assert ''plenary authority to revise [their] determinations whenever [they] thought appropriate,'' because such a power grab would render ''a nullity . . . the lines drawn by the authorizing statute . . . to confine . . . post hoc amendments'' to statutorily identified circumstances.'' *Johnson* at 392. So, ''new'' means the new application of an *existing* statutorily available ''agency action'' that had not previously been invoked—not ''new'' in the sense of a form of action conjured up to meet the moment. (When this phrase is used in a quotation I do not use the double quotation marks.) This distinction is important because the Majority and Copyright Owners advance new *forms* of (extra-statutory) agency action, not merely new applications of statutorily-authorized agency actions.

[203] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (''Determination''); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018) (citations to the Determination and to the Dissent in this Dissent in Part are found in this document). The Dissent is appended to and part of the same document as the Determination.

the Bundled Revenue definition that was in the Initial Determination,[204] only to circle back to where it started by creating—through the D.C. Circuit's own remand no less—a further and extra-statutory ''new 'agency action'''.

The Majority also renders Johnson *useless,* by adopting a process by which—after the D.C. Circuit has remanded an issue because the Judges lacked procedural authority to rule—the procedural error is essentially honored in the breach, because the remand neuters the effect of the D.C. Circuit's ruling.[205]

I join with the Majority though on its *substantive* decision to re-adopt the definition of Bundled Revenue set forth in the Initial Determination. As explained *infra,* I too find that it is clearly preferable to the definition that was swapped into the (Final) Determination. But as explained herein, I reconcile the procedural and substantive points differently. I apply what I believe to be the proper understanding of the D.C. Circuit's ruling—finding, contrary to the Majority, no avenue for ''new 'agency action''' post-remand. Rather, the Judges must *revert* to the original—and substantively appropriate—definition of Bundled Revenue in the Initial Determination.

To explicate the bases of this Dissent, my opinion as to this issue is set forth below.

II. Introduction

The Majority and I analyze the definition of ''Service Revenue'' from ''Bundled Offerings'' (henceforth ''Bundled Revenue'' definition) in the context of our partial adoption of the PR II-based benchmark. As discussed *supra,* the Remand Majority found that the PR II-based benchmark is a useful benchmark, particularly because of its features that incentivize beneficial downstream price discrimination and generate more listeners, revenues, and royalties. As explained below, the Bundled Revenue definition—itself an element within the PR II-based benchmark—also embodies such price discriminatory incentives. Thus, the Judges' analysis of the PR II-based benchmark and the Bundled Revenue definition are connected.

In the Determination, the earlier Majority likewise found the issues relating to the PR II-based benchmark to be bound-up with the question of the appropriate Bundled Revenue definition. But because that earlier Majority *rejected* the PR II-based benchmark, it likewise rejected the Bundled Revenue definition contained in the Initial Determination. The definition in the Determination thus eliminated the royalty-based incentive to engage in price discrimination via bundling.

In the interregnum between the Initial Determination and the (Final) Determination, the Judges considered Copyright Owners' post-hearing motion which sought, *inter alia,* to strike the Bundled Revenue definition in the Initial Determination. The Majority agreed with Copyright Owners that the definition in the Initial Determination should be replaced. An important rationale—highly relevant in the present context—was as follows: ''The Judges have . . . declined to rely on the 2012 . . . benchmark . . . as the basis for the rate structure, or, therefore, as regulatory guidance.'' Amended Order Granting in Part and Denying in Part Motions for Rehearing at 17 (Jan. 4, 2019) (Clarification Order).[206]

Unlike in the Determination, in this Initial Remand Ruling the Judges *do* rely on the PR II-based benchmark in part because of its price discriminatory aspects. More particularly, because the bundling of interactive services also constitutes a form of price discrimination, the Judges find the PR II-based benchmark definition of Bundled Revenue set forth in the Initial Determination to be substantively reasonable and otherwise consistent with the four itemized factors in section 801(b)(1).

As a *procedural* matter though, I can neither: (1) offer any further or fuller explanation for why the Majority made this change in the Bundled Revenue definition nor (2) identify any ''new 'agency action''' that would permit this definitional switch. And contrary to present Majority on remand, I also cannot identify a ''new 'agency action''' that the Judges can now take to return to the definition in the Initial Determination. But, as explained *infra,* the Judges need not identify such action, because the absence of a justification for the definitional switch requires the Judges to *revert back* to the definition in the Initial Determination.

As a *substantive* matter though, the Judges unanimously agree to replace the post-hearing definition of Bundled Revenue in the Determination and reinstate the definition set forth in the Initial Determination.

III. Background

In this remand proceeding, the parties propose two starkly different definitions of Bundled Revenue. Each has a dramatically different impact on the use of the royalty structure and levels to incentivize price discrimination in the downstream market.

The Services argue in favor of the language contained in the Initial Determination, *i.e.,* in their PR II-based benchmark, which defines Bundled Revenue, in pertinent part, as

> the revenue recognized from End Users [*i.e.,* consumers] for the Bundle less the standalone published price for End users for each of the other component(s) of the Bundle . . . .

Initial Determination, Attachment A at 7 (§ 382.2 therein).

By contrast, Copyright Owners support the Majority's substituted language contained in the Determination, which defines Bundled Revenue, in pertinent part, as

> the lesser of the revenue recognized from End Users [*i.e.,* consumers] for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are License Activities . . . .

Determination, Attachment A at 8 (§ 382.2 therein).

In *Johnson,* the D.C. Circuit succinctly summarized these conflicting definitions as follows:

> In its Initial Determination, the [Judges] directed that the revenue from streaming services that are included in bundled offerings would generally be measured by the value remaining after subtracting the prices attributable to the other products in the bundle.
>
> When the Copyright Owners objected to the substance of that definition in their motion for ''clarification,'' the Board adopted an entirely new definition of Service Revenue for bundled offerings. . . . This new definition generally measured the value of the streaming component of a bundle as the standalone price of the streaming component.

[204] Initial Determination, 16–CRB–0003–PR (2018–2022) (Jan. 27, 2018).

[205] The Initial Ruling suggests that the Judges *could* have utilized a ''further explanation'' for the switched Bundled Revenue definition, as opposed to using ''new 'agency action.''' I do not dissent from that general point. However, even though the Majority did not utilize this alternative approach on remand, I dissent to the extent that section could be read to allow a fuller explanation that would conflict with *Johnson.*

[206] This January 4, 2019 Order was issued in response to two motions; the Services' ''Joint Motion for Rehearing to Clarify the Regulations'' and Copyright Owners' ''Motion for Clarification or Correction of Typographical Errors and Certain Regulatory Terms.'' As explained *infra,* Copyright Owners did not style their motion as a ''rehearing'' motion and expressly declined to argue that their motion met the statutory and regulatory requisites for rehearing. This remand issue pertains only to the post-hearing switch in the Bundled Revenue definition sought and obtained by Copyright Owners via their motion. Accordingly, it is clearer to refer herein to the Judges' January 4, 2019 Order as the ''Clarification Order,'' rather than as a ''Rehearing Order,'' because the semantic distinction carries substantive overtones. (I had dissented from the Initial Determination and the Determination, and thus did not join in the Clarification Order.)

Johnson at 389.[207]

In the Clarification Order, the Judges succinctly summarized the parties' respective positions. *Id.* at 17. They noted that Copyright Owners had presented evidence that the PR II-based benchmark definition contained in the Initial Determination ''led *in some cases* to an inappropriately low revenue base,'' although the Judges ''agree that there is *no support for any sweeping inference that cross-selling has diminished the revenue base.*'' *Id.* at 17, 21 (emphasis added). The Judges further noted the Services' assertion that the Bundled Revenue definition in the Initial Determination is consistent with the Judges' ''endorsement of the classic price discrimination enabled by bundling strategies.'' *Id.*[208]

The Majority resolved this issue in the Clarification Order in favor of Copyright Owners. Specifically, the Majority found that, because of the ''indeterminacy problem'' [209] inherent in bundling, ''the Services—not the Copyright Owners—. . . are in a position to provide evidence of how they price bundles and value the component parts thereof.'' *Id.* at 17–18. However, according to the Majority, although the Services ''bore the burden of providing evidence concerning the proper economic allocation of bundled revenue,'' they ''failed to do so,'' and ''[b]y default . . . the Judges must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners have proposed.'' *Id.* at 18.

IV. The Rulings in Johnson Regarding the Bundled Revenue Definition

The Services appealed the Majority's abandonment of the Bundled Revenue definition in their Initial Determination. Their appeal ''challenge[s] both the legal authority and the substantive soundness'' of this switch.

First, the Services argued that the Majority failed to identify and explain the *procedural* basis for making the switch after the hearing had concluded. Second, the Services argued that, *substantively,* the replacement definition in the Determination ''was arbitrary, capricious, or unsupported by substantial evidence.'' *Johnson* at 389, 392.

The D.C. Circuit agreed with the Services regarding the *procedural* issue and therefore vacated and remanded that aspect of the Bundled Revenue definitional switch. In light of its procedural ruling, the D.C. Circuit explicitly declined to rule on the Services' *substantive* argument relating to the definitional switch. *Id.* at 392. (''Because the Board failed to explain the legal authority for its late-breaking rewrite, we vacate and remand that aspect of the decision [and] we have no occasion to address the Streaming Services' separate argument that the definition was arbitrary, capricious, or unsupported by substantial evidence.'').

The D.C. Circuit's rulings in *Johnson* pertaining to this Bundled Revenue Definition were clearly articulated. The D.C. Circuit found that the Majority ''failed to explain under what authority'' it made a material change to the definition ''so late in the game.'' *Johnson* at 389, 392. The D.C. Circuit noted that the Judges expressly declined to treat the Clarification Motion as a motion for rehearing; consequently, the motion did not request and the Judges did not reconsider either evidence or legal argument. *Id.* at 390. Although appellate counsel offered rationales, the D.C. Circuit rejected counsel's *post hoc* reasoning. *Id.* and 391–92. Ultimately, the D.C. Circuit remanded the adopted regulation ''either to provide 'a fuller explanation of the [Judges'] reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.'' *Id.* at 392, citing *Dep't of Homeland Sec.* v. *Regents of Univ. of Cal.* 140 S.Ct. 1891, 1908 (2020).

To be precise, I take note of the following specific rulings in *Johnson:*

1. ''The problem is that the [Majority] has completely failed to explain under what authority it was able to materially rework that definition so late in the game.'' *Id.* at 389.

2. ''The [Majority] did not treat Copyright Owners' motion to have the definition changed as a motion for rehearing . . . [because] Copyright Owners' motion did not request a literal rehearing of evidence or legal argument.'' *Id.* at 390 (cleaned up).

3. ''The [Majority] nowhere in its order or the [ ] Determination explains the source of its power to make 'fundamental' changes under the authorizing statute . . . .'' *Id.* at 392. [same as #1]

4. ''[I]t should go without saying that we may not sustain the Board's action based on its attorney's theorizing at oral argument . . . vacillating gestures to uninvoked authority will not do.'' *Id.* at 391–92 (the D.C. Circuit alluding to its rejection of arguments also made only by appellate counsel in support of the Majority's rejection of the PR II-based benchmark earlier in the decision).[210]

''We must vacate the [ ] Determination's bundled offering Service Revenue definition and remand for the [CRB Judges] either to provide 'fuller explanation of the agency's reasoning at the time of the agency action[,]' or to take 'new agency action' accompanied by the appropriate procedures.'' *Id.* at 392.

V. Remand Procedure Regarding Bundled Revenue Definition

Post-remand, the Judges stated their understanding, as well as the parties' understanding, of the issue on remand with respect to the Bundled Revenue definition:

> The Services and Copyright Owners agree that the proceedings on remand should be limited to three issues: * * * [3] the adoption of a revised definition of ''service revenue'' for bundled offerings between issuing their Initial Determination and [their] Determination.

Order Regarding Proceedings on Remand at 1 (Dec. 15, 2020) (Remand Order).

The parties proposed, and the Judges agreed, that the record would not be re-opened with regard to the Bundled Revenue definitional issue. Rather, the Remand Order permitted the parties only to provide further briefing on this matter. *Id.* Specifically, the Judges subsequently permitted each party to file simultaneous Initial Remand Submissions and simultaneous Reply Remand Submissions. *See* Order Adopting Schedule for Proceedings on Remand (Dec. 20, 2020). Thereafter, seeking further analysis on the question of ''new agency action,'' the Judges solicited, and received, further briefing on this issue. *See* Notice and *Sua Sponte* Order Directing the Parties to Provide Additional Materials (Dec. 9,

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[207] As explained *infra* (including by way of an example), the Bundled Revenue definition in the Initial Determination aligns with and incentivizes price discrimination in the downstream market, but the definition in the Determination does not.

[208] The parties' substantive arguments are discussed in more detail *infra.*

[209] The ''economic indeterminacy arises when ''the input suppler . . . is paid as a percent of retail revenue, and the bundled revenue consists of some revenue attributable to the royalty base and other revenue excluded from the royalty base, the economic indeterminacy of the revenue attributable to each bucket creates a measurement problem, absent further information regarding the WTP [Willingness-to-Pay] of buyers/subscribers to the bundle.'' *SDARS III,* 83 FR 65264. As explained *infra,* the PR II-based benchmark addresses this informational uncertainty with the parties' negotiated alternative rate prongs and floors that guarantee royalties are paid, whereas the definition in the Determination eliminated the alignment of royalties to price discriminatory bundles designed to increase downstream access to musical works.

[210] Going beyond the Majority's actual rulings, the CRB Judges' appellate counsel argued that the Majority's authority for this definitional switch fell under either or both of the ''inherent'' statutory powers of the Judges or their ''rehearing power.'' *Id.* at 392. (The D.C. Circuit rejecting appellate counsel's argument that it was unnecessary ''for this Court to address which one it is because . . . it could properly be understood as both.'').

2021) (Feb. 9, 2021); *Sua Sponte* Order Regarding Additional Briefing (Feb. 9, 2021).

VI. The Parties' Submissions Regarding Bundled Revenue Definition

In their respective briefing, Copyright Owners and the Services made arguments relating to: (1) the *procedural* issue, *i.e.,* the Judges' authority, *vel non,* to switch to a new Bundled Revenue definition in the Determination; and (2) the *substantive* issue, *i.e.,* the relative merits of the two conflicting Bundled Revenue definitions. *See* Initial Remand Submission of Copyright Owners at 7–10 (Apr. 1, 2021) (CO Initial Submission); Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) at 64–76 (Apr. 1, 2021) (Services' Initial Submission); Copyright Owners' Reply Brief on Remand (in Reply Remand Submission of Copyright Owners, Vol. 1) at 64–88 (CO Reply); Services' Joint Reply Brief at 52–63 (Services' Reply).

A. The Procedural Issue

1. Copyright Owners' Arguments

Copyright Owners assert first that the Judges can preserve their post-hearing switch of the Bundled Revenue definition by sidestepping the D.C. Circuit's holding and rationale in *Johnson.* That is, Copyright Owners maintain that this remand proceeding itself constitutes the necessary form of ''new 'agency action''' that *Johnson* invites, while also liberating the Judges from the consequences of the procedural infirmities identified by the D.C. Circuit. More particularly, Copyright Owners argue:

> [T]he new agency action here is a determination after remand proceedings[.] [T]he [Judges are] largely free to chart [their] own procedural course, and [they] ha[ve] done so in [their] [Remand] Order. The [Judges are] not required to undertake any of the procedural steps set forth in 17 U.S.C. 803(b) in order to take such ''new agency action.'' See 17 U.S.C. 803(d)(3) (requiring only that on remand further proceedings be taken ''in accordance with subsection (a)''); 37 CFR 351.15; *Intercollegiate Broad. Sys., Inc.,* 796 F.3d at 125 (''[N]either the Copyright Act nor the [Judge's] regulations prescribe any particular procedures on remand.'') The Circuit's instruction that the action be ''accompanied by the appropriate procedures[,]'' *Johnson,* 969 F.3d at 392, does not dictate what those ''appropriate procedures'' must be but instead plainly refers to these flexible rules. *See also Oceana, Inc.,* 321 F. Supp. 3d at 136 (explaining that when remanding to an agency, a court generally ''may not dictate to the agency the methods, procedures, or time dimension, for its reconsideration'').
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> CO Initial Submission at 71 n.33.

Copyright Owners reject the Services' position that the asserted procedural error is an ''absence of authority'' that can never be cured. *Id.* at 74 (citing Services' Proposal for Remand Proceedings at 10). They note that the D.C. Circuit did not say the Judges lacked the authority to revisit the service revenue definition from bundles on remand. Nor, they observe, did it say the Judges have no authority to review the record evidence and the parties' arguments and reach the same conclusion or a different conclusion on remand.

Copyright Owners further opine that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. But instead, they note, the D.C. Circuit remanded and said the Judges could take ''new agency action'' precisely to cure the asserted procedural defect. Copyright Owners assert that the remand allowed the parties to present the record evidence and their arguments so that the Judges can address the definition ''afresh'' in the remand determination. *Id.* at 74.

Further, Copyright Owners argue that 17 U.S.C. 803(d)(3) states only that proceedings on remand must be in accordance with 17 U.S.C. 803(a). They contend that remand proceedings need not be confined to procedures the Services claim are too late in the game for the Judges to follow, again relying on the holding in *Intercollegiate Broad. Sys., supra,* that ''neither the Copyright Act nor the Board's regulations prescribe any particular procedures on remand.'' *Id.* at 125. Accordingly, they argue, the Judges can reaffirm the adopted bundled service revenue definition following their review of the parties' submissions without invoking section 803(c)(2) or 803(c)(4) that were ruled inapplicable in *Johnson.* CO Reply at 65–66.

Also, Copyright Owners argue that the Judges may properly justify the changed definition under section 803(c) as a fuller explanation of the agency's reasoning at the time it was made. They urge that the Judges could explain that, especially in light of the evidence of how (in Copyright Owners' characterization) the Services misused the prior definition to make service revenue completely disappear, the Judges carry-over of the prior Bundled Revenue definition from *Phonorecords II* into the Initial Determination was unintended and inadvertent.[211] CO Reply at 69.

Copyright Owners also assert that, on remand, the Judges could explain that Copyright Owners had, in their Motion for Clarification, identified an ''exceptional case'' under section 803(c)(2) because the prior definition failed to comport with Judges' precedent and economic principles, and was unsupported by evidence. In addition, the Judges reheard the evidence and legal arguments as presented in the parties' briefs on the issue and, as a result, chose to adopt the revised definition. Copyright Owners maintain that for the Judges to do so would not be impermissible *post-hoc* reasoning. They note that the D.C. Circuit remanded precisely because the Judges did not provide any reason in the Determination for revising the Bundled Revenue definition. Copyright Owners note that it was the Services, not Copyright Owners, who appealed the Judges' modification of the bundled service revenue definition; thus, Copyright Owners cannot be penalized for not making every possible argument for affirmance. CO Reply at 70.

Further, and again notwithstanding the holding in *Johnson,* Copyright Owners argue that the Judges have the authority to engage in new agency action in this remand proceeding through a recasting of the Motion for Clarification as a motion for rehearing, pursuant to 17 U.S.C. 803(c)(2)(A) and 37 CFR 353.1. In this regard, Copyright Owners dismiss the point, raised by the D.C. Circuit, that their Motion for Clarification could not be recast as a motion for rehearing because Copyright Owners had explicitly disavowed that their motion sought rehearing under the statute, and that the Judges agreed. Rather, Copyright Owners maintain that the foregoing is not the same as a finding that the standard could not have been met. In Copyright Owners' view, the Judges could revisit on remand the question of whether the rehearing standard has now been met, and find that Copyright Owners have satisfied the ''exceptional case'' standard for granting rehearing motions under section 803(c)(2).[212] Copyright Owners

[211] Copyright Owners assert that the definition in the Initial Determination conflicted with the CRB Judges' finding in the Initial Determination that the adopted rates and terms would afford Copyright Owners a fair return for their creative works, thereby satisfying Factor B of the 801(b) standard. Thus, they maintain that the definitional switch was necessary so as to not ''frustrate the proper implementation of'' the Determination. CO Reply at 69 (*citing* 17 U.S.C. 801(b) and 803(c)(4)).

[212] The Majority set forth the rehearing standard in the *Clarification Order:* ''According to the

Continued

add that if the Judges do engage in new agency action that reconsiders the Motion for Clarification as a motion for rehearing, the Judges should fully explain their reasoning. *Id.* at 8–10.

However, Copyright Owners urge that proceeding in that fashion would add an entirely unnecessary and complicating step. They again suggest that there is no need to reconsider or recharacterize the Motion for Clarification as a motion for rehearing because the remand itself affords the opportunity for the Judges to take new agency action, which, as in a rehearing, permits them to reconsider evidence and arguments, but, unlike a rehearing, is not limited by the constraints of section 803(c)(2). *See* Copyright Owners' . . . Additional Briefing on New Agency Action . . . Question, etc., Tab B at 7–8 (Feb. 24, 2021).

2. The Services' Arguments

The Services' arguments are based on the reasoning of the D.C. Circuit in *Johnson.* Specifically, they assert that the D.C. Circuit found only ''three ways in which the [Judges] can revise Initial Determinations'' via ''new agency action,'' and the Judges failed to establish that the change to the service revenue definition fit any of those three categories. Services' Initial Submission at 64–65 (citing *Johnson* at 390).[213]

According to the Services, the *first* statutory way the Judges may revise an Initial Determination is to ''order rehearing 'in exceptional cases' in response to a party's motion, 17 U.S.C. 803(c)(2)(A).'' Services' Initial Submission at 65 (citing *Johnson* at 390). The Services argue that the D.C. Circuit held in *Johnson* that the Judges' ''material revision of the '[Bundled] Revenue' definition . . . does not fall within the [Judges'] rehearing authority under section 803(c)(2)(A)'' because ''the [Judges] [themselves] . . . w[ere] explicit that [they] 'did not treat the [Copyright Owners'] motion[ ]' . . . 'as [a] motion[ ] for rehearing under 17 U.S.C. 803(c)(2).'" *Id.* The D.C. Circuit also noted that ''as the [Judges] found, . . . Copyright Owners' motion did 'not meet [the] exceptional standard for granting rehearing motions' under section 803(c)(2).'' *Id.* (citing *Johnson* at 390). The Services assert, quoting *Johnson* once more, that the Judges were not able to make ''a volte-face'' and justify on appeal their revision to the definition as an exercise of rehearing authority. As the D.C. Circuit held, agency action must be justified by ''reasons invoked by the agency at the time it took the challenged action,'' and post-hoc rationalizations are insufficient. *Id.* (citing *Johnson* at 390).

The Services add their view that the Judges cannot revisit the decision to deny rehearing without engaging in impermissible *post-hoc* reasoning. They note the Supreme Court has explained that, while an agency may ''elaborate later'' on its ''initial explanation'' of the reason (or reasons) for its action, it ''may not provide new ones.'' Services' Initial Submission at 66, citing *e.g., Regents at* 1908. The Services offer that the Judges, having stated that they did not consider the Copyright Owners' motion to revise the definition to be a motion for rehearing, cannot now conclude that the motion qualified as one for rehearing and that the Judges in fact engaged in rehearing. *Id.*[214]

The Services next argue, relatedly, that the Judges cannot simply recast the Services Motion for Clarification as a rehearing motion in an attempt to satisfy the rehearing standard. In this regard, they maintain that Copyright Owners did not argue before the Judges or the D.C. Circuit that their Motion for Clarification satisfied the ''exceptional cases'' standard, and have therefore waived that argument. *Id.*

The Services assert that the *second* statutory way the Judges may revise an Initial Determination, *viz.* taking ''new agency action'' to correct a technical or clerical error under section 803(c)(4), cannot be used to justify the modification of the Bundled Revenue definition in the Initial Determination. The Services note that the D.C. Circuit held specifically that the Judges' change in the Bundled Revenue definition could not be construed as correcting a technical or clerical error because it involved a substantive rewrite of the Service revenue definition. *Id.* at 67 (citing *Johnson* at 391).

The Services argue that the *third* and final statutory justification for the Judges to engage in ''new agency action'' is to revise the terms in an Initial Determination is in response to ''unforeseen circumstances'' that would frustrate the proper implementation of the determination. *Id.* at 67. The Services note that the D.C. Circuit held in *Johnson* that this authority did not justify the Judges' change to the Bundled Revenue definition because the Judges did not invoke this authority and ''the need to ground the original definition in the record'' could not credibly be described as ''an unforeseen circumstance.'' *Id.* (citing *Johnson* at 391).

The Services also note that the D.C. Circuit rejected the argument that the Judges have an ''inherent authority''—unmentioned in the statute—to make changes to the Initial Determination. The D.C. Circuit explained that the specific restrictions Congress placed on the [Judges'] authority in section 803 ''would be a nullity if [they] also had plenary authority to revise [their] determinations whenever [they] thought appropriate.'' *Id.* (citing *Johnson* at 391–92). The Services add that even if the Judges offered a new source of authority capable of justifying substantive changes to the [Bundled] Revenue definition now, the Judges would be unable to rely on this ''uninvoked authority'' without engaging in impermissible *post-hoc* reasoning. *Id.*

The Services also reject Copyright Owners' position that the Judges may sidestep the D.C. Circuit's ruling by issuing a new determination on remand and simply arguing that *any* ruling after remand qualifies as new agency action pursuant to *Johnson.* The Services argue that failure to address the legal and factual issues on which the court remanded would violate the D.C. Circuit's decision and would result in yet another remand. The Services emphasize that the issue of authority to make the changes to the Initial Determination are especially important in this context, because the D.C. Circuit recognized that the Copyright Act places limits on the Judges' authority to alter an initial determination by defining conditions for rehearing and the types of changes that are permitted absent a rehearing. In this regard, the Services maintain that the Judges cannot do on remand what they lacked authority to do in the first instance. The Services assert that the Judges must resolve the legal question of whether authority exists to alter the revenue definition in

Copyright Act, the Judges may grant a motion for rehearing in exceptional circumstances, provided the moving party shows that an aspect of the determination is ''erroneous.'' *See* 17 U.S.C. 803(c)(2); 37 CFR 353.1. The moving participant must identify the aspects of the determination that it asserts are ''without evidentiary support in the record or contrary to legal requirements.'' 37 CFR 353.2. In general, the Judges grant rehearing only ''when (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice.'' *See, e.g.,* Order Denying Motion for Reh'g at 1, Docket No. 2006–1 CRB DSTRA (Jan. 8, 2008) (*SDARS I* Rehearing Order) (applying federal district court standard under Fed. R. Civ. P. 59(e)).'' Clarification Order at 2, n.3.

[213] The Services acknowledge that the Judges could alternatively have attempted to provide on remand a fuller explanation of their prior reasoning (in lieu of engaging in ''new 'agency action''). That issue is considered *infra.*

[214] In fact, the issue of whether to characterize Copyright Owners' Motion for Clarification as a motion for rehearing is not one raised by Copyright Owners, but rather by the Judges *sua sponte.*

the Initial Determination. Services' Reply at 52–54.[215]

The Services also take note of the alternative path available to the Judges: to provide a ''fuller explanation'' of the prior conclusion that the Judges had legal authority to revise the Service Revenue definition. The Services maintain that if the Judges pursue the ''fuller explanation'' path, the Judges are limited to elaborating on what they said previously, and that they cannot add new reasons they did not initially provide. *Id.* at 54–55; *see also* Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal at 38–42 (Feb. 24, 2022) (''Services' Additional Submission'').

The Services address Copyright Owners' position that if the only possible outcome were for the Judges to reinstate a definition that lacked any explanation or evidentiary support solely because it was present in the Initial Determination, then the D.C. Circuit would not have remanded the issue but would have simply reversed and reinstated the Initial Determination definition. The Services urge that the D.C. Circuit could not reverse because the CRB's appellate counsel had raised—for the first time on appeal—new justifications for the Judges' decision to change the Initial Determination. Instead, the Services maintain, the D.C. Circuit had to remand and give the Judges the opportunity to address appellate counsel's new justifications in the first instance, as the D.C. Circuit could not rule them out given the posture of the appeal. Services' Reply at 56.

VII. Analysis and Decision

A. The Procedural Issue: Is There ''New Agency Action'' Available to the Judges?

Having considered the parties' arguments, I conclude that the rulings in *Johnson,* which clearly rejected all of the Majority's procedural arguments seeking to justify their switch in the Bundled Revenue definition, foreclose any avenue for procedurally justifying this definitional switch. More particularly, I conclude that none of the procedural avenues proffered by Copyright Owners would constitute ''new 'agency action''' consonant with the holdings in *Johnson.* Further, I cannot identify any other procedural device (*i.e.,* an extra-statutory form of agency action) that would permit the switched definition in a manner consistent with *Johnson.*[216] In addition, I cannot identify any further or fuller explanation that might support the Majority's procedural reasoning for swapping out the Bundled Revenue definition in the Initial Determination and substituting the definition in the Determination.

In reaching this conclusion, I take note of the following specific language in *Johnson:*

> Section 803 identifies three ways in which the Board can revise Initial Determinations. It can (i) order rehearing ''in exceptional cases'' in response to a party's motion; (ii) correct ''technical or clerical errors,''; and (iii) ''modify the terms, but not the rates'' of a royalty payment, ''in response to unforeseen circumstances that would frustrate the proper implementation of [the] determination.''

Johnson at 390 (citations omitted). After identifying these three alternatives, the D.C. Circuit concluded that the CRB Judges ''rollout of an entirely new manner for calculating the streaming service revenue from bundled offerings fit none of those categories.'' *Id.*

First, I consider whether in the present case they can engage in ''new 'agency action''' pursuant to 17 U.S.C. 803(c)(2)(A) by recasting Copyright Owners' Motion for Clarification as a Motion for Rehearing. I conclude that this avenue has been unambiguously cut-off by *Johnson* and, indeed (as noted in *Johnson*), by the Judges' own prior ruling:

> The [CRB Judges'] material revision of the Bundled Revenue definition . . . does not fall within [their] rehearing authority under Section 803(c)(2)(A). We have that on no less an authority than the [CRB Judges themselves], [who were] explicit that [they] ''did not treat the Copyright Owners' motion'' to have the definition changed ''as a motion] for rehearing under 17 U.S.C. 803(c)(2).'' That is because the Copyright Owners' motion did not ''request[ ] a literal rehearing of evidence or legal argument.''
>
> Nor could they have because, as the [CRB Judges] found, the Copyright Owners' motion did ''not meet [the] exceptional standard for granting rehearing motions'' under Section 803(c)(2). . . . [The CRB Judges] explain[ed] that . . . Copyright Owners ''failed to make even a *prima facie* case for rehearing under the [rehearing] standard''.

Johnson, 369 F.3d at 390.

Further cutting off this ''rehearing'' approach, *Johnson* also expressly holds that it is a ''forceful'' principle that the D.C. Circuit ''cannot sustain action on grounds that the agency itself specifically disavowed. *Id.* Moreover, in this Initial Remand Ruling I echo the Majority's ruling in the Clarification Order that Copyright Owners had failed to present ''even a *prima facie* case for rehearing under the applicable standard''. Clarification Order at 2.[217]

Next, I consider whether the Judges can engage in ''new 'agency action''' by recharacterizing their switch of the Bundled Revenue definition as an attempted correction of ''technical or clerical errors,'' pursuant to their ''continuing jurisdiction'' under section 803(c)(4). Once again, they cannot, and the D.C. Circuit has effectively explained why this is so:

> The [Judges] do[ ] not even try to squeeze [their] substantive rewrite of the Service Revenue definition into that [§ 803(c)(4)] category. Quite the opposite, the [Judges] admit[ ] that the new definition ''represent[s] a departure'' from the definition in the Initial Determination, and was a substantive swap designed to ''mitigate'' the alleged ''problem'' of the original definition leaving the interactive streaming service providers free to ''obscure royalty-based streaming revenue by offering product bundles that include music service offerings with other goods and services[.]'' . . . To that same point, the order itself labels the initial and new definitions ''diametrically-opposed approaches to valuing bundled revenues.'' . . . . Nothing technical or clerical about that.

Johnson at 391.

On remand, I am unable to ascertain any basis for describing or justifying the changed Bundled Revenue definition as a technical or clerical correction. Thus, I conclude that the Judges cannot engage in ''new 'agency action''' pursuant to this section.

Next, I consider whether the Judges can engage in ''new 'agency action'''—

[215] In The Services agree that this remand proceeding qualifies as *a* ''new agency action'' but do not maintain that a ruling on remand that is inconsistent with *Johnson* would be the type of ''new 'agency action''' that *Johnson* permits. *See* Services Additional Submission at 38–42.

[216] In this section, Copyright Owners' arguments regarding recasting their Motion for Clarification as a request for rehearing, a correction for technical or clerical errors, or for unforeseen circumstances would constitute a new application of an *existing* ''form of agency action'' that the D.C. Circuit had rejected. But Copyright Owners' argument in favor of the Judges' supposed ''inherent authority'' to enlarge their post-hearing jurisdiction is an argument creating a *new form* of agency action, not an argument in favor of new application of an existing form of authority. Likewise, the next approach proffered by Copyright Owners, *i.e.* construing the remand itself as generating the requisite agency action, which is also the Majority's approach, is an example of an agency action that is not statutorily specified and, as explained *infra,* is inconsistent with section 803(a).

[217] The first two bases for rehearing under the statute, *viz.,* change in the controlling law and the availability of new evidence, clearly do not apply. The third basis, *i.e.,* to correct a clear error or prevent manifest injustice, also does not apply. As explained herein, the substantive difference between the conflicting Bundled Revenue definitions should be resolved consistent with the Judges' adoption of the PR II-based benchmark and the parties' negotiated compromise of the ''price discrimination vs. revenue diminution'' dilemma. This resolution does not constitute an ''error,'' let alone a ''clear error,'' and maintaining the parties' rate architecture from the Initial Determination does not generate any ''injustice,'' ''manifest'' or otherwise.

by trying to squeeze the square peg of their definitional swap into the round hole that is the ''unforeseen circumstances'' clause in section 803(c)(4). That provision permits the Judges to exercise ''continuing jurisdiction'' if necessary to modify a regulatory term in a determination in response to ''unforeseen circumstances,'' if the absence of modification would frustrate the proper implementation of the determination. Once again, *Johnson* shuts the door:

> Come oral argument, the [Judges] attempted to explain that ''the unforeseen circumstances would be that [they] initially adopted a definition that was not supported by the record, and that was in fact substantively unreasonable and would frustrate the proper implementation of their determination.'' . . . It is hard to see how the need to ground the original definition in the record was an unforeseen circumstance. That is Administrative Law 101. *See also* 17 U.S.C. 803(c)(3) (''A determination of the [Judges] shall be supported by the written record.'').

Johnson at 391 (cleaned up). I agree. The present panel of Judges is bound by the D.C. Circuit's ruling that the overlooking of the need to ground in the factual record the Bundled Revenue definition in the Initial Determination cannot constitute an ''unforeseen circumstance.'' Accordingly, I am unable to ascertain any basis for describing or justifying the changed Bundled Revenue definition as an ''unforeseen circumstance'' that would justify their invocation of ''continuing jurisdiction.''

I further consider the argument (made by the Judges' appellate counsel and by Copyright Owners) that the Judges have the ''inherent authority *sua sponte* to make any 'appropriate' substantive . . . or 'fundamental' changes after the Initial Determination . . . that [they] believe[ ] serve 'the interests of enhancing the clarity and administrability of the regulatory terms accompanying the [ ] Determination.''' *Johnson* at 391. The D.C. Circuit made short work of this argument as well, stating that, although the CRB Judges have ''considerable freedom'' with regard to determining their own procedures

> that flexibility must be exercised within the lines drawn by the authorizing statute. Congress's decision to limit rehearing to ''exceptional cases,'' and to confine other *post hoc* amendments to cases involving ''technical or clerical errors,'' would be a nullity if the [Judges] also had plenary authority to revise [their] determinations whenever [they] thought appropriate. The [Judges] nowhere in [their] order or the [ ] Determination explain[ ] the source of [their] power to make ''fundamental'' changes under the authorizing statute . . . any time [they] deem such changes ''appropriate'' . . . even after the Initial Determination.

Johnson at 392.[218]

As with regard to the proffered rationales discussed *supra,* I cannot identify any authority that would allow the Judges to declare for themselves in the present factual and legal context an ''inherent'' authority to override the Copyright Act and declare their right to engage in ''new 'agency action.'''

Finally, I consider Copyright Owners' suggestion that the *remand itself* by the D.C. Circuit permits the Judges, pursuant to the Copyright Act, to engage in any procedure necessary to support their switch in the Bundled Revenue definition. The present Majority essentially adopts this procedural approach. However, I reject that argument as meritless.

The argument begins with a correct premise but seriously veers off course. Copyright Owners correctly note (and the Services do not disagree) that this remand proceeding constitutes ''new 'agency action.''' Copyright Owners then maintain that, because the Copyright Act does not provide for procedures that govern remand proceedings, the Judges are statutorily unconstrained with regard to the procedures they may adopt. This premise, although perhaps correct in other contexts, is most definitely incorrect in this specific context, given the clear holding in *Johnson.*

Here, the D.C. Circuit has been unequivocal in identifying the statutory limitations that precluded the Judges from switching out the Bundled Revenue definition in their Initial Determination and replacing it with a different definition in the Determination that was, to use the Majority's phrase, ''diametrically opposed'' to the prior definition, in that it would eliminate the royalty-based incentive to price discriminate via bundling.[219] *But Copyright Owners assert that the remand itself clothes the Judges with the procedural authority to make the very switch that Johnson forbids!* I do not understand the D.C. Circuit to have admonished the Majority for its failure to respect the boundaries of its jurisdiction, only to provide them, via remand, with a back-door through which they may circle-back and exceed those very boundaries.

A reading of section 803(a), upon which Copyright Owners rely, provides a further demonstration of the error in this argument. This subsection lists the authorities whose pronouncements the Judges must ''act in accordance with,'' including, quite unsurprisingly, ''the decisions of the court of appeals under this chapter.'' 17 U.S.C. 803(a). In the instant case, the D.C. Circuit has unambiguously held that the Judges lacked the statutory authority to make the definitional switch at issue. For the Judges to construe that clear ruling as an implicit invitation to create new extra-statutory remand procedures that contradict the D.C. Circuit's rationale for the remand would be inexplicable and would render useless the procedural ruling in *Johnson.*[220]

In sum, I cannot and do not understand that the D.C. Circuit intended in *Johnson* simply to write a meaningless procedural opinion that the Judges could not merely ignore, but use to cleanse the very procedural error the D.C. Circuit had condemned.[221]

Accordingly, the Bundled Revenue definition in the Initial Determination should be reinstated. As explained in the portion of the Initial Remand Ruling in which I join, this reinstatement is harmonious with the entirety of the Judges' findings and conclusions regarding the other remanded issues.

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[218] By the same reasoning, *Johnson* also rejected the Judges' explanation in the *Determination* that they were permitted to treat Copyright Owners' request as a general motion under § 350.4) of their regulations. *Id.*

[219] This substantive impact of the definitional switch is discussed *infra.*

[220] In fact, this argument is dangerous. The CRB Judges or any administrative agency, could willfully engage in extra-statutory procedures to obtain a particular substantive result. If there is no appeal, the extra-statutory procedure would be successful. But if the extra-statutory procedure was the subject of a successful appeal resulting in a remand, the CRB Judges (or any agency) could declare the remand as license to engage once more in extra-statutory procedures in order to obtain the same substantive result. This is a ''heads-I-win, tails-you-lose'' strategy.

[221] Copyright Owners also argue that if the D.C. Circuit had intended in *Johnson* to prohibit the Judges from engaging in ''new 'agency action''' on remand, they would have reversed and reinstated the Initial Determination, rather than vacated and remanded that aspect of the Determination. But that argument confuses prudence with uncertainty. The D.C. Circuit prudently allowed the Judges, who are presumed to have particular knowledge of their duties, to consider whether there exist further explanations of their reasoning or ''new 'agency actions''' they could invoke to support their definitional switch. That prudence hardly suggests that the D.C. Circuit was sanguine about the existence of further explanations or additional actions that might support the switch.

Also, 17 U.S.C. 803(d)(3) explicitly allows the D.C. Circuit to ''vacate [a] determination of the . . . Judges and remand the case to the . . . Judges for further proceedings,'' but only expressly allows the court to ''enter its own determination''' in connection with ''the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees and the payment of interest pertaining respectively thereto . . . .'' *Id.* Thus, it is hardly clear that the D.C. Circuit understood it had any choice upon vacating, save to remand for further proceedings.

B. The Substantive Issue: The Dueling Definitions of Bundled Revenue

1. Introduction: The Issue as Framed in the Clarification Order

Regarding the definition of ''Service Revenue'' from bundled offerings, the Judges summarized the parties' competing arguments:

> Copyright Owners presented evidence that the existing approach led, *in some cases,* to an inappropriately low revenue base—but did so in service to their argument that the Judges should reject revenue-based royalty structures. *They did not present evidence to support a different measure of bundled revenue* because their rate proposal was not revenue-based.
>
> The Services rely on the fact that the approach to bundled revenue in the extant regulations is derived from the 2012 Settlement. The Judges have, however, *declined to rely on the 2012 Settlement as a benchmark,* as the basis for the rate structure, or, therefore, as regulatory guidance. The Services have observed *correctly* that the evidentiary records in *Web IV* and *SDARS III* differ from the record in this proceeding.[222]

Clarification Order at 17 (emphasis added).

Despite these arguments, the Judges found that neither party presented evidence adequate to support the approach advocated in post-determination filings, because the ''economic indeterminacy problem inherent in bundling'' remained unresolved. *Id.* The Judges stated that the Services were the party in possession of the relevant information, and concluded that the Services bore the burden of providing evidence that might mitigate the ''indeterminacy problem'' inherent in bundling. Because the Judges concluded that the Services had not met that burden, they ruled that they must adopt an approach to valuing bundled revenue that is in line with what the Copyright Owners proposed. As a result, the Judges discarded the formula in the Initial Determination and ruled, instead, that streaming service providers will use their own standalone price (or comparable) for the music component (not to exceed the value of the entire bundle) when allocating bundled revenue. *Id.* at 16–18.

On remand, the parties have made the following arguments regarding the substance of the Bundled Revenue definition:

2. Copyright Owners

According to Copyright Owners, the prior Bundled Revenue definition in the Initial Determination failed to address the '' 'economic indeterminacy' problem inherent in bundling'' appropriately and in a way consistent with Judges' precedent. CO Initial Submission at 75 (citing Clarification Order at 16–18). Copyright Owners proceeded to cite several portions of testimony from the Services' economic experts who acknowledged this problem. *Id.* They then point to hearing testimony in which Copyright Owners repeatedly raised the ''economic indeterminacy'' problem and demonstrated what they characterized as the absurd results to which the prior definition had led. *Id.* at 76. They pointed out that under the Initial Determination, the first step in computing Bundled Revenue was to identify revenues recognized from the entire bundle (*i.e.,* the price paid by the subscriber). The second step was to subtract ''the standalone published price'' for all non-music components of the bundle. According to Copyright Owners, [REDACTED]. *Id.* at 76, 83.

Copyright Owners point out that the Judges already found with respect to other licenses that such an approach is not only fundamentally unfair, but ''absurd.'' *Id.* (citing *Web IV,* 81 FR 26316, 26382 (May 2, 2016) (webcaster licenses); *see also SDARS III,* 83 FR 65210, 65264 (Dec. 19, 2018) (SDARS licenses) (rejecting proposed deductions by service from bundle revenues because of the ''acknowledged 'economic indeterminacy' problem inherent in bundling''). Copyright Owners concur with the Judges' conclusion that the same reasoning applies to *Phonorecords III. Id.* at 76–77 (citing Clarification Order at 18 (''the 'economic indeterminacy' problem inherent in bundling is common to all three proceedings.'')). Copyright Owners offer that Spotify conceded to this flaw in the definition in the Initial Determination, but offered an alternative that contained the same loophole. *Id.* at 77–78.

Copyright Owners also point out that the proponent of a term bears the burden of proof as to adoption. The Judges made clear that the licensee who wishes to offer bundles must bear the burden of providing evidence that might mitigate the acknowledged economic indeterminacy problem inherent in bundling, because any such evidence would be in its possession, not in the possession of the licensors. *Id.* at 79 (citing *SDARS III,* 83 FR 65264 (''bundling [is] undertaken to increase [the Services'] revenues and it would be reasonable to assume that [the Services have] information relevant to the economic allocation of the bundled revenue.'')). Copyright Owners contend they presented unrebutted evidence showing the unreasonableness of the Services' proposed definition while the Services offered no evidence to support their definition. *Id.* at 78, 79 (citing Clarification Order at 18). Copyright Owners maintain that no Service offered evidence concerning the separate values of the constituent parts of the bundles, or any other evidence concerning the economic allocation of bundled revenue, let alone the reasonableness of the definition in the Initial Determination. *Id.* at 80. Copyright Owners assert that in the absence of evidence to support the proposed definition, the Judges may adopt or fashion a definition of service revenue for bundled offerings that comports with the record evidence, which is precisely what the Judges did and, through new agency action, do again. *Id.* at 81.

They further argue that the hearing record and the Judges' precedent and reasoning further explain the unreasonableness of the prior definition and support the adopted bundle revenue definition. *Id.* at 82. Copyright Owners offer that in contrast to the Services' evidentiary failure, they have provided sufficient evidence showing the unreasonableness of the Services' proposed definition. They maintain that the definition adopted by the Judges in the Determination was consistent with the statutory factors and the evidence in the proceeding showing how the prior definition had been manipulated and ''led, in some cases, to an inappropriately low revenue base.'' *Id.* at 83 (citing Clarification Order at 17–18).

Copyright Owners dispute the Services' assertion that there is support for the *Phonorecords II* approach to bundles in the record of this proceeding. Instead, Copyright Owners argue, the Services' purported evidence at most supports the benefits of the practice or strategy of bundling. They maintain that the strategy of bundling covered music services with other products or services has nothing to do with [REDACTED]. They offer that the definition in the Initial Determination has nothing to do with such benefits, and that those benefits may be equally served by a definition that ensures value is apportioned to the music component in the bundle. CO Reply at 73–76.

3. The Services

The Services argue that the evidence in the existing written record addressing bundles shows both that this definition is supported by the *Phonorecords II* benchmark and that it has proven industry-wide benefits. Services' Initial Submission at 68. They emphasize that

[222] In *Web IV* and *SDARS III,* unlike under the Phonorecords II-based benchmark, there were no minima or floors to provide licensors with royalties in the event bundled offerings would otherwise fail to generate royalties.

Copyright Owners did not propose an alternative definition of service revenue until after the Judges issued the Initial Determination and that any definition they propose now would fail the basic requirement that the Judges must adopt rules ''on the basis of a written record.'' *Id.* (citing 17 U.S.C. 803(a)(1) and 803(c)(3)).

Addressing the merits of the definition contained in the Initial Determination, the Services argue that it best serves the goals of the Copyright Act; that as a bright-line, easily administered rule, it continues the broad industry agreement from *Phonorecords II,* which ''was negotiated voluntarily between the Services and . . . Copyright Owners—strong evidence that its terms are mutually beneficial.'' Services' Initial Submission at 69.

The Services contend the prior negotiated definition increases output and incentivizes beneficial price discrimination to reach casual and passive listeners who would otherwise not pay for music and thus would not generate revenue from which royalties could be paid. With regard to [REDACTED]. *Id.* at 71 (and record citations therein).

They further state that the definition of Bundled Revenue in Phonorecords II also enabled funneling of many of listeners into full-priced, full-catalog services. The Services allege that Copyright Owners also ignore the extensive royalties that were generated. They add that, for casual/passive listeners and those who may be funneled to subscription services, the per-subscriber minimum guarantees that the Copyright Owners will still be paid a fair royalty. The Services then cite several portions of testimony from various Services' economic experts who point out the realization of an expanded royalty pool, which the Services offer as proving a functioning marketplace. *Id.* at 68–74.[223]

The Services maintain that while neither the Services nor Copyright Owners submitted evidence specifically addressing the way that customers, Services, or Copyright Owners might value the component parts of bundles, such subjective valuations are unnecessary—given that the parties' negotiated handling of the bundling issues provides the Judges with ample support for the PR II-based benchmark definition in the Initial Determination. See *id.* at 75–76.

The Services also argue that while the Judges' decision in SDARS III did involve valuation of the music and non-music components of a bundle, the resolution in SDARS III is inapposite because, here, the rate structure has a way of ensuring that Copyright Owners are fairly compensated from bundles: the statutory minimum payment. Services' Reply at 62.

C. Analysis and Decision

The fundamental difference between the impact of the two alternative definitions is simply stated:

Under the Initial Determination: downstream bundling and its price discriminatory effect *would* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle;

Under the (Final)Determination: downstream bundling and its price discriminatory effect *would not* be incentivized by a royalty structure that reflects the lower WTP of consumers who subscribe by paying for a Bundle.

To explain this difference, the Judges find it helpful to describe (as in the Determination and Dissent) how bundling facilitates price discrimination and how lower royalties for bundled streaming services incentivize such bundling.

Price discrimination occurs when a seller offers different units of output at different prices. *See, e.g.,* H. Varian, *Intermediate Economics* at 462 (8th ed. 2010). The benefit to the seller arises from attempting to ''charge each customer the maximum price that the customer is willing to pay for each unit bought.'' R. Pindyck & D. Rubinfeld, *Microeconomics* at 401 (8th ed. 2013). For all goods, and intellectual property goods such as copyrights in particular,[224] the social benefit is that price discrimination more closely matches the quantity sold with the competitive quantity as the seller or licensor better aligns the price with the WTP of different categories of buyers or licensees. *See* W. Fisher, *Reconstructing the Fair Use Doctrine,* 101 Harv. L. Rev. 1659, 1701 (1988).

A seller can engage in price discrimination in several ways. One form is known as ''second-degree price discrimination,'' by which buyers self-sort the packages and quantities they purchase.[225] *See* W. Adams & J. Yellen, *Commodity Bundling and the Burden of Monopoly,* 90 Q. J. Econ. 470, 476 (1976) (the profitability of bundling ''stem[s] from its ability to sort customers into groups with different reservation price [WTP] characteristics.''). Bundling, *i.e.,* the ''practice of selling two or more products as a package,'' *Pindyck & Rubinfeld, supra* at 419, is thus a type of second-degree price discrimination. *See* A. Boik & H. Takahashi, *Fighting Bundles: The Effects of Competition on Second Degree Price Competition,* 12 a.m. Econ. J. 156, 157 (2020).

The applicability of these basic economic principles was understood and explained by the parties' experts at the hearing. *See, e.g.,* 3/15/17 Tr. 1224–25 (Leonard) (Google's economic expert testifying that price discrimination through bundling is ''very, very common . . . even by pretty competitively positioned firms . . . to sort out customers into willingness-to-pay groups.''); 3/30/17 Tr. 3983 (Gans) (Copyright Owners' economic expert acknowledging that bundling is a form of price discrimination); *see also* Dissent at 69 (same).

How does this downstream (retail level) benefit of price discrimination impact the setting of upstream royalty rates? As the Majority explained (in summarizing the Services' expert testimony) the linkage is explained by the economic concept of ''derived demand'':

> [M]ultiple pricing structures necessary to satisfy the WTP and the differentiated quality preferences of downstream listeners relate directly to the upstream rate structure to be established in this proceeding. Professor Marx opines that the appropriate *upstream* rate structure is derived from the characteristics of downstream demand. 3/20/17 Tr. 1967 (Marx) (rate structure upstream should be derived from need to exploit WTP of users downstream via a percentage of revenue). This upstream to downstream consonance in rate structures represents an application of the concept of ''derived demand,'' whereby the demand upstream for inputs is dependent upon the demand for the final product downstream. *Id.; see* P. Krugman & R. Wells, *Microeconomics* at 511 (2d ed. 2009) (''[D]emand in a factor market is . . . *derived demand* . . . [t]hat is, demand for the factor is derived from the [downstream] firm's output choice'').

Determination at 19; *accord* Dissent at 32 (noting that ''the upstream demand of the interactive streaming services for musical works (and the sound recordings in which they are embodied)—known as 'factors' of

[223] The Services' Reply reiterates this point and offers that the testimony cited by the Copyright Owners also shows why the Initial Determination's Service Revenue definition works for bundles and grows royalties. Services' Reply at 57–58.

[224] Streamed copies of intellectual property, such as musical works and sound recordings, have a marginal production cost of essentially zero, making price discrimination particularly beneficial, because charging any positive price, even to a buyer with the lowest WTP, still exceeds the zero marginal production costs. *See* Dissent, *passim.*

[225] ''First-degree'' price discrimination is a hypothetical construct by which a seller can identify the WTP of every buyer. ''Third-degree'' price discrimination occurs when the seller offers different prices to buyers based on their different characteristics (*e.g.,* a senior citizen discount). *See Pindyck & Rubinfeld, supra,* at 402, 404–05.

production or 'inputs'—is derived from the downstream demand of listeners to and users of the interactive streaming services . . . This interdependency causes upstream demand to be characterized as ''derived demand.'').

In the present proceeding, the PR II-based benchmark embodies the parties' negotiated definition of Bundled Revenue for purposes of calculating royalties on bundled interactive offerings. This is the definition in the Initial Determination. Copyright Owners' preferred definition for Bundled Revenue—the Determination's definition—would not only ignore this agreed-upon definition, but would also de-link the royalty rate from the WTP of purchasers of bundles.[226] The Judges recognize that Copyright Owners have expressed concern the Services could use such bundling in order to diminish revenue otherwise payable on a higher royalty tier. However, the Majority noted that the evidence indicated such diminishment only occurred ''in some cases'' and that such practices were not ''sweeping.'' Clarification Order at 17, 21. Thus, the Judges find that eliminating the incentive for price discrimination via bundling would be a disproportionate response and inconsistent with the broad price discriminatory PR II-based benchmark they find useful in this proceeding.

Expert testimony in this regard is ''substantial evidence'' on which the Judges can rely. For example, the D.C. Circuit also relied in *Johnson* on the testimony of the same witness, Spotify's economic expert witness, Professor Marx, to affirm the inclusion of the price discriminatory structure for student and family plans. *Johnson,* 969 F.3d at 392–94. Professor Marx explained how a downstream ''lower willingness (or ability) to pay'' among some cohorts of consumers supports definitional terms, for student and family subscribers, that lower royalty rates in order to further ''economic efficiency'' in a manner that ''still allows more monetization of that provision of that service.'' *Johnson* at 392–93. Broadening her lens, Professor Marx also explained that this price discriminatory approach is appropriate ''across all types of services and subscribers,'' as in ''[t]he current law [and in the PR II-based benchmark]'' which ''accommodates . . . ad-supported services . . . and '*bundled services*' through different rate provisions.'' Marx WRT ¶ 41 (emphasis added). *See also* 3/21/17 2182–83 (Hubbard) (Amazon's expert witness testifying that ''Prime Music, which is *bundled* with an Amazon Prime service . . . sort[s] out customers' willingness to pay, with an idea of trying to maximize the number of customers,'' and agreeing that this approach constitutes ''sorting by way of bundling.'') (emphasis added). Further, Professor Hubbard opined that, given the revenue attribution ''measurement problem'' associated with bundled products, the ''Phonorecords II'' approach ''with the different categories and the minima . . . address this sort of problem [in] a very good way.'' 3/15/17 Tr. 1221 (Hubbard).

As in the case of family and student price discrimination, the beneficial effect of such differential pricing was supported by industry witnesses as well as expert witnesses. *See, e.g.,* Mirchandani WDT ¶ 71 (Amazon executive citing the Phonorecords II-based benchmark provisions regarding bundling that ''allowed Amazon to bundle Prime Music with Amazon Prime, enabling Amazon to bring a limited catalog of music [REDACTED]''). In sum, the same type of witness testimony that the D.C. Circuit found sufficient to support price discriminatory student and family plans also supports the use of the price discriminatory bundled definition contained in the Initial Determination.

Given the overall benefits from price discrimination, at first blush it is curious that Copyright Owners would risk ''leaving money on the table'' by seeking to remove the royalty-based incentive for price discrimination via bundling. The Judges have identified this problem earlier in this Initial Remand Ruling, in connection with the broader issue of the overall beneficial price discriminatory structure of the PR-based benchmark. As the Judges noted in that general price discrimination context, Copyright Owners' own expert economic witnesses acknowledged that they would not irrationally leave money on the table. In fact, Copyright owners' aim, according to that testimony, is to create an unregulated space—per the Bargaining Room theory—and to use their complementary oligopoly power to negotiate price discriminatory rates (in bundles or otherwise), which would free them from the section 801(b)(1) requirements of reasonableness and fairness.

The Judges further find that their prior ruling on this issue in *SDARS III* is distinguishable. There, a proffered bundled revenue definition eliminated the payment of any royalty at all. Copyright Owners quite correctly describe that result as ''absurd,'' but that is not the result here. Rather, in the present case, the parties' negotiated an approach that the Judges adopted in the Initial Determination requiring royalties to be paid on interactive services bundled with other products or services.

Even more distinguishable is Copyright Owners' assertion that *Web IV* provides support for their preferred definition of service revenue. The argument is immediately suspect, because *Web IV* involved per-play royalty rates—not percent-of-revenue rates, making the definition of revenue wholly inapposite. Further, the discussion of the price of an ''ice cream cone'' in *Web IV*—on which Copyright Owners rely—had nothing to do with bundling or isolating the WTP for different products or services. Rather, there the Judges criticized a bizarre argument made by a licensee (who had a quantity discount for plays steered in its direction), that was tantamount to arguing that if a vendor sells one ice cream cone for $1.06 but a buyer could buy two for $1.06, that the market price of an ice cream cone is thus only $.06. This argument was indeed fallacious, because the price of an ice cream cone would be reasonably identified as the average of the total cost for the two cones, *i.e.,* $.53/cone, and never as $.06 per cone.

Here, the issue, is how to address the WTP of different classes of buyers with heterogeneous WTP, not the pricing of a quantity discount. The parties addressed this issue by utilizing the Bundled Revenue definition contained in the PR II-based benchmark (and in the Initial Determination) to address the indeterminacy inherent in the variable WTP among purchasers of the bundles, by setting floors and minima, rather than attempt to sort out the WTP of individual (or individual blocs) of

[226] To see the incentivizing effect of the link between the royalty level and variable WTP, consider the following example. Assume a hypothetical bundle consists of a subscription to the ''Acme'' interactive music streaming service and the sports service NFL Sunday Ticket. Assume also that Acme and NFL Sunday Ticket have standalone monthly subscription prices of $9.99/month and $149.99/month respectively, so that purchasing both separately would cost $159.98/month. But assume the bundle price is only $140/month. Acme's purpose in bundling its interactive music streaming service subscription offering with NFL Sunday Ticket would be to attract customers who had a WTP for the standalone Acme service below $9.99/month, but a WTP at or above the $140/month for the bundle.

Under the definition in the Determination, royalties would be paid on the standalone $9.99/month Acme price. But the purpose of the bundling was to attract subscribers *who would not pay the standalone $9.99/month price,* so no such would-be subscribers would sign-up, and *no royalties would be generated by them.*

By contrast, under the Initial Determination, the standalone price of NFL Sunday Ticket, $159.98/month, would be subtracted from the $140/month bundle price. Although that would preclude a payment of royalties on a *revenue* prong, *royalties still would be paid, under a different tier or on the mechanical floor.*

subscribers. The ''ice cream cone'' issue in *Web IV* is wholly unrelated, and the *SDARS III* situation, as explained *supra,* is also distinguishable.[227]

For the foregoing reasons, I find that—even if the Judges had a procedural mechanism by which to support the switch in the Bundled Revenue definition—I would decline to utilize it in this Initial Remand Ruling, because the definition in the Initial Determination (unlike the definition in the Determination) is consistent with the Judges' other substantive rulings herein. That is, just as the Majority abandoned its Bundled Revenue definition in its Initial Determination because it refused to credit the PR II-based benchmark (even as ''guidance''), the Judges here do partially rely on the PR II-based benchmark, and thus find that it supports the Bundled Revenue definition contained in the Initial Determination.

VIII. Application of the Four Itemized Statutory Factors

As the forgoing analysis explains, bundling is a form of price discrimination. Accordingly, the Judges' explanation of how price discriminatory rates in the PR II-based benchmark interrelate with the Factor A through D objectives in section 801(b)(1) are equally applicable here. Accordingly, the Judges incorporate by reference here their discussion of those four factors set forth *supra* in connection with the PR II-based benchmark, and find that there is no basis pursuant to those four factors to adjust the PR II-based benchmark definition of Bundled Revenue.

IX. Conclusion

This Dissent in part is issued as a RESTRICTED document. Within 30 days of the date of issuance, the participants shall file a version of this Dissent with agreed redactions to permit viewing by the public.

Issue Date: July 2, 2022.[228]

DAVID R. STRICKLER,
Copyright Royalty Judge

D. Dissent in Part Re Benchmark (Redacted Version With Federal Register Naming and Formatting Conventions)

The Copyright Royalty Judges (Judges) sit as a panel in all determination proceedings. *See* 17 U.S.C. 803(a)(2). A majority of two Judges is sufficient to issue a determination. *See* 17 U.S.C. 803(a)(3). If any Judge dissents from the majority determination, that dissenting Judge may issue a dissenting opinion and file it with the majority's determination. *Id.* The Judges accept this same standard with regard to their issuance of the present Initial Ruling and Order after Remand (Initial Ruling).

The undersigned Judge, author of this dissent in part (Benchmark Dissent) respectfully dissents [229] from the Initial Ruling of the majority (Remand Majority) on the issue of adopting as a benchmark for current rates and terms the rates and terms adopted after a settlement by the parties to the preceding phonorecords proceeding.[230] It should be noted that the Remand Majority adopts the rate structure from *Phonorecords II,* but retains the headline percent-of-revenue rate adopted in the Determination.[231]

I. Areas of Concurrence

A. Background Statements

The Benchmark Dissent adopts the statements regarding the background and procedural posture of this remand proceeding. *See* Initial Ruling at 1–2.

B. Percent of Revenue Rate

The Benchmark Dissent agrees with the Remand Majority's retention of the headline percent-of-revenue rate and its phase-in over the period at issue.

C. Definition of Service Revenue for Bundled Offerings

For the reasons articulated in the Initial Ruling and the reasoning of the judge dissenting from that portion of the Initial Ruling, the definition of Service Revenue for bundled offerings contained in the Initial Determination must be adopted. *See* Initial Determination (Jan. 27, 2018). Adoption of the *Phonorecords II* (PR II) rate structure requires that the original definition pertain.

II. Area of Dissent

The first function of the Judges is ''to make determinations . . . of reasonable terms and rates of royalty payments. . . .'' 17 U.S.C. 801(b)(1). Under the statute in effect during the captioned proceeding, the rates shall be calculated to achieve four statutory objectives. *Id.* The terms of payment of the rates, however, are not subject to any particular statutory restrictions or guidelines. *See, e.g., Live365* v. *Copyright Royalty Bd.,* 698 F. Supp. 2d 25, 29–30 (D.D.C. 2010) (''In performing their duties, the [Judges have] broad discretion to . . . impose regulations

[227] The foregoing analysis also explains why Copyright Owners' assertion that the Services did not satisfy their burden of proof with regard to the Bundled Revenue definition misses the point. The Services' burden was to show the reasonableness of utilizing the Bundled Revenue definition in the PR II-based benchmark, not to show that their proffered approach measured the WTP of individual subscribers (or blocs of subscribers). Such an alternative approach might have had merit but no alternative approach was presented to the Judges.

To be clear, the Judges are not declaring that an alternative Bundled Revenue definition and/or alternative rates and structures for bundle, might not have been preferable. *See* 4/15/17 Tr. 5056–58 (Katz) (''[I]f someone had a proposal [with] a specific reason why we should adjust this minimum that's something I would have examined,''). *See also* 3/15/17 Tr. 1227–28 (Leonard) (Google's economic expert testifying that ''if somebody had . . . suggest[ed] . . . a different sort of bucket that should be created . . . that's a good idea.''). But Copyright Owners did not propose such alternatives at the hearing, and the alternative in their Motion for Clarification simply eviscerated the ''derived demand''-based link between royalties and bundled offerings. As the Judges have noted *supra,* in the words of Judge Patricia Wald, all judges are cabined by the record evidence introduced by the parties. Therefore (in the absence of a way in which to synthesize the parties' proposals in a manner that does not ''blindside'' the parties) the Judges must choose between the proposals that are in the record, not potentially superior proposals that are not in the record. Here, the Judges favor the Bundled Revenue definition in the Initial Determination that was negotiated by the parties, incentivizes price discrimination and pays royalties on the bundled music, over the substituted definition in the Determination pursued by Copyright Owners that would eliminate price discrimination, except under the terms Copyright Owners could impose via their complementary oligopoly power, and without regard to the statutory requirements of a ''reasonable rate'' and a ''fair income'' for the Services.

[228] Technical difficulties on July 1 caused the delay in filing of this Dissent until July 2.

[229] The dissenting Judge does not fault the economic analysis of the Remand Majority on this issue. The dissenting Judge is not the Judge selected for ''a significant knowledge of economics.'' *See* 17 U.S.C. 802(a)(1). This Benchmark Dissent is based on a broader reading of the requirements of section 801 of the Copyright Act, *viz.* ''to make determinations of reasonable terms and rates. . .'' consistent, of course, with the record evidence and sound legal and economic analysis. The role of the Judge is to weigh evidence; two Judges might rightfully and respectfully disagree on where that scale balances. The Remand Majority's analysis led those Judges to conclude that they were bound to re-introduce the rate structure devised in the *Phonorecords II* proceeding. The Benchmark Dissent concludes that the economic analysis outlined in the Initial Ruling supports, but does not dictate, that result, but that the goal of reasonableness can be met with different structure(s). The Benchmark Dissent does not construct or propose a detailed, different structure. To do so would be an inefficient application of judicial resources at this late stage of this proceeding. The Benchmark Dissent finds, however, that both licensor and licensee participants agreed in this proceeding that a less complex rate structure is warranted.

[230] The preceding proceeding, referred to as *Phonorecords II,* consisted of a final rule adopting the participants' settlement agreement as regulatory terms and rates. *See* Final Rule, Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, Docket No. 2011–3 CRB Phonorecords II, 78 FR 67938 (Nov. 13, 2013), Technical Amendment at 78 FR 76987 (Dec. 20, 2013). In this partial dissent, references to *Phonorecords II,* PR II, and PR II-based benchmark are references to this final rule.

[231] *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III),* 84 FR 1918 (Copyright Royalty Board Feb. 5, 2019) (final rule and order) (Determination); *See also* Final Determination, 16–CRB–0003–PR (2018–2022) (Nov. 5, 2018).

governing the rates and terms of copyright royalties. . . .'').[232]

In general, in promulgating regulations the Judges aim to effect efficient and effective payment of royalty license fees. Regulations relating to license royalty rates describe the rates the Judges determine to be reasonable, whether presented by agreement of the affected parties or after adjudication. The regulations include, where necessary, methods of calculation of the payable royalties. The regulations also include such provisions as recordkeeping requirements, late fee assessments, and audit authority. As the Remand Majority points out, simplicity and clarity were not among the statutory factors applicable to determining royalty rates in the captioned underlying proceeding. Simplicity and clarity should, however, be paramount among the Judges' considerations in governing rate payment procedures.

In recent proceedings, the Judges have emphasized that the statute requires that they set both rates and terms. At the end of a different royalty rate proceeding, having been confronted with competing proposed regulations, or even with largely agreed regulatory terms, upon which the parties had proffered no evidence, the Judges cautioned counsel in this proceeding:

> Please be reminded that the Judges have an obligation to set both rates and terms. . . . In any proceeding, just because a regulation is in the current Code of Federal Regulations does not mean that the Judges are adopting that term. . . . The Judges cannot determine rates or terms without an evidentiary record. . . . The Judges cannot adopt any terms of royalty administration unless the parties present evidence to support their proposed terms.
>
> Tr. 03/08/2017 (Barnett, J.) While chapter 8 of the Copyright Act encourages settlement, the Judges are not mandated to adopt parties' settlements if they find they face opposition that discounts reasonableness or if the proposed regulations are contrary to law. *See, e.g., Determination of Royalty Rates and Terms . . . (Phonorecords IV),* 87 FR 18342, 18347, 18349 (Mar. 30, 2022).

In the proceeding underlying the Determination, the parties proffered a variety of proposed regulations.[233] Copyright Owners contended that the extant rate structure ''should be modified and simplified.'' Copyright Owners' Amended Proposed Rates and Terms (5/17/2017) at 2. Copyright Owners argued that the ten different rate categories should be ''no longer applicable'' as Copyright Owners proposed application of the same rates and rate structure to ''all interactive streams and/or limited downloads [except bundles], regardless of the business model employed.'' *Id.* at 3. Copyright Owners' rate proposal hinged on a per-unit calculation across the board: the greater of a per-play amount or a per end user amount.

Amazon proposed retaining the PR II rate structure. *See* Proposed Findings . . . of Amazon (May 13, 2017) ¶ AM–F–25. Amazon argued that the PR II rate structure ''enabled Amazon to develop a varied assortment of services. . . .'' *Id.* Amazon contended that the different royalty rates permit price discrimination by the Services. *Id.* ¶¶ AM–F–47, 49. Amazon conflates price discrimination with provision of heterogenous musical tastes and preferences. *Id.* ¶ AM–F–48. Amazon's proposal mimicked the regulations adopted by agreement in the immediately prior proceeding.

Apple proposed a per-play rate calculation, which would render the PR II rates and rate structure obsolete. Notwithstanding the different structure, however, Apple offered valid criticisms of the PR II rate structure. Apple termed the PR II rate structure ''problematic.'' *See* Apple Inc.'s Findings . . . and Conclusions . . . (May 11, 2017) at 30. Apple argued that the PR II rate structure was ''overly complex, economically unsound, and unpredictable.'' *Id.* ¶ APL–F65. Apple acknowledged that these shortcomings resulted in ''a loss of trust and overall dissatisfaction with interactive streaming among songwriters. . . .'' *Id.*

Apple noted that across the ten rate categories in the PR II rates, ''there are roughly 79 different calculations that can be made.'' *Id.* ¶ APL–F67. Apple argued that the PR II rate structure was ''not transparent or easy to understand'' for copyright owners and created ''uncertainty for services, who may find it difficult to predict which prong . . . will kick in in any given month.'' *Id.* ¶¶ 68–69. Apple opined that, rather than encouraging new business models, the PR II rate structure ''tends to stifle innovation around new pricing or distribution models, as services are incentivized to create businesses that fit into the ten pre-defined 'boxes.' '' *Id.* ¶ 70. Apple further argued that the PR II rates were economically unsound because they are based on revenue, which is unrelated to demand for a given copyright owner's song. *Id.* ¶ 71.

Google's proposal, from which the Majority derived the uncapped TCC rate prong of the Determination, contended that the ''fragmented service categories are unnecessary under [its] proposal. . . .'' Google, Inc.'s Proposed Findings . . . and Conclusions. . . (May 11, 2017) ¶ GPFF58. Google acknowledged questions regarding the complexity of the PR II rate structure. Google, therefore proposed a rate structure that would both streamline the regulations and protect Copyright Owners' concerns regarding Services' revenue deferment and displacement. *Id.* ¶ GPFF57.

In the captioned underlying proceeding, the Judges heard little evidence offered in resounding support or vehement objection to the regulations the parties proffered. No party argued or supported the proposition that the PR II rate structure was the only way, or even the best way, to achieve license fee payment.[234]

In this remand proceeding, no party argued against the all-in approach to rate calculation. The parties disagreed regarding retention of ''mechanical floors'' for configurations for which the Services must pay mechanical royalties both to Copyright Owners in this proceeding under section 115 and to Performing Rights Organizations (PROs) according to the determinations of the ''Rate Court.'' [235] The parties disagreed over imposition of a cap on the TCC prong [236] in the greater-of percent-of-revenue calculation. They also disagreed over retention or elimination of the per subscriber sub-minima that were featured in the PR II rates.

The Remand Majority cites with approval the remand parties' criticism of the simplified rate structure in the Determination, *viz.,* that it is ''virtually as complex as'' the PR II rate structure. *See* Services' Joint Opening Brief (Apr. 1, 2021) at 39. This characterization is

[232] The Judges' regulations are, of course, subject to approval by the Librarian of Congress. 17 U.S.C. 802(f)(A)(i); *see Live365* v. *Copyright Royalty Bd.,* 698 F. Supp. 2d 25, 29–30 (D.D.C. 2010).

[233] Spotify, as the only pure-play service, offered simplified regulations, but only because it did not propose any rates or terms for bundled or locker services. Spotify advocated elimination of the per-subscriber stop-gap alternative in the greater-of percent-of-revenue/percent-of-TCC calculation.

[234] The Benchmark Dissent does not argue that the PR II rate structure did not achieve its purpose. Indeed, the all-in, greater-of, lesser-of scheme with payment minima and mechanical floors achieved the goals of (1) supporting increased absolute revenue through downstream price discrimination and (2) protecting creators from potential loss resulting from licensees' revenue deferral or displacement. The Judges have never denied the value of price discrimination in these or other rate setting proceedings.

[235] The District Court of the Southern District of New York determines performing rights royalties. Parties to those rate proceedings refer to that court, when engaged in the rate-setting cases, as the ''Rate Court.''

[236] ''TCC'' refers to a streaming services' costs of content, referring in this proceeding to the cost of sound recording royalties the streaming services pay to record companies.

a bit of hyperbole. The rate structure in the Determination is an all-in rate with ''mechanical floors'' where those are warranted. Except for the fundamentally different configurations included in subpart B, it does not set out separate calculations for different delivery configurations. On remand, the Remand Majority chooses to reinstate the PR II rate structure in its entirety, with all of its 79 permutations, changing only the headline percent-of-revenue rate and adding a cap on the TCC rate prong (which is an element of the structure itself). The Benchmark Dissent does not dispute the necessity and propriety of the increased headline percent-of-revenue rate or the cap on the TCC rate prong. Indeed, as noted in the Remand Majority, the D.C. Circuit endorsed the rate increase as well-reasoned and determined well within the Judges' discretion. The D.C. Circuit also found fault with ''yoking'' the TCC rate alternative to sound recording royalty rates, not subject to the Judges' control, without reins. The basis of this Benchmark Dissent is simply that the regulatory scheme is not efficient, transparent, or mandated by credible evidence; nor is the structure necessary to achieve the purposes of reasonableness and equity.[237]

A. Acceptance of Phonorecords II Settlement as a Proper Benchmark

This is a Dissent in Part. The undersigned Judge does not disagree with the headline rate being retained at 15.1% or with the imposition of a TCC cap, for the reasons elucidated by the Remand Majority. Nonetheless, the Benchmark Dissent continues to disagree with adoption of the entirety of the rate *structure* adopted by *Phonorecords II.* As noted above, the Judges solicited evidence to support adoption of regulatory language to effect payment of the rates they established. Copyright Owners, Google, and Apple submitted rate proposals that greatly simplified the rate structure. Their rate structure regulation proposals were crafted to support their varying approaches to rate calculations not adopted by the Judges. Their criticisms of the PR II rate structure are valid, nonetheless, and support the Benchmark Dissent's analysis.

In the underlying proceeding, the Majority declined to label the rate structure and resulting rates incorporated in the regulations promulgated after the *Phonorecords II* proceeding (rates and rate structure) as a benchmark, or starting point, for determination of new rates and terms in that proceeding. In the Determination in the extant proceeding, the Majority alluded to reasons they found the PR II rates to be inadequate to serve current circumstances.[238] The D.C. Circuit noted that appellate counsel offered further explanation on appeal for the rejection of the PR II rates and rate structure as a benchmark. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 387 (D.C. Cir. 2020). Nevertheless, the D.C. Circuit faulted the Majority for not providing adequate explanation of their rejection of a PR II-based benchmark in the first instance. *See id.* Indeed, the D.C. Circuit found the Majority's reasoning on the issue in the Determination to be ''muddled.'' *Id.* at 386–87.

Copyright Owners argue that the D.C. Circuit's remand for further explanation did not equate to finding error in the Judges' rejection of the PR II-based benchmark. *See* Initial Remand Submission of Copyright Owners (Apr. 1, 2021) 1, 10 (CO Initial Submission). Notably, the Services did not address the question of a finding of error, but proposed on remand a rate structure substantially similar to that in PR II and offered a benchmark analysis therefor. *See* Services' Joint Opening Brief (in Services' Joint Written Direct Remand Submission at Tab D) (Apr. 1, 2021) at 19 (Services' Initial Submission).

While the Copyright Owners' parsing of *Johnson* might be technically correct, the Benchmark Dissent nonetheless accepts the wisdom of revisiting the analysis of the PR II rates and rate structure, focusing on the intricacies of the structure that ultimately come into play in determining the amount of royalty payable. The Benchmark Dissent disagrees that the record in this case demands adoption of the PR II rate structure as a suitable benchmark. The Benchmark Dissent hereby provides a full analysis of this issue, which includes a fuller explanation of the conclusions in the Determination and supports and justifies rejection of the *Phonorecords II* rate structure.

B. Attributes of a Useful Benchmark

As repeated by the parties in the initial proceeding and in their remand submissions, for an exemplar to serve as a useful benchmark, it must be compared to the target market. The hallmarks of a useful benchmark are: (1) unity of products, (2) unity of sellers, and (3) unity of buyers. In addition, (4) economic circumstances and market conditions can influence the value of a benchmark. *See* Services' Initial Submission at 20 (citing *Determination of Royalt[ies] for Transmission of Sound Recordings. . .,* 83 FR 65210, 65214 (Dec. 19, 2018) (*SDARS III*).

In the Remand Majority opinion, the Judges argue that the PR II rate structure meets ''most of the requisites for a useful benchmark.'' *See* Initial Ruling, section III. C. 3. Assuredly, in the real world one is unlikely to find a perfect benchmark; consequently, the Judges in these proceedings look to the best available benchmark(s) and make adjustments to compensate for their shortcomings when compared to the attributes and circumstances of the target rates. The Benchmark Dissent is not so sanguine about one's ability to reconcile the PR II rate structure with current market circumstances pertaining to music streaming (including participants and volumes of sales) almost a decade after the parties agreed to that structure. Because of the recognized gulf in market conditions between *Phonorecords II* and this *Phonorecords III* proceeding, the Benchmark Dissent rejects attempts to fit that square peg into the current round hole.

1. Unity of Products—the Same Rights

The PR II rates regulated ''sales'' of the same licensing rights as those at issue in the current underlying proceeding, *viz.,* the statutory license to utilize musical works embodied in the sound recordings that are the lifeblood of the music streaming services. This factor was not and is not in controversy. In this respect, the Judges could look to the PR II rates as a benchmark.

2. Unity of Sellers—Rightsholders

The songwriter or songwriters own the copyright for musical works, that is, the musical notes and lyrics. In general, songwriters sell or license their works to publishers who fix the works to a physical medium, for example, piano rolls or sheet music. Music publishers also market the musical works licenses to record companies for their sound recordings. In today's market,

[237] As part of the Judges' discretion to promulgate regulations to effect license rate collection, the Majority reorganized the regulations in part 385. This reorganization was completed to further the goal of clarity and conciseness. No party objected to or sought to overturn that reorganization of the regulations. Apparently, the perceived sanctity of the PR II rate structure is not unassailable. Reorganization can perhaps be seen as a first step to toward clarity, transparency, and simplicity for licensors and licensees.

[238] The D.C. Circuit found that the Majority articulated a reasoned and reasonable rejection of the negotiated rates applicable to the categories of phonorecords included in ''Subpart A'' of the regulations as a benchmark in this proceeding. The issue on remand is articulation of a reason for not using the other subparts of 37 CFR 385 as a benchmark in this proceeding. *See Johnson* v. *Copyright Royalty Board,* 969 F.3d 363, 386 (D.C. Cir. 2020).

publishers and songwriters exist in a symbiotic relationship. Without new works, the publishers have no new product to market.[239] To ensure a flow of new product, publishers often subsidize songwriters by providing working space or monetary advances on future sales of licensed work, or publishers might purchase outright the songwriters' copyrights. Whether the rightsholder is a writer, composer, or publisher, the rights are the same, those derived from 17 U.S.C. 106 and limited by 17 U.S.C. 115. *See* 17 U.S.C. 106(1), (3) (exclusive rights); sec. 115 (compulsory licensing). The sellers' interests are aligned.

3. Unity of Buyers—Streaming Services

The Services argue unity of rights and sellers between the time of the PR II rates and the current proceeding. With respect to buyers, the Services allege that the current buyers are ''the same or similar. . . .'' Services' Initial Submission at 20. The Services argue that the PR II rates involved ''either the same type of buyers or the very same buyers as this proceeding.'' *Id.* The license delimits the users it binds. It is axiomatic that current licensees are ''of the same type'' as licensees in 2012. Describing participants as ''similar to those currently in the market'' or ''of the same type'' as current participants is sufficiently imprecise to call into question the unity of buyers required to give great weight to a potential benchmark.

The Services allege that ''[m]ost of the participants in Phonorecords III were either directly involved in the Phonorecords II settlement or operated in the market at the time of the settlement.'' *Id.* ''Most of the participants'' does not reveal which participants were active in *Phonorecords II* or the reasons for their participation. Amazon began an MP3 digital music service in 2004; it launched steaming in mid-2014. *See* Written Direct Testimony of Jeffrey Eisenach (Nov. 3, 2016) (Eisenach WDT) ¶ 51. Tab. 2. Apple launched its streaming service in 2019. During the Phonorecords II negotiations, Apple's primary interest was digital downloads from the iTunes store. According to one of its witnesses, Google was, at the time of the Phonorecords II negotiations, ''planning to launch a store, a locker, and a subscription service.'' Google's participation in the Phonorecords II negotiations was ''primarily designed to make sure that our interests were met in—for our forthcoming music service.'' 3/8/17 Tr. 157:2–158:2 (Zahavah Levine).

Although the Services argue that the buyers in the current market are the same as, or similar to, buyers at the time of adoption of the PR II rates, the Services then and now advocate differing rate calculations for each music delivery configuration. Indeed, between 2008 and 2012, the delivery configurations multiplied and the parties negotiated different rate structures for those multiple configurations. Acknowledging participation by a service with one configuration—or a plan to launch one configuration—is insufficient to establish a unity of buyers for purposes of rate setting. Almost a decade after the effectuation of the 2012 rates, with new businesses tacking music streaming onto their digital ecosystems, the development of new and different delivery configurations continues to evolve.[240] Nonetheless, the Services would have the Judges adopt a rate structure that specifies current delivery configurations but excludes some current innovations and cannot encompass the next innovations, whatever form they might take.

The Benchmark Dissent acknowledges that buyers of the musical works for which licenses are at issue in this proceeding are of the ''same type'' as the *Phonorecords II* buyers. In some instances, they are the same participants. In the current landscape, however, the interests of those buyers are vastly different. The extent to which Apple, Amazon, and Google, were involved in Phonorecords II negotiations bears no resemblance to the interests of those services and their current service configurations. Without greater unity of buyers, the Benchmark Dissent must discount the viability of the PR II rates or rate structure as a useful benchmark in this proceeding.

4. Economic and Market Conditions

The Services argue that the music streaming industry in 2018 was essentially unchanged from 2008 or 2012.[241] *See* Services' Initial Submission at 20–21. The evidence in this proceeding compels a contrary conclusion. In 2008, musical works distribution consisted primarily of sound recordings reproduced in physical formats (vinyl and CDs) and digital downloads. *See* Eisenacht WRT ¶ 33 (Feb. 13, 2017). The record reflects that in 2008, of record labels' revenues 96% were derived from sales of physical and digitally downloaded sound recordings; 2.5% from interactive streaming.[242] By 2012, at the inception of the rates that were re-adopted as the PR II rates, musical works sales were beginning to shift from physical media to digital forms. In 2012, 8.1% of record label revenues were attributable to interactive streaming. *Id.* By 2015, evidence available in this proceeding showed that record labels' revenues from digital downloads approximately equaled revenues from streaming and digital sales were more than double the sales of physical configurations, such as vinyl and CDs. *Id.* ¶¶ 44–45 and accompanying tables.

Spotify, the dominant pure play streaming service in the U.S., did not enter the U.S. market until mid-2011. *See* CO Initial Submission at 20–21 (Apr. 1, 2021) *and evidence cited therein.* Spotify did not participate in the negotiations leading up to the adoption of the 2012 musical works royalty rates. *See* Eisenacht WRT ¶ 35, n.38. In fact, the record contains evidence that music streaming was not a major factor in setting mechanical license rates in 2008 or 2012.[243] *See* CO Initial Submission at 19–21, *and evidence cited therein.* As more and larger streaming services entered the market, music consumption changed in character. Music consumption in the 2018 market had changed character completely from an ownership model to an access model. *See* Determination at 6.

Further, three of the Services participating in the current proceeding are not pure play streaming services but are multidimensional marketing firms for whom music streaming is only one small facet of the business. From the perspective of those current licensees, the music streaming license is relatively insignificant to their overall financial

[239] Publishers may retain rights to songs no longer considered ''new'' or ''popular'' that might nonetheless still be subject to the section 115 license. The Services' revenue is driven, however, by streaming new music. They understand that reselling older music, even in new packaging (covers) would lower their desirability and decrease the sources of revenue, their end users.

[240] Some services offer different levels of access to consumers using their proprietary devices, *e.g.,* Amazon Echo. Some (non-satellite) music streaming services are now available directly via a button on a vehicle dashboard.

[241] The PR II rates and rate structure were the product of a negotiated settlement that began and ended with reference to the negotiated rates adopted in 2008. Some additional categories of service were added to the 2008 structure, *e.g.* locker services. Of those categories added in 2012, few remain a significant part of the current streaming industry.

[242] The difference is attributable to sound recording revenues from non-interactive streaming.

[243] The Services argue that only Mr. Israelite testified that the 2008 and 2012 rates were ''experimental'' and that the market is significantly changed since 2012. The Majority found, based upon the totality of the evidence, that Mr. Israelite's testimony was credible and accorded it due weight.

health. The Judges must, therefore, value the license objectively to assure the conglomerate licensees do not manipulate their revenues so as to reduce music streaming rights below what is fair and reasonable to the rightsholders.

The Services further advocate use of the PR II rates and rate structure as a benchmark because they assert that the multifaceted rate structure is reflective of the Services' own price discriminatory services. The Majority noted the Services' price discrimination as a way to optimally monetize segments of the market with a lesser willingness to pay.[244] Greater accommodation of users less willing to pay results in more streaming and more revenue for the Services at minimal to no marginal cost. A rate determined as a percentage of a service's revenue allows that price discrimination to continue, resulting in additional royalties. The Benchmark Dissent contends, however, that the Judges need not adopt a rate structure with ten different service categories to allow the Services to continue their price discriminatory downstream sales. The payable royalties are a percent of revenue. If the Services receive relatively less revenue by marketing a family plan, for instance, that reduced revenue is the basis for the royalty calculation. Nothing in a simplified rate structure would inhibit price discriminatory service plans. The PR II rates' multi-category structure might encompass the price discrimination the Services employ, but that does not make it a mandatory benchmark for current rates, especially if the target rate structure permits the same flexibility.

C. Adoption of PR II Rates and Rate Structure in Direct Licenses

The Services assert that the PR II rates and rate structure have been adopted in negotiated direct licenses they have signed with rightsholders rendering those rates and that rate structure a valuable benchmark. The Services' witnesses analyzed direct licenses and concluded that the *rates* closely matched the rates in the PR II regulations. [REDACTED].[245] Analysis of direct licenses executed belie the Services' assertion that the PR II rates *structure* is embraced by rightsholders.[246]

D. Additional Shortcomings of PR II Rates as a Benchmark

The D.C. Circuit dismissed the Majority's argument on appeal that (1) the PR II rates were too low and (2) the PR II rates were outdated. The D.C. Circuit noted that these two reasons might support the Majority's conclusions, but they could not be asserted in the first instance on appeal. *See Johnson* at 386.

1. Rates Too Low

The D.C. Circuit found that the Judges' finding that the PR II rates were too low was not fully articulated until the matter was on appeal. As a result, the D.C. Circuit could not evaluate that reason as support for the final rates. Indirectly, however, the D.C. Circuit nonetheless accepted that underlying reason for the rate changes when it approved the higher rates themselves. *See Johnson* at 384–86. The adopted rates were soundly grounded in the record evidence. *See id.* By implication, acceptance of increased rates means the PR II rates were too low to be continued. With or without the ''too low'' rationale, the final adopted rates prove the point.[247]

2. Rate Structure Outdated

In the Determination, the Majority cited several factors that implied the inadequacy of the PR II rates and rate structure as a compelling benchmark for *Phonorecords III.* As discussed above, the music streaming industry in 2018 was completely transformed from 2008 or 2012. Both the buyers and the economic market conditions were markedly changed. Referring to the PR II rates as ''outdated'' encompasses both a temporal element and a structural component.

a. Significance of the Passage of Time

Music streaming in the earlier rate setting periods was in its infancy. Listeners had not yet fully embraced the subscribed access model for music consumption. By 2018, listeners could choose from ''a diverse array of streaming offerings.'' *See* WDT of Rishi Mirchandani ¶ 63. Such industry shifts alone could render the PR II rates ''outdated.''

b. Clarity and Simplicity

Another salient factor the Majority addressed is the rate structure itself. To understand the PR II rate structure, one needed ten separate full-page flow chart diagrams, each featuring three formulae for calculating greater-of and lesser-of rate components. *See* Trial Ex. 846. The rates for some consumption configurations included a per-subscriber ''mechanical floor'' as a failsafe against overreaching by PROs, should the Rate Court increase their rates to an extent that all of the section 115 all-in percent of revenue royalty be consumed by the PROs. *See, e.g.,* [FORMER] 37 CFR 385.13(a)(1) (Standalone non-portable subscription—streaming only [$.15 per subscriber]); [FORMER] 385.13(a)(2) (Standalone portable subscription—mixed use [$.50 per subscriber]) (2018).[248] Other consumption configurations included ''minima;'' that is a lesser-of calculation comparing a percent of sound recording license costs (TCC) and a per subscriber amount. *See, e.g.,* [FORMER] 37 CFR 385.13(b) (2018). Further, rate calculations differed depending upon, for example, whether the listener streamed on a portable device or a non-portable device; or whether the listener purchased access to the music alone from a pure-play streaming service or as part of a bundled offering, such as ''free'' streaming for a limited period included in the purchase price of the streaming device.[249]

The rationale for these convoluted rate calculation differences is

[244] The adopted *Phonorecords III* rate regulations acknowledged price discrimination by, *inter alia,* permitting Services to account for discounted subscriptions in different ways. *See* Determination at 34.

[245] The [REDACTED] direct licenses reportedly adopt the rates in part 385, which open-ended adoption could indicate acceptance of both rates and rate structure.

[246] [REDACTED] *See* AWDT Leonard ¶¶ 63–64.
[REDACTED]. *See* Leonard AWDT ¶ 70–71.
[REDACTED]. *See* AWDT Leonard ¶ 54. (calculation is ''effectively simplified'').
[REDACTED].
[REDACTED].

[247] The Services argue that an agreed continuation of the Subpart A (now Subpart B) rates for, *inter alia,* physical phonorecords and permanent downloads, proves that the Phonorecords II rates are appropriate. *See* Services' Initial Submission at 30. This argument asserts a false equivalency. Physical Phonorecords and permanent downloads are fundamentally different in character from streamed music. Further, the evidence indicates that the prominence of streaming access over ownership of recordings is waning. The parties' agreement to maintain the *Phonorecords II* rates for this declining segment of the market does not equate to a mandate to adopt the entirety of the PR II rate structure.

[248] The Majority reintroduced these ''mechanical floor'' safeguards, notwithstanding a lack of evidence to explain, let alone justify, the difference between $0.15 and $0.50 per subscriber (the latter being 300% greater than the former) simply because one consumer listened to a song on a standalone non-portable device and another consumer listened to a song on a standalone portable device.

[249] The Services have not offered convincing, substantive evidence or argument to support the fractured structure of the PR II rates. Tellingly, the user's choice of consumption device is not a factor in license rates for other services. *See, e.g.,* 17 CFR 380.10 (Webcasters rates differentiate between commercial and non-commercial licensees, not based on users' reception devices); §§ 382.3, 382.12 (rates for satellite radio and pre-existing subscription services do not differentiate based on users' reception devices).

unknown.[250] They were the product of confidential negotiations among the parties involved in the music streaming business in the first decade of the 21st century. One side of the negotiating table sought reconsideration of those rates. The current licensees are not the same as those who negotiated the 2012 rollover of the 2008 rate scheme. Music streaming business models have witnessed significant growth and change. Meanwhile, the business models employed by songwriters and publishers remain largely unchanged—and not realizing a proportionate capture of the stream of dollars realized by the Services' monetization of ever-more consumption configurations. The marginal cost to the Services of additional streams, regardless of the business configuration or the user's reception device, is zero. The Services, therefore, are in a position to capture increased revenue without an increase in cost of goods sold.

In the end, a sound recording embodying a licensed musical work is being delivered to an end ''user'': one song; one listener. The calculation of what royalty the songwriter is entitled to should not rest on the medium of transmission or the location of the listening. *See* WDS Steve Bogard ¶ 34 (''Streaming music anytime, any place, on any device is the way today's music fans want to enjoy their music. Notwithstanding that the inherent value of a song is the same whether the consumer chooses to buy an album, permanently download an album or a single, or stream music on demand. . . .''). The incremental difference in value to the listener of hearing a song in the car as opposed to through earbuds during a workout is not likely measurable. Certainly, no participant in this proceeding presented any evidence of the relative value of a song to a listener depending on the delivery configuration.[251]

In the interest of making government more transparent and accessible to interested citizens, less is more. Opaque systems and formulae are or should be, in a word, outdated. The fact of settlement does not cure or even address the unnecessary complication of paying a royalty for the use of a statutory license under the PR II rates structure. More importantly, owners of the copyrights being licensed should be able to comprehend, calculate, and verify the sources and amounts of their royalty payments.

3. Not Business Model Neutral

The Services contend that the PR II rate structure is preferable as it is business model neutral. Nothing in the record supports that assertion. In fact, Apple argued that the PR II rate structure stifled innovation as streaming services sought to fit any new business into a business model already defined as one of the ten identified models in the *Phonorecords II* regulations. The statute does not require that rate structures be business model neutral. The reasonableness requirement demands, however, that the Judges find and adopt *reasons* for differentiation in rates based on business models.

4. No Evidence of Settling Parties' Subjective Intent

Copyright Owners participating in the current proceeding argued that the Judges should consider the subjective intent of the parties in agreeing to ''roll over'' the 2008 rates and rate structure into the PR II regulations. The Services countered that subjective intent is irrelevant, as the product of those negotiations serves as objective evidence of the parties' intents. On this question, the Services are correct. The negotiated rates show, objectively, that the negotiating parties agreed to a certain rate structure. The D.C. Circuit criticized the Majority for not including in the Final Determination an explanation of why the subjective intent of the parties to the settlement was a ''prerequisite'' to adoption of that settlement as a benchmark. *See Johnson* at 387. The Judges need not, however, accept that objective evidence uncritically.

Negotiating parties' subjective state of mind can serve as convincing evidence of the economic circumstances and the state of the market at the time of the negotiations. While ascertaining the parties' subjective intent in reaching the settlement is not a ''prerequisite'' to examination of the terms as a benchmark, the Benchmark Dissent finds subjective intent informative and useful as one factor in weighing the value of the settlement as a benchmark.

E. Statutory Factors

The Services argued to the D.C. Circuit that the Majority's rejection of the PR II rates and rate structure was erroneous because the Majority failed to evaluate that structure and those rates under the statutory factors delineated in 17 U.S.C. 801(b)(1). Evaluation under section 801(b)(1) is required by the statute applicable to this proceeding.[252] Nothing in section 801(b)(1) compels the Judges to evaluate compliance with the statutory factors of every proposed potential rate or rate structure. Neither are the Judges required to evaluate every potential benchmark or past rate structure under section 801(b)(1). The Judges are obliged to evaluate any rate structure they intend to adopt against the requirements of section 801(b)(1). If the Judges' promulgated rate structure meets the section 801(b)(1) standard, then the promulgated rate structure can be adopted. Whether other possible proposals might also meet the section 801(b)(1) standard is not at issue in a proceeding.

1. Maximize the Availability of Creative Works to the Public

The Services argue that the PR II rates and rate structure support and contribute to the maximization of musical works. As evidence, they cite the growth of music streaming overall, the profitability of all segments of the music industry.[253] It is beyond question that music consumption has grown exponentially since the co-incident

[250] Prof. Katz asserted that ''economic analysis'' indicates that varying rates based on the characteristics of the service ''facilitates continuing innovation, experimentation, and differentiation in means of making music accessible to consumers.'' Katz WDT ¶ 85. Prof. Katz did not identify that economic analysis. He asserted that the fractured rates allow services to benefit despite different consumers' willingness to pay. Nothing in the PR III rate structure at issue in any way inhibited services adapting to meet consumers' willingness to pay. The rates are, in the main, revenue based—even if the services choose to market the service at a lower rate to a particular segment of the market.

[251] The Remand Majority dubs analysis of value based on the cost of production rather than willingness to purchase as old-fashioned economic analysis. So it may be. In the modern economist's widget market, if buyers are unwilling to pay enough to cover the cost of widget components, then widget production ceases. But in the old-fashioned creativity market, the goods are not fungible. The inputs to a hit song are ephemeral; sometimes plentiful, sometimes elusive; they either coalesce or they do not. Songwriters will persevere because they cannot do otherwise. The demand for music continues to grow with each new innovation in delivery methods. The United States Constitution provides for protection of art and the creators of art. U.S. Const. art. I, sec. 8. Congress has specified how to protect, *inter alia,* the copyrights of songwriters. The Judges' small part in that effort is to continue to assure that royalty rates are reasonable—for both creators and exploiters. In the music streaming industry, the evidence supports devoting a greater share of licensees' increased wealth to the ''widget makers.'' The Dissent contends that the increase in the percent-of-revenue headline rate is a good step forward, but only the first step to assuring equity in the market. Streamlining, simplifying, and generally ''cleaning up'' payment calculations would go a long way in the right direction by removing twists and turns and confusing signals along the path of the royalty dollar from end user to creator.

[252] With the passage of the Orrin G. Hatch—Bob Goodlatte Music Modernization Act, Congress eliminated the four statutory factors for evaluating license royalty rates. *See* Public Law 115–264, 132 Stat. 3676 (2018) (codified in scattered sections of title 17, U.S.C.

[253] According to the Services, all segments of the music industry are thriving [REDACTED].

introduction of portable devices and streaming services. Growth continues as those devices and services become increasingly easy to actuate in vehicles.

No participant alleged, however, that music industry success is caused by or even correlated to the PR II rate structure. Coincidence is not probative evidence.

2. Assure Fair Return to Copyright Owner and Fair Income to the Licensee

The Services argued they were receiving a fair income and copyright owners were receiving a fair return under the PR II regulations. Although the Services argued that overall music royalties absorbed an inordinate portion of their revenues, none expressly laid that lack of available revenue at the door of mechanical royalties. Amazon's witness, Dr. Glenn Hubbard described a growing increase in streaming industry revenues and forecasts of continuing growth. *See* WRT of Glenn Hubbard (Feb. 15, 2017) ¶ 2.23–24 (Hubbard WRT). Dr. Hubbard deconstructed Amazon's increased revenues and concluded that the growth in streaming services' revenue resulted in increased royalty payments to music publishers and other rights holders. *Id.* ¶ 3.10. When royalty rates are calculated on a percent-of-revenue, the royalty payments increase when revenues increase.

The difficulty with this tautological argument is that revenue growth as between services and rightsholders has not been proportional. And, as Copyright Owners have argued, the *rate* at which the services share with mechanical rightsholders is the issue in this proceeding. The Judges are not called upon to set annual royalty payment dollar amounts; rather they are mandated to set the rates that drive those dollar amounts. And to adopt regulations that most closely effectuate actual payment to rightsholders, minimizing revenue deferral and other such loopholes. For all of the reasons provided in the Determination and in this Benchmark Dissent, the PR II-based rates and the controlling rate structure do not balance the section 115 fair income-fair return scale appropriately and reasonably.

3. Weigh Relative Roles of Licensors and Licensees in Making the Works Available to the Public

No participant presented evidence to elucidate specifically the relative roles of the parties relating to musical works. Economic evidence assumed that the marginal cost of streaming more music is minimal. This does not discount the services' sunk costs, such as the original technological or capital investments. With respect to the contributions of the copyright owners, the contribution is clear. It all begins with a song. Without new music, the Services could continue by streaming unregulated works, new arrangements or covers of existing works, and non-music content. Whether they would continue to enjoy the growth they have enjoyed over the last decade is unknown. The PR II rates might be a contributing factor to both stability and growth of the industry, but based on the totality of the evidence, the Dissent concludes that with regard to musical works, the relative role of the creator of the musical works, and to a lesser extent, the music publisher, is undervalued.

4. Minimize Disruption

The language for the fourth statutory factor requires the Judges to establish a rate structure in such a way as ''[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.'' [FORMER] 17 U.S.C. 801(b)(1)(D). The Services argue that the change in rate structure determined by the Majority in this proceeding is massively, and potentially fatally, disruptive to music streaming services.

Ironically, the music industry has been in a constant state of disruption since the introduction of digital music. From peer-to-peer sharing, to purchased permanent downloads, to interactive and non-interactive streaming, the history of modern music consumption has been a model of disruption. Entry into the streaming market by multifaceted digital ecosystem providers is just the latest significant change in music delivery to consumers. Innovation in music delivery is constant.

Allegedly to minimize disruption, the Services advocated retention of the PR II rates and rate structure.[254] While every aspect of the music industry is experiencing explosive growth, maintenance of the inadequate rates for mechanical licenses is unfathomable. Some change, phased in over time, might be uncomfortable for the licensees, but failure to change rates to acknowledge the music delivery revolution is not an option. With such a dynamic history and uncertain future, a change in mechanical license rates is not just inevitable, but mandatory.

Indeed, the Benchmark Dissent's approach in this proceeding advances the notion that streamed music is streamed music. This is certainly true from the viewpoint of the songwriters and publishers, and of music consumers. Rather than introduce separate rate structures for each new delivery technology or streaming business model, the Judges need to establish a rate that will fairly compensate Copyright Owners for the use of their works and permit a fair return to licensees, regardless of what next technological disruption they might choose to introduce to the industry. In the captioned proceeding, the Majority declined to label the rate structure and resulting rates incorporated in the regulations promulgated after the *Phonorecords II* proceeding as a benchmark, or starting point, for determination of new rates and terms in this proceeding.

In the Determination, the Majority alluded to reasons they found the PR II rates to be inadequate to serve current circumstances.[255] Nevertheless, the D.C. Circuit faulted the Majority for not providing adequate explanation of their rejection of the PR II benchmark in the first instance. *See Johnson* at 386–87. Indeed, the D.C. Circuit found the Majority's reasoning on the issue in the Determination to be ''muddled.'' *Id.*

F. Rate Structure

For all of the reasons outlined above, the Remand Majority's acceptance and adoption of the *Phonorecords II* rate structure results in a rate structure in this proceeding that suffers from the same deficits the Benchmark Dissent believes to be inherent in that rate structure. Changing the headline rate and capping the TCC rate prong do not cure the ills of the rate structure itself. True, the PR II-based rates permit price discrimination, which increases revenue, and therefore royalties, in absolute terms. Reinstatement of minima in the TCC prong introduces a failsafe to runaway TCC-based rates. The mechanical floors adopted in the Determination continue, protecting mechanical license rightsholders from runaway performance royalties.

The Benchmark Dissent maintains that all these goals could be met equally well with a streamlined, transparent, fair, and reasonable rate structure, as several of the participants in this proceeding advocated.

[254] Tellingly, on remand, the Services did not pursue any argument that the changes in the rates or rate structure in the Determination were disruptive.

[255] The D.C. Circuit found that the Majority articulated a reasoned and reasonable rejection of the negotiated rates applicable to the categories of phonorecords included in [FORMER] subpart A of the regulations as a benchmark in this proceeding. The issue on remand is articulation of a reason for not using the other subparts of 37 CFR part 385 as a benchmark in this proceeding. *See Johnson* at 386.

III. Conclusion

This Dissent in part is issued as a RESTRICTED document. Within 30 days of the date of issuance, the participants shall file a version of this Dissent with agreed redactions to permit viewing by the public.

Issue Date: July 1, 2022.

Suzanne M. Barnett

Chief Copyright Royalty Judge

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 385 as follows.

PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

■ 1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

■ 2. Add appendix A to read as follows:

Appendix A to Part 385—Part 385 Applicable to the Period January 1, 2018, through December 31, 2022, as clarified on August 10, 2023

Note: Cross-references to part 385 in this appendix are to those provisions as contained within this appendix.

PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS

Subpart A—Regulations of General Application

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

Subpart D—Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

Subpart A—Regulations of General Application

§ 385.1 General.

(a) *Scope.* This part establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart contains regulations of general application to the making and distributing of phonorecords subject to the license under 17 U.S.C. 115 (section 115 license).

(b) *Legal compliance.* Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part describes rates and terms for the compulsory license only.

(c) *Interpretation.* This part is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither this part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) *Relationship to voluntary agreements.* The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part.

§ 385.2 Definitions.

For the purposes of this part, the following definitions apply:

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i), and any related regulations in this chapter, as applicable.

Active Subscriber means an End User of a Bundled Subscription Offering who has made at least one Play during the Accounting Period.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound Recording Company shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Eligible Interactive Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (*e.g.,* a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price).

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery has the same meaning as in 17 U.S.C. 115(e)(10).

Eligible Interactive Stream means a Stream in which the performance of the sound recording is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).

Eligible Limited Download means a Limited Download as defined in 17 U.S.C. 115(e)(16) that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Eligible Limited Download, separately, and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

End User means each unique person that:

(1) Pays a subscription fee for an Offering during the relevant Accounting Period; or

(2) Makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted Subscription Offering to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a Service Provider's transmissions of sound recordings embodying musical works when:

(1) Neither the Service Provider, the Sound Recording Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the Service Provider is operating with appropriate musical license authority and complies with the recordkeeping requirements in § 385.4;

(4) Upon receipt by the Service Provider of written notice from the Copyright Owner or its agent stating in good faith that the Service Provider is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the Service Provider shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the End User free of any charge; and

(6) The Service Provider offers the End User periodically during the free usage an opportunity to subscribe to a non-Free Trial Offering of the Service Provider.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as ''GAAP'' for purposes of this subpart.

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, as the term is used in subpart B of this part, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

Limited Offering means a Subscription Offering providing Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (*i.e.,* the Service Provider does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers in the marketplace providing access to a comprehensive catalog of recordings (*e.g.,* a product limited to a particular genre or permitting Eligible Interactive Streams only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent Downloads, Restricted Downloads or Ringtones where the Service Provider has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term *Locker Service* does not mean any part of a Service Provider's products otherwise meeting this definition, but as to which the Service Provider has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider delivers to End Users together with one or more non-music services (*e.g.,* internet access service, mobile phone service) or non-music products (*e.g.,* a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent Downloads, or Ringtones delivered as part of one transaction (*e.g.,* download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (*e.g.,* a corresponding digital album), the Service Provider may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service Provider must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a Service Provider's engagement in Licensed Activity covered by subparts C and D of this part.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service Provider.

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part.

Permanent Download has the same meaning as in 17 U.S.C. 115(e)(24).

Play means an Eligible Interactive Stream, or a play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or a play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or a play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and:

(1) A Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) For Eligible Interactive Streams or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service Provider representing that the Service Provider is operating with appropriate musical works license authority and that the Service Provider is in compliance with the recordkeeping requirements of § 385.4;

(3) For Eligible Interactive Streams of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service Provider nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) The Promotional Offering is made available to an End User free of any charge; and

(5) The Service Provider provides to the End User at the same time as the Promotional Offering Stream an opportunity to purchase the sound recording or the Service Provider periodically offers End Users the opportunity to subscribe to a paid Offering of the Service Provider.

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the Permanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Downloads, Restricted Downloads, or Ringtones.

(1) A qualifying seller for purposes of this definition is the entity operating the Service Provider, including Affiliates, predecessors, or successors in interest, or—

(i) In the case of Permanent Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Downloads or Ringtones are offered through the same third party); or

(ii) In the case of physical phonorecords:

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service Provider has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service Provider both sell the physical phonorecord and offer the integrated locker service.

(2) [Reserved]

Relevant Page means an electronic display (for example, a web page or screen) from which a Service Provider's Offering consisting of Eligible Interactive Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (*e.g.,* an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted Download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part, which might or might not be the Licensee, that with respect to the section 115 license:

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue, as used in this part:

(1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, *Service Provider Revenue* shall mean:

(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party ''in-stream'' or ''in-download'' advertising as part of any Offering, *i.e.,* advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(i) Include revenue recognized by the Service Provider, or by any associate, Affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and

(ii) Include the value of any barter or other nonmonetary consideration; and

(iii) Except as expressly detailed in this part, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition.

(4) For purposes of paragraph (1) of this definition, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition shall be the revenue recognized from End Users for the bundle less the standalone published price for End Users for each of the other component(s) of the bundle; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

(6) In the case of a Mixed Service Bundle, the revenue deemed to be recognized from End Users for the Offering for the purpose of paragraph (1) of this definition shall be the greater of—

(i) The revenue deemed to be recognized pursuant to paragraph (5) of this definition; and

(ii) Either—

(A) In the case of a Mixed Service Bundle that either has 750,000 subscribers or other registered users, or is reasonably expected to have 750,000 subscribers or other registered users within 1 year after commencement of the Mixed Service Bundle, 40% of the standalone published price of the licensed music component of the bundle (*i.e.,* the Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used; and further provided that in any case in which royalties were paid based on this paragraph (6)(ii)(A) due to a reasonable expectation of reaching 750,000 subscribers or other registered users within 1 year after commencement of the Mixed Service Bundle and that does not actually happen, applicable payments shall, in the accounting period next following the end of such 1-year period, retroactively be adjusted as if paragraph (6)(ii)(B) of this definition applied; or

(B) Otherwise, 50% of the standalone published price of the licensed music component of the bundle (*i.e.,* the Permanent Downloads, Ringtones, Locker Service, or Limited Offering); provided that, if there is no such standalone published price for the licensed music component of the bundle, then the average standalone published price for End Users for the most closely comparable licensed music component in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used.

Sound Recording Company means a person or entity that:

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under 17 U.S.C. chapter 14, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Standalone Non-Portable Subscription Offering—Mixed means a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Eligible Interactive Streams or Eligible Limited Downloads are originally transmitted.

Standalone Non-Portable Subscription Offering—Streaming Only means a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Eligible Interactive Streams are originally transmitted while the device has a live network connection.

Standalone Portable Subscription Offering means a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device.

Stream means the digital transmission of a sound recording of a musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while maintaining a live network connection to the Service Provider, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted Subscription Offering available on a limited basis to students.

*Subscription Offering m*eans an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a bundle with one or more other products or services.

Total Cost of Content or *TCC* means the total amount expensed by a Service Provider or any of its Affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider for the Accounting Period, which amount shall equal the Applicable Consideration for those rights at the time the Applicable Consideration is properly recognized as an expense under GAAP. As used in this definition, *Applicable Consideration* means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an Affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, Applicable Consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or Affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

§ 385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(2)(I) or (d)(4)(A)(i), as applicable and detailed in part 210 of this title. Late fees shall accrue from the due date until the Copyright Owner receives payment, except that where payment is due to the mechanical licensing collective under 17 U.S.C. 115(d)(4)(A)(i), late fees shall accrue from the due date until the mechanical licensing collective receives payment.

§ 385.4 Recordkeeping for promotional or free trial non-royalty-bearing uses.

(a) *General.* A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part and claiming a Promotional Offering or Free Trial Offering zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero-rate is authorized (including the internet address if applicable), and the beginning and end date of each zero rate Offering.

(b) *Retention of records.* A Service Provider claiming zero rates shall maintain the records required by this section for no less time than the Service Provider maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§ 385.11 Royalty rates.

(a) *Physical phonorecord deliveries and Permanent Downloads.* For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music Bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or (b) of this section, as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§ 385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D of this part.

§ 385.21 Royalty rates and calculations.

(a) *Applicable royalty.* Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services

described in § 385.22, provided, however, that Promotional Offerings, Free Trial Offerings, and certain Purchased Content Locker Services shall instead be subject to the royalty rates provided in subpart D of this part.

(b) *Rate calculation.* Royalty payments for Licensed Activity in this subpart shall be calculated as provided in this paragraph (b). If a Service Provider includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider Revenue and expenses associated with each Offering.

(1) *Step 1: Calculate the all-in royalty for the Offering.* For each Accounting Period, the all-in royalty for each Offering under this subpart shall be the greater of the applicable percent of Service Provider Revenue, as set forth in table 1 to this paragraph (b)(1), and the result of the TCC Prong Calculation for the respective type of Offering, as set forth in table 2 to this paragraph (b)(1):

TABLE 1 TO PARAGRAPH (b)(1)

Royalty year	2018	2019	2020	2021	2022
Percent of Service Provider Revenue	11.4	12.3	13.3	14.2	15.1

TABLE 2 TO PARAGRAPH (b)(1)

Type of offering	TCC prong calculation
Standalone Non-Portable Subscription Offering—Streaming Only	The lesser of 22% of TCC for the Accounting Period and 50 cents per subscriber per month.
Standalone Non-Portable Subscription Offering—Mixed	The lesser of 21% of TCC for the Accounting Period and 50 cents per subscriber per month.
Standalone Portable Subscription Offering	The lesser of 21% of TCC for the Accounting Period and 80 cents per subscriber per month.
Bundled Subscription Offering	21% of TCC for the Accounting Period.
Free nonsubscription/ad-supported services free of any charge to the End User.	22% of TCC for the Accounting Period.
Mixed Service Bundle	21% of TCC for the Accounting Period.
Purchased Content Locker Service	22% of TCC for the Accounting Period.
Limited Offering	21% of TCC for the Accounting Period.
Paid Locker Service	20.65% of TCC for the Accounting Period.

(2) *Step 2: Subtract applicable Performance Royalties.* From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider, subtract the total amount of Performance Royalty that the Service Provider has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider's payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider pays Performance Royalties for the Accounting Period. The Service Provider shall make this allocation on the basis of Plays of musical works or, where per-play information is unavailable because of bona fide technical limitations as described in step 4 in paragraph (b)(4) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3: Determine the payable royalty pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service Provider by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of:

(i) The result determined in step 2 in paragraph (b)(2) of this section; and

(ii) The royalty floor (if any) resulting from the calculations described in § 385.22.

(4) *Step 4: Calculate the per-work royalty allocation.* This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this paragraph (b)(4) only (*i.e.,* after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment.* For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows:

(1) 5:01 to 6:00 minutes—Each Play = 1.2 Plays.

(2) 6:01 to 7:00 minutes—Each Play = 1.4 Plays.

(3) 7:01 to 8:00 minutes—Each Play = 1.6 Plays.

(4) 8:01 to 9:00 minutes—Each Play = 1.8 Plays.

(5) 9:01 to 10:00 minutes—Each Play = 2.0 Plays.

(6) For playing times of greater than 10 minutes, continue to add 0.2 Plays for each additional minute or fraction thereof.

(d) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(2)(I) and (d)(4)(A)(i) and part 210 of this title. Without limitation, statements of account (where applicable) shall set forth each step of the calculations with sufficient information to allow the assessment of the accuracy and manner in which the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to § 385.22 does or does not apply) were

determined and, for each Offering reported, also indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

(e) *Computation of subscriber months in TCC Prong Calculation.* In connection with the TCC Prong Calculation in step 1 in paragraph (b)(1) of this section for an Accounting Period, to the extent applicable, the total number of subscriber-months for the Accounting Period shall be calculated, taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber shall be used as the subscriber-based component (if any) in step 1 for the Accounting Period.

§ 385.22 Royalty floors for specific types of Offerings.

(a) *In general.* The following royalty floors for use in step 3 of § 385.21(b)(3)(ii) shall apply to the respective types of Offerings.

(1) *Standalone Non-Portable Subscription Offering—Streaming Only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone Non-Portable Subscription Offering—Mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Streams or Eligible Limited Downloads are originally transmitted, the royalty floor is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone Portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled Subscription Offering.* In the case of a Bundled Subscription Offering, the royalty floor is the aggregate amount of 25 cents per month for each Active Subscriber.

(b) *Computation of royalty floors.* For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to subpart D of this part, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to Active Subscribers. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or Active Subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.

Subpart D—Promotional Offerings, Free Trial Offerings and Certain Purchased Content Locker Services

§ 385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers in accordance with the provisions of 17 U.S.C. 115.

§ 385.31 Royalty rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Eligible Interactive Streams and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the Service Provider receives no monetary consideration, the royalty rate is zero.

(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.

Dated: July 3, 2023.

David P. Shaw,
Chief Copyright Royalty Judge

David R. Strickler,
Copyright Royalty Judge

Steve Ruwe,
Copyright Royalty Judge

Approved by:

Carla D. Hayden,
Librarian of Congress.

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CFR PARTS AFFECTED DURING AUGUST

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List August 9, 2023

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the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; Liberty Media Corp. (''LMC''), a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; and the Federal Trade Commission (''Commission''), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 et seq.

Whereas Time Warner entered into an agreement with Turner for Time Warner to acquire the outstanding voting securities of Turner, and TCI and LMC proposed to acquire stock in Time Warner (hereinafter ''the Acquisition'');

Whereas the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

Whereas TCI and LMC are willing to enter into an Agreement Containing Consent Order (hereafter ''Consent Order'') requiring them, inter alia, to divest TCI's and LMC's Interest in Time Warner and TCI's and LMC's Turner-Related Businesses, by contributing those interests to a separate corporation, The Separate Company, the stock of which will be distributed to the holders of Liberty Tracking Stock (''the Distribution''), but, in order to fulfill paragraph II(D) of that Consent Order, TCI and LMC must apply now to receive an Internal Revenue Service ruling as to whether the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended (''IRS Ruling'');

Whereas ''TCI's and LMC's Interest in Time Warner'' means all of the economic interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R. E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement;

Whereas ''TCI's and LMC's Turner-Related Businesses'' means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs;

Whereas ''Liberty Tracking Stock'' means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock;

Whereas Time Warner, Turner, TCI, and LMC are willing to enter into a Consent Order requiring them, inter alia, to forego entering into certain new programming service agreements for a period of six months from the date that the parties close this Acquisition (''Closing Date''), but, in order to comply more fully with that requirement, they must cancel now the two agreements that were negotiated as part of this Acquisition: namely, (1) the September 15, 1995, program service agreement between TCI's subsidiary, Satellite Services, Inc. (''SSI''), and Turner and (2) the September 14, 1995, cable carriage agreement between SSI and Time Warner for WTBS (hereafter ''Two Programming Service Agreements'');

Whereas if the Commission accepts the attached Consent Order, the Commission is required to place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 C.F.R. 2.34;

Whereas the Commission is concerned that if the parties do not, before this order is made final, apply to the IRS for the IRS Ruling and cancel the Two Programming Service Agreements, compliance with the operative provisions of the Consent Order might not be possible or might produce a less than effective remedy;

Whereas Time Warner, Turner, TCI, and LMC's entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

Whereas Time Warner, Turner, TCI, and LMC understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Time Warner, Turner, TCI, and LMC with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which this Agreement is annexed and made a part thereof, the parties agree as follows:

1. Within thirty (30) days of the date the Commission accepts the attached Consent Order for public comment, TCI and LMC shall apply to the IRS for the IRS Ruling.

2. On or before the Closing Date, Time Warner, Turner and TCI shall cancel the Two Programming Service Agreements.

3. This Agreement shall be binding when approved by the Commission.

Analysis of Proposed Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission has accepted for public comment from Time Warner Inc. (''Time Warner''), Turner Broadcasting System, Inc. (''Turner''), Tele-Communications, Inc. (''TCI''), and Liberty Media Corporation (''LMC'') (collectively ''the proposed respondents'') an Agreement Containing Consent Order (''the proposed consent order''). The Commission has also entered into an Interim Agreement that requires the proposed respondents to take specific action during the public comment period.

The proposed consent order is designed to remedy likely antitrust effects arising from Time Warner's acquisition of Turner as well as related transactions, including TCI's proposed ownership interest in Time Warner and long-term cable television programming service agreements between Time Warner and TCI for post-acquisition carriage by TCI of Turner programming.

II. Description of the Parties, the Acquisition and Related Transactions

Time Warner is a leading provider of cable networks and a leading distributor of cable television. Time Warner Entertainment (''TWE''), a partnership in which Time Warner holds the majority interest, owns HBO and Cinemax, two premium cable networks. Time Warner and Time Warner Cable, a subsidiary of TWE, are collectively the nation's second largest distributor of cable television and serve approximately 11.5 million cable subscribers or approximately 17 percent of U.S. cable television households.

Turner is a leading provider of cable networks. Turner owns the following ''marquee'' or ''crown jewel'' cable networks: Cable News Network (''CNN''), Turner Network Television (''TNT''), and TBS SuperStation (referred to as ''WTBS''). Turner also owns Headline News (''HLN''), Cartoon Network, Turner Classic Movies, CNN International USA and CNN Financial Network.

TCI is the nation's largest operator of cable television systems, serving approximately 27 percent of all U.S. cable television households. LMC, a subsidiary of TCI, is a leading provider of cable programming. TCI also owns interests in a large number of cable networks.

In September 1995, Time Warner and Turner entered into an agreement for Time Warner to acquire the approximately 80 percent of the outstanding shares in Turner that it does not already own. TCI and LMC have an approximately 24 percent existing interest in Turner. By trading their interest in Turner for an interest in Time Warner, TCI and LMC would acquire approximately a 7.5 percent interest in the fully diluted equity of Time Warner as well as the right of first refusal on the approximately 7.4 percent interest in Time Warner that R. E. Turner, III, chairman of Turner, would receive as a result of this acquisition. Although Time Warner has a 'poison pill' that would prevent TCI from acquiring more than a certain amount of stock without triggering adverse consequences, that poison pill would still allow TCI to acquire approximately 15 percent of the Fully Diluted Equity, and if the poison pill were to be altered or waived, TCI could acquire more than 15 percent of the fully diluted equity of Time Warner. Also in September 1995, Time Warner entered into two long-term mandatory carriage agreements referred to as the Programming Service Agreements (PSAs). Under the terms of these PSAs, TCI would be required, on virtually all of its cable television systems, to carry CNN, HLN, TNT and WTBS for a twenty-year period.

III. The Complaint

The draft complaint accompanying the proposed consent order and the Interim Agreement alleges that the acquisition, along with related transactions, would allow Time Warner unilaterally to raise the prices of cable television programming and would limit the ability of cable television systems that buy such programming to take responsive action to avoid such price increases. It would do so, according to the draft complaint, both through horizontal combination in the market for cable programming (in which Time Warner, after the acquisition, would control about 40% of the market) and through higher entry barriers into that market as a result of the vertical integration (by merger and contract) between Turner's programming interests and Time Warner's and TCI's cable distribution interests. The complaint alleges that TCI and Time Warner, respectively, operate the first and second largest cable television systems in the United States, reaching nearly half of all cable households; that Time Warner would gain the power to raise prices on its own and on Turner's programming unilaterally; that TCI's ownership interest in Time Warner and concurrent long term contractual obligations to carry Turner programming would undermine TCI's incentive to sign up better or less expensive non-Time Warner programming, preventing rivals to the combined Time Warner and Turner from achieving sufficient distribution to realize economies of scale and thereby to erode Time Warner's market power; that barriers to entry into programming and into downstream retail distribution markets would be raised; and that substantial increases in wholesale programming costs for both cable systems and alternative service providers—including direct broadcast satellite service and other forms of non-cable distribution—would lead to higher service prices and fewer entertainment and information sources for consumers.

The Commission has reason to believe that the acquisition and related transactions, if successful, may have anticompetitive effects and be in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

IV. Terms of the Proposed Consent Order

The proposed consent order would resolve the alleged antitrust concerns by breaking down the entry barriers that would otherwise be erected by the transaction. It would do so by: (1) Requiring TCI to divest all of its ownership interests in Time Warner or, in the alternative, capping TCI's ownership of Time Warner stock and denying TCI and its controlling shareholders the right to vote any such Time Warner stock; (2) canceling the PSAs; (3) prohibiting Time Warner from bundling Time Warner's HBO with any Turner networks and prohibiting the bundling of Turner's CNN, TNT, and WTBS with any Time Warner networks; (4) prohibiting Time Warner from discriminating against rival Multichannel Video Programming Distributors (''MVPDs'') in the provision of Turner programming; (5) prohibiting Time Warner from foreclosing rival programmers from access to Time Warner's distribution; and (6) requiring Time Warner to carry a 24-hour all news channel that would compete with Turner's CNN. The following sections discuss the primary provisions of the proposed consent order in more detail.

A. TCI Will Divest Its Interest in Time Warner or Accept a Capped Nonvoting Interest. The divestiture provision of the proposed consent order (Paragraph II) requires TCI and LMC to divest their collective ownership of approximately 7.5 percent of the fully diluted shares in Time Warner - the amount they will obtain from Time Warner in exchange for their 24 percent ownership interest in Turner—to a different company (''The Separate Company'') that will be spun off by TCI and LMC. The stock of The Separate Company would be distributed to all of the shareholders of TCI's LMC subsidiary. Because that stock would be freely tradeable on an exchange, the ownership of The Separate Company would diverge over time from the ownership of the Liberty Media Tracking Stock (and would, at the outset, be different from the ownership of TCI). TCI would therefore breach its fiduciary duty to its shareholders if it forestalled programming entry that could benefit TCI as a cable system operator in order to benefit Time Warner's interests as a programmer.

In addition to the divestiture provisions ensuring that TCI will have no incentive to forgo its own best interests in order to favor those of Time Warner, the proposed consent order contains provisions to ensure that the transaction will not leave TCI or its management in a position to influence Time Warner to alter its own conduct in order to benefit TCI's interests. Absent restrictions in the consent order, the TCI Control Shareholders (John C. Malone, Bob Magness, and Kearns-Tribune Corporation) would have a controlling share of the voting power of The Separate Company. To prevent those shareholders from having significant influence over Time Warner's conduct, the proposed consent order contains the following provisions that will wall off the TCI Control Shareholders from influencing the officers, directors, and employees of The Separate Company and its day-to-day operations:

- The Commission must approve the initial board of directors of The Separate Company;
- Within six months of the distribution of The Separate Company's stock, the stockholders (excluding the TCI Control Shareholders) of The Separate Company must elect new directors;
- Members of the board of directors of The Separate Company are prohibited from serving as officers, directors, or employees of TCI or LMC, or holding or controlling greater than one-tenth of one percent (0.1%) of the ownership in or voting power of TCI or LMC;
- Officers, directors or employees of TCI or LMC are prohibited from concurrently serving as officers, directors, or employees of The Separate Company, with a narrow exception so that TCI or LMC employees may provide limited operational services to The Separate Company;

• The TCI Control Shareholders are prohibited from voting (other than a de minimis voting share necessary for tax purposes) any stock of The Separate Company to elect the board of directors or on other matters. There are limited exceptions for voting on major issues such as a proposed merger or sale of The Separate Company, the disposition of all or substantially all of The Separate Company's assets, the dissolution of The Separate Company, or proposed changes in the corporate charter or bylaw of The Separate Company. However, no vote on any of these excepted issues would be successful unless a majority of shareholders other than the TCI Control Shareholders vote in favor of such proposal;

• The TCI Control Shareholders are prohibited from seeking to influence, or attempting to control by proxy or otherwise, any other person's vote of The Separate Company's stock;

• Officers, directors, and employees of TCI or LMC, or any of the TCI Control Shareholders are prohibited from communicating with any officer, director, or employee of The Separate Company except on the limited matters on which they are permitted to vote. Further restrictions require that, in order for a TCI Control Shareholder to seek to initiate action on an issue on which they are entitled to vote, they must do so in writing;

• The Separate Company is prohibited from acquiring more than 14.99% of the fully diluted equity shares of Time Warner, with exceptions in the event that the TCI Control Shareholders sell their stock in The Separate Company or in TCI and LMC; and

• The Separate Company is prohibited from voting its shares (other than a de minimis voting share necessary for tax purposes) in Time Warner, except that such shares can become voting if The Separate Company sells them to an Independent Third Party or in the event that the TCI Control Shareholders sell their stock in The Separate Company or in TCI and LMC.

The Commission has reason to believe that the divestiture of TCI's and LMC's interest in Time Warner to The Separate Company is in the public interest. The required divestiture of the Time Warner stock by TCI and LMC and the ancillary restrictions outlined above are beneficial to consumers because (1) they would restore TCI's otherwise diminished incentives to carry cable programming that would compete with Time Warner's cable programming; and (2) they would eliminate TCI's and LMC's ability to influence the operations of Time Warner.

The proposed consent order also requires TCI and LMC to apply to the Internal Revenue Service (''IRS'') for a ruling that the divestiture of TCI's and LMC's interest in Time Warner to The Separate Company would be generally tax-free. Upon receipt of the IRS Ruling, TCI and LMC has thirty days to transfer its Time Warner stock to The Separate Company. After TCI and LMC divest this interest in Time Warner to The Separate Company, TCI, LMC, Magness and Malone are prohibited from acquiring any stock in Time Warner, above a collective de minimis nonvoting amount, without the prior approval of the Commission.

Pending the ruling by the IRS, or in the event that the TCI and LMC are unable to obtain such an IRS ruling, (1) TCI, LMC, John C. Malone and Bob Magness, collectively and individually, are capped at level no more than the lesser of 9.2 percent of the fully diluted equity of Time Warner or 12.4% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles; and (2) TCI, LMC and the TCI Control Shareholders' interest in Time Warner must be nonvoting (other than a de minimis voting share necessary for tax purposes), unless the interest is sold to an Independent Third Party. This nonvoting cap is designed to restore TCI's otherwise diminished incentives to carry cable programming that would compete with Time Warner's cable programming as well as to prevent TCI from seeking to influence Time Warner's competitive behavior.

B. TCI's Long-Term Carriage Agreement With Turner Is Canceled. As part of the transaction, Time Warner and TCI entered into PSAs that required TCI to carry Turner programming for the next twenty years, at a price set at the lesser of 85% of the industry average price or the lowest price given to any distributor. According to the complaint, the PSAs would tend to prevent Time Warner's rivals from achieving sufficient distribution to threaten Time Warner's market power by locking up scarce TCI channel space for an extended period of time. By negotiating this arrangement as part of the Turner acquisition, and not at arms length, Time Warner was able to compensate TCI for helping to achieve this result. Under the Interim Agreement, TCI and Time Warner are obligated to cancel the PSAs. Following cancellation of the PSAs, there would be a six month ''cooling off'' period during which Time Warner and TCI could not enter into new mandatory carriage requirements on an analog tier for Turner programming.[1] This cooling off period will ensure that such agreements are negotiated at arm's length. Thereafter, the parties cannot enter into any agreement that would secure Time Warner guaranteed mandatory carriage rights on TCI analog channel capacity for more than five-year periods. This restriction would not prevent TCI from having renewal options to extend for additional five-year periods, but would prohibit Time Warner from obligating TCI to carry a Time Warner channel for more than five years. The only exceptions to the cooling off period for Time Warner/TCI carriage agreements would relate to WTBS and HLN on which there are no existing contracts. Any such carriage agreements for those services would also be limited to five years.

In requiring the cancellation of the PSAs and prescribing shorter renewal option periods, the Commission has not concluded that any such long-term programming agreements are anticompetitive in and of themselves or would violate the antitrust laws standing alone. Rather, the Commission has concluded that the PSAs are anticompetitive in the context of the entire transaction arising from the merger and ownership of Time Warner stock by TCI and in light of those two companies' significant market shares in both programming and cable service. The divestiture and rescission requirements would therefore sever complementary ownership and long-term contractual links between TCI and Time Warner. This would restore incentives for TCI, a cable operator serving nearly a third of the nation's cable households, to place non-Time Warner programming on its cable systems, in effect disciplining any market power resulting from a combination of Time Warner and Turner programming.

C. Time Warner is Barred From Bundling HBO with any Turner Programming and CNN, TNT and WTBS with Time Warner Programming. Paragraph V bars Time Warner from bundling HBO with Turner channels—that is, making HBO available, or available on more favorable terms, only if the purchaser agrees to take the Turner channels. Time Warner is also barred from bundling CNN, TNT, or

[1] Analog technology is currently used for cable programming distribution and places significant limitations on the addition of new channels. Digital technology, which is still in its infancy and not currently a competitive factor in video distribution, has the potential to expand capacity sixfold, thereby substantially alleviating capacity constraints on the digital tier.

WTBS with Time Warner channels. This provision applies to new programming as well as existing programming. This provision is designed to address concerns that the easiest way the combined firm could exert substantially greater negotiating leverage over cable operators is by combining all or some of such ''marquee'' services and offering them as a package or offering them along with unwanted programming. Because the focus of the provision is on seeking to prevent the additional market power arising from this combination of programming, this provision does not prevent bundling engaged in pre-merger—that is, Turner channels with Turner channels and pre- merger Time Warner channels with Time Warner channels. Rather, it is narrowly targeted at Time Warner's use of its newly-acquired stable of ''marquee'' channels to raise prices by bundling.

The Commission emphasizes that, in general, bundling often benefits customers by giving firms an incentive to increase output and serve buyers who would otherwise not obtain the product or service. The Commission, however, believes that, in the context of this transaction, the limited bar on bundling is a prudent measure that will prevent actions by Time Warner that are likely to harm competition.

D. Time Warner is Barred from Price Discrimination Against Rival MVPDs. Paragraph VI is designed to prevent Time Warner from using its larger stable of programming interests to disadvantage new entrants into the distribution of cable programs such as Direct Broadcast Services, wireless systems, and systems created by telephone companies. The complaint alleges that, as a programmer that does not own its own distribution, Turner pre- merger had no incentive to and did not generally charge significantly higher prices to new MVPD entrants compared to the prices offered to established MVPDs. Under the terms of Paragraph VI, the preacquisition range of pricing offered by Turner is used as a benchmark to prevent Time Warner from discriminating against the rival distributors of programming in its service areas, and Time Warner may not increase the range of pricing on Turner programming services between established MVPDs and new entrants any more than Turner had pre-merger. Because Time Warner's incentive to discriminate against MVPDs stems from an incentive to protect its own cable company from those in or entering its downstream distribution areas, this provision only covers competitors in Time Warner's distribution areas. Because the price charged by Time Warner as a programmer to Time Warner's cable systems is, to some extent, an internal transfer price, the proposed consent order uses as a benchmark the price charged to the three largest cable system operators nationwide rather than the price charged to Time Warner. This provision, therefore, compares the price charged to Time Warner's competitors in the overlap areas with the price charged to the three largest cable system operators, and asks whether the spread between the two is any greater than the pre-merger spread between a similarly situated MVPD and the three largest cable system operators. It thus focuses on the greater possibility for price discrimination against new MVPD entrants arising directly as a result of this merger. It both ensures that Time Warner's additional market power as a result of this merger does not result in higher prices to new MVPD entrants, while it narrowly protects only those new entrants that Time Warner may have an incentive to harm.

E. Conduct and Reporting Requirements Designed to Ensure that Time Warner Cable Does Not Discriminatorily Deny Carriage to Unaffiliated Programmers. The order has two main provisions designed to address concerns that this combination increases Time Warner's incentives to disadvantage unaffiliated programmers in making carriage decisions for its own cable company. Paragraph VII, drawn from statutory provisions in the 1992 Cable Act, is designed to prevent Time Warner from discriminating in its carriage decisions so as to exclude or substantially impair the ability of an unaffiliated national video programmer to enter into or to compete in the video programming market. The Commission views these provisions as working in tandem with the collection and reporting requirements contained in Paragraph VIII. Under that paragraph, Time Warner is required to collect and maintain information about programming offers received and the disposition of those offers as well as information comparing Time Warner cable systems' carriage rates to carriage rates on other MVPDs for national video programming services. Such information would be reported on a quarterly basis to the management committee of TWE. TWE's management committee includes representatives of U S West since U S West is a minority partner in TWE. TWE owns or operates all of Time Warner's cable systems. Because U S West's incentives would be to maximize return to TWE's cable systems rather than to Time Warner's wholly owned programming interests, it would have strong incentives to alert the Commission to actions by Time Warner that favored Time Warner's wholly owned programming interests at the expense of Time Warner cable systems' profitability. Such information would also be available for inspection independently by the Commission. Furthermore, Time Warner's General Counsel responsible for cable systems is required to certify annually to the Commission its compliance with the substantive prohibitions in Paragraph VII.

F. Time Warner Cable Agrees to Carry CNN Rival. Of the types of programming in which the post-merger Time Warner will have a leading position, the one with the fewest existing close substitutes is the all-news segment, in which CNN is by far the most significant player. There are actual or potential entrants that could in the future erode CNN's market power, but their ability to do so is partly dependent on their ability to secure widespread distribution. Without access to Time Warner's extensive cable holdings, such new entry may not be successful. Time Warner's acquisition of CNN gives it both the ability and incentive to make entry of competing news services more difficult, by denying them access to its extensive distribution system. To remedy this potential anticompetitive effect, Time Warner would be required to place a news channel on certain of its cable systems under Paragraph IX of the proposed agreement. The rate of roll-out and the final penetration rate is set at levels so as not to interfere with Time Warner's carriage of other programming. It is set at such a level that Time Warner may continue carrying any channel that it is now carrying, may add any channel that it is contractually committed to carry in the future, and may continue any plans it has to carry unaffiliated programming in the future. It limits only Time Warner's ability to give effect to its incentive to deny access even to a news channel that does not interfere with such commitments or plans. Time Warner has committed to achieve penetration of 50% of total basic subscribers by July 30, 1999, if it seeks to fulfill this provision by increasing carriage for an existing channel, or to achieve penetration of 50% of total basic subscribers by July 30, 2001, if it seeks to fulfill this provision by carrying a channel not currently carried by Time Warner. This shorter period is possible in the former case because, to the extent that Time Warner is already committed to carry the channel on a portion of Time Warner's systems, less additional

capacity would need to be found in order to achieve the required penetration. On the other hand, the longer period if a new news service is selected assures that an existing news service or other service need not be displaced to make room for the new service.

This provision was crafted so as to give Time Warner flexibility in choosing a new news channel, without undermining the Commission's competitive concern that the chosen service have the opportunity to become a strong competitor to CNN. To ensure that the competing news channel is competitively significant, the order obligates Time Warner to choose a news service that will have contractual commitments with unaffiliated cable operators to reach 10 million subscribers by February 1, 1997. Together with Time Warner's commitments required by the proposed order, such a service would have commitments for a total of approximately 15 million subscribers. In the alternative, Time Warner could take a service with a smaller unaffiliated subscriber base, if it places the service on more of its own systems in order to assure that the service's total subscribers would reach 15 million. In order to attract advertisers and become a competitive force, a news service must have a critical mass of subscribers. The thresholds contained in this order give Time Warner flexibility while ensuring that the service selected has enough subscribers to have a credible opportunity to become an effective competitor. The February 1, 1997, date was selected so as to give competitive news services an opportunity to achieve the required number of subscribers.

Accordingly, this provision should not interfere with Time Warner's plans to carry programming of its choosing or unduly involve the Commission in Time Warner's choice of a new service. It is analogous to divestiture of one channel on some cable systems and is thus far less burdensome to Time Warner than the typical antitrust remedy which would require that Time Warner divest some or all of cable systems in their entirety. The Commission, however, recognizes that this provision is unusual and invites public comment on the appropriateness of such a requirement.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 60 days for reception of comments from interested persons. Comments received during this period will become part of the public record. After 60 days, the Commission will again review the agreement and comments received, and will decide whether it should withdraw from the agreement or make final the order contained in the agreement.

By accepting the consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or in any way to modify their terms.

Benjamin I. Berman,

Acting Secretary.

Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney In the Matter of Time Warner Inc., File No. 961–0004

The proposed merger and related transactions among Time Warner, Turner, and TCI involve three of the largest firms in cable programming and delivery—firms that are actual or potential competitors in many aspects of their businesses. The transaction would have merged the first and third largest cable programmers (Time Warner and Turner). At the same time it would have further aligned the interests of TCI and Time Warner, the two largest cable distributors. Finally, the transaction as proposed would have greatly increased the level of vertical integration in an industry in which the threat of foreclosure is both real and substantial.[1] While the transaction posed complicated and close questions of antitrust enforcement, the conclusion of the dissenters that there was no competitive problem at all is difficult to understand.

Many of the concerns raised in the dissenting Commissioners statements are carefully addressed in the analysis to aid public comment. We write to clarify our views on certain specific issues raised in the dissents.

Product market. The dissenting Commissioners suggest that the product market alleged, ''the sale of Cable Television Programming Services to MVPDs (Multichannel Video Programming Distributors),'' cannot be sustained. The facts suggest otherwise. Substantial evidence, confirmed in the parties' documents and testimony, as well as documents and sworn statements from third-parties, indicated the existence of an all cable television market. Indeed, there was significant evidence of competitive interaction in terms of carriage, promotions and marketing support, subscriber fees, and channel position between different segments of cable programming, including basic and premium channel programming. Cable operators look to all types of cable programming to determine the proper mix of diverse content and format to attract a wide range of subscribers.

Although a market that includes both CNN and HBO may appear somewhat unusual on its face, the Commission was presented here with substantial evidence that MVPDs require access to certain ''marquee'' channels, such as HBO and CNN, to retain existing subscribers or expand their subscriber base. Moreover, we can not concur that evidence in the record supports Commissioner Azcuenaga's proposed market definition, which would segregate offerings into basic and premium cable programming markets.

Entry. Although we agree that entry is an important factor, we cannot concur with Commissioner Azcuenaga's overly generous view of entry conditions in this market. While new program channels have entered in the past few years, these channels have not become competitively significant. None of the channels that has entered since 1991 has acquired more than a 1% market share.

Moreover, the anticompetitive effects of this acquisition would have resulted from one firm's control of several marquee channels. In that aspect of the market, entry has proven slow and costly. The potential for new entry in basic services cannot guarantee against competitive harm. To state the matter simply, the launch of a new ''Billiards Channel,'' ''Ballet Channel,'' or the like will barely make a ripple on the shores of the marquee channels through which Time Warner can exercise market power.

Technology. Commissioner Azcuenaga also seems to suggest that the Commission has failed to recognize the impact of significant technological changes in the market, such as the emergence of new delivery systems such as direct broadcast satellite networks (''DBS'').[2] We agree that these alternative technologies may someday become a significant competitive force

[1] Both Congress and the regulators have identified problems with the effects of vertical foreclosure in this industry. See generally James W. Olson and Lawrence J. Spiwak, Can Short-term Limits on Strategic Vertical Restraints Improve Long-term Cable industry Market Performance?, 13 *Cardozo Arts & Entertainment Law Journal* 283 (1995). Enforcement action in this case is wholly consistent with the goals of Congress in enacting the 1992 Cable Act: providing greater access to programming and promoting competition in local cable markets.

[2] DBS providers are included as participants in the relevant product market.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
INSILCO CORPORATION,	)	Docket No. C-3783
	)	
a corporation.	)	
	)	

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Insilco Corporation ("Insilco"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired certain assets of Helmut Lingemann, GmbH, ("Lingemann") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

For purposes of this Complaint the following definitions apply:

1. "Welded Aluminum Tubes", including welded aluminum tubes with diameters of 50 millimeters or greater ("Large Welded Aluminum Tubes") and welded aluminum tubes with diameters less than 50 millimeters ("Small Welded Aluminum Tubes"), means thin wall welded-seam aluminum tubes used in the manufacture of heat exchangers, which are devices that transfer heat from one fluid or gas to another medium, generally air.

2. "Non-Aggregated, Customer-Specific Information" means information about a product’s cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.

II. THE RESPONDENT

3. Respondent Insilco is a corporation organized, existing, and doing business under and by virtue of the laws of

the State of Delaware, with its principal place of business at 425 Metro Place N, Box 7196, Dublin, Ohio, 43017.

4. Insilco is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE ACQUIRED COMPANY

5. Helima-Helvetion, Inc. ("Helima") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business having been located at Duncan, South Carolina.

6. Helima, at all times relevant herein, was engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and was a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

IV. THE ACQUISITIONS

7. On or about July 10, 1996, Insilco purchased from Lingemann for $12.8 million the assets of Helima ("Helima Acquisition"); for $17 million, the stock of Lingemann’s European manufacturer of welded aluminum heat exchanger tubes, ARUP Alu-Rohr und Profil, GmbH; and the option to purchase Maschinenbau, GmbH, a Lingemann subsidiary in Germany that manufactures mills used in the production of aluminum tubes (together, the "Acquisitions").

8. Prior to the consummation of the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information all of which is the type of information that would likely have been detrimental to competition in the relevant markets if the Acquisition had not been consummated.

9. The Non-Aggregated, Customer-Specific Information transferred from Helima to Insilco included descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-by-customer future pricing strategies.

V. THE RELEVANT MARKETS

10. For purposes of this Complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Large Welded Aluminum Tubes.

11. For purposes of this Complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Small Welded Aluminum Tubes.

12. For purposes of this Complaint, the relevant geographic market for both relevant lines of commerce is North America.

13. Each of the relevant markets is highly concentrated. As a result of the Helima Acquisition, Insilco is currently the only supplier of Large Welded Aluminum Tubes with 100% of the market, and one of only two suppliers of Small Welded Aluminum Tubes, with a market share of over 90%.

14. There has been no entry into the market for Large Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Because the cost of entering and producing Large Welded Aluminum Tubes is relatively high compared to the limited potential sales revenues available to an entrant, entry into this market is not likely to be profitable. Consequently, entry into the Large Welded Aluminum Tube market is not likely to occur in a timely manner and counteract the additional anticompetitive effects likely to result from the Helima Acquisition. Entry into this relevant market is difficult and unlikely.

15. There has been no entry into the market for Small Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Additional anticompetitive effects resulting from the Helima Acquisition are likely and will continue until such time as actual and sufficient entry occurs.

16. Prior to the Acquisitions, Insilco and Helima were actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

17. The Acquisitions have substantially lessened or may substantially lessen competition in the following ways:

a. they have eliminated Helima as a substantial independent competitor in the relevant markets;

b. they have eliminated actual, direct, and substantial competition between Insilco and Helima in the relevant markets;

c. they have increased the level of concentration in the already highly concentrated relevant markets;

d. they have led, or may lead, to increases in prices in the relevant markets;

e. they have led, or may lead, to a reduction in service in the relevant markets;

f. they have led, or may lead, to the reduction in quality in the relevant markets;

g. they have led, or may lead, to a reduction in technological improvements in the relevant markets;

h. they have increased barriers to entry into the relevant markets; and

i. they have given Insilco market power in the relevant markets.

VII. EFFECTS OF INFORMATION TRANSFER

18. Insilco received from Lingemann competitively sensitive information prior to the consummation of the Acquisitions, that, but for the consummation of the Acquisitions, may have detrimentally affected competition in the relevant markets.

VIII. VIOLATIONS CHARGED

19. The effects of the Acquisitions may be substantially to lessen competition or tend to create a monopoly in violation of

Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

20. Insilco, through the Acquisitions, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

21. Prior to the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information about customers for which they both competed in the relevant product markets in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of January, 1998, issues its Complaint against said respondent.

By the Commission, Commissioner Swindle not participating.

Benjamin I. Berman
Acting Secretary

0610197

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of

TC GROUP, L.L.C.,
a limited liability company,

RIVERSTONE HOLDINGS LLC,
a limited liability company,

CARLYLE/RIVERSTONE GLOBAL ENERGY AND POWER FUND II, L.P.,
a limited partnership,

and

CARLYLE/RIVERSTONE GLOBAL ENERGY AND POWER FUND III, L.P.,
a limited partnership.

Docket No. C-4183

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondent TC Group, L.L.C. ("Carlyle"), a limited liability company, and Respondent Riverstone Holdings LLC ("Riverstone"), a limited liability company, each subject to the jurisdiction of the Commission, have through affiliates entered into an agreement and plan of merger to acquire equity interests in Kinder Morgan, Inc. ("KMI"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE PARTIES

A. TC Group, L.L.C.

1. Respondent TC Group, L.L.C. ("Carlyle") is a limited liability company doing business as The Carlyle Group, and is organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 S, Washington, DC 20004.

2. Respondent Carlyle is, and at all times relevant herein has been, engaged in the business of originating, managing and operating private equity funds. As part of its private equity fund business, Respondent Carlyle directly or indirectly acquires interests in a variety of firms, including, as relevant here, midstream energy companies whose businesses include the terminaling of gasoline and other light petroleum products.

3. Respondent Carlyle is, and at all times relevant herein has been, engaged in activities in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. Riverstone Holdings LLC

4. Respondent Riverstone Holdings LLC ("Riverstone") is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019.

5. Respondent Riverstone is, and at all times relevant herein has been, engaged in the business of originating, managing and operating private equity funds. As part of its private equity fund business, Respondent Riverstone directly or indirectly acquires interests in a variety of firms, including, as relevant here, midstream energy companies whose businesses include the terminaling of gasoline and other light petroleum products.

6. Respondent Riverstone is, and at all times relevant herein has been, engaged in activities in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

C. Carlyle/Riverstone Global Energy and Power Fund II, L.P.

7. Respondent Carlyle/Riverstone Global Energy and Power Fund II, L.P. ("CR-II") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).

8. Respondent CR-II is, and at all times relevant herein has been, a private equity fund that holds interests in a variety of investments.

9. Respondent CR-II is a joint venture between, and is managed and controlled by, Respondents Carlyle and Riverstone.

10. Respondent CR-II holds a fifty percent interest in MGG Midstream Holdings GP, LLC, the general partner of MGG Midstream Holdings, L.P., which in turn holds 100% of Magellan Midstream Holdings GP, LLC, the general partner of Magellan Midstream Holdings, L.P., which in turn holds 100% of Magellan GP, LLC, the general partner of Magellan Midstream Partners, L.P. ("Magellan"). Magellan is a midstream energy firm whose business includes the terminaling of gasoline and other light petroleum products.

11. Respondent CR-II has the right to designate two representatives on a four-member Board of Managers of MGG Midstream Holdings GP, LLC, and has the ability to veto actions by the Board of Managers. The CR-II representatives on the Board of Managers also serve as CR-II's representatives on the Boards of Directors of Magellan Midstream Holdings GP, LLC, and Magellan GP, LLC.

12. As a result of the interests and rights set forth above in Paragraphs 9, 10 and 11, Respondents Carlyle, Riverstone and CR-II have the ability to exercise veto power over actions by the Board of Managers of MGG Midstream Holdings GP, LLC and to receive non-public competitively sensitive information from and about Magellan.

13. Through the interests set forth above in Paragraphs 9 and 10, Respondents Carlyle, Riverstone, and CR-II are, and at all times relevant herein have been, engaged in the business of terminaling gasoline and other light petroleum products.

14. Respondent CR-II is, and at all times relevant herein has been, engaged in activities in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

D. Carlyle/Riverstone Global Energy and Power Fund III, L.P.

15. Respondent Carlyle/Riverstone Global Energy and Power Fund III, L.P. ("CR-III"), is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 712 Fifth Avenue, 51st Floor, New York, NY 10019 (c/o Riverstone Holdings LLC).

16. Respondent CR-III is, and at all times relevant herein has been, a private equity fund that has been set up to hold interests in a variety of investments.

17. Respondent CR-III is a joint venture between, and is managed and controlled by, Respondents Carlyle and Riverstone.

18. Respondent CR-III is, and at all times relevant herein has been, engaged in activities in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

19. On August 28, 2006, Kinder Morgan, Inc. ("KMI") announced that it had entered into a definitive merger agreement under which a group of investors (collectively the "Investor Group") would acquire all outstanding shares of KMI for approximately $14.4 billion plus the assumption of more than $7 billion in debt (the "Acquisition").

20. KMI is a midstream energy firm whose business includes, directly or through affiliates, the terminaling of gasoline and other light petroleum products.

21. The Investor Group consists of (1) Members of KMI management, including Chairman and Chief Executive Officer Richard Kinder; (2) Goldman Sachs Capital Partners and affiliates; (3) American International Group and affiliates; (4) Carlyle Partners IV, L.P., a private equity fund managed and controlled by Respondent Carlyle; and (5) Respondent CR-III, a private equity fund jointly managed and controlled by Respondents Carlyle and Riverstone.

22. As a result of the Acquisition, Respondents Carlyle and Riverstone, through their interests in Respondent CR-III, will jointly hold approximately 11.3% of the equity of KMI.

23. As a result of the Acquisition, Respondent Carlyle, through its interest in Carlyle Partners IV, L.P., will also hold approximately 11.3% of the equity of KMI.

24. As a result of their interest in KMI held through CR-III, Respondents Carlyle and Riverstone will have the right to appoint a representative to the Board of Directors of KMI and to receive non-public competitively sensitive information from and about KMI.

25. As a result of its interest in KMI held through Carlyle Partners IV, L.P., Respondent Carlyle will have the right to appoint a representative to the Board of Directors of KMI and to receive non-public competitively sensitive information from and about KMI.

III. TRADE AND COMMERCE

A. Relevant Market

26. Terminals are specialized facilities with large storage tanks used for the receipt and local distribution of large quantities of gasoline and other light petroleum products. Terminals receive deliveries of gasoline and other light petroleum products from pipelines or marine vessels, store the products in large tanks, and redeliver them into tank trucks for ultimate delivery to retail gasoline stations or other buyers. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.

27. A relevant line of commerce in which to evaluate the effects of the Acquisition is the terminaling of gasoline and other light petroleum products.

28. Magellan and KMI both own competing terminals in each of the following metropolitan areas in the southeastern United States: (a) Birmingham, Alabama; (b) Albany, Georgia; (c) Atlanta (Doraville), Georgia; (d) Charlotte, North Carolina; (e) Greensboro, North Carolina; (f) Selma, North Carolina; (g) North Augusta, South Carolina; (h) Spartanburg, South Carolina; (i) Knoxville, Tennessee; (j) Richmond, Virginia; and (k) Roanoke, Virginia.

29. Because of costs and delivery logistics, buyers of gasoline and other light petroleum products in any of the metropolitan areas listed above in Paragraph 28, and shippers of such products into any of such metropolitan areas, would have no effective alternative to terminals located within the area.

30. Each of the metropolitan areas listed above in Paragraph 28 is a relevant section of the country in which to evaluate the effects of this Acquisition on the terminaling of gasoline and other light petroleum products.

B. Market Structure

31. Following the Acquisition, as a result of Respondents' holding of interests in both Magellan and KMI, the market for the terminaling of gasoline and other light petroleum

products in each geographic area would be either highly concentrated or moderately concentrated, and would become significantly more concentrated as a result of the Acquisition.

C. Entry Conditions

32. Construction of a terminaling facility and its necessary infrastructure, including tanks, pipeline connections, and truck loading facilities, is subject to significant regulatory and other legal constraints, and requires significant sunk costs and substantial time to accomplish.

33. Entry into the market for the terminaling of gasoline and other light petroleum products in any of the eleven geographic areas listed in Paragraph 28 above would not be timely, likely, or sufficient to prevent the anticompetitive effects that are likely to result from the Acquisition.

IV. ANTICOMPETITIVE EFFECTS

34. KMI and Magellan are actual competitors for the terminaling of gasoline and other light petroleum products in each of the relevant sections of the country. By holding significant interests in both KMI and Magellan, by having the right to board representation at both firms, by having the right to exercise veto power over actions by Magellan, and by receiving, using or sharing non-public competitively sensitive information from or about KMI or Magellan, Respondents Carlyle, Riverstone, CR-II and CR-III may substantially lessen competition in the relevant line of commerce in each of the relevant sections of the country.

35. The Acquisition may substantially lessen competition in the following ways, among others:

    a. by eliminating competition between KMI and Magellan in the terminaling of gasoline and other light petroleum products in the relevant sections of the country;

    b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between KMI and Magellan, or between KMI, Magellan and other providers of terminaling services, in the relevant sections of the country; and

    c. by increasing the likelihood that Magellan or KMI, or the combination of Magellan and KMI, will unilaterally exercise market power in the terminaling of gasoline and other light petroleum products;

each of which increases the likelihood that terminal fees and prices for gasoline and other light petroleum products would increase in each of the relevant sections of the country.

V. VIOLATIONS CHARGED

36. The effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of January, 2007, issues its complaint against Respondents.

By the Commission, Commissioner Leibowitz dissenting and Commissioner Rosch recused.

Donald S. Clark
Secretary

SEAL:

051 0154

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of **FRESENIUS AG,** **a corporation.**	**Docket No. C-4159**

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Renal Care Group, Inc. by Fresenius AG and entities controlled by Fresenius AG, including (1) Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, the general partner of which is majority owned by Fresenius AG, (2) Fresenius Medical Care Holdings, Inc., a New York corporation majority owned by Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, and (3) Florence Acquisition, Inc., a Delaware corporation that is wholly owned by Fresenius Medical Care Holdings, Inc., and Fresenius AG (hereafter referred to as "Respondent") having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should

issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius AG is the ultimate parent of (1) Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, the general partner of which is majority owned by Fresenius AG, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany, (2) Fresenius Medical Care Holdings, Inc., a New York corporation majority owned by Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, with its office and principal place of business located at 95 Hayden Avenue, Lexington, MA 02420, and (3) Florence Acquisition, Inc., a Delaware corporation that is wholly owned by Fresenius Medical Care Holdings, Inc, with its office and principal place of business located at 95 Hayden Avenue, Lexington, MA 02420.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Fresenius" means Fresenius AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, Fresenius Medical Care Holdings, Inc., and Florence Acquisition, Inc.), divisions, groups, and affiliates controlled by Fresenius AG (including, after the Effective Date, Renal Care Group, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "RCG" means Renal Care Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Renal Care Group, Inc.(including, but not limited to Renal Dimensions, LLC, and Summit Renal Care, LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" and "Acquirers" means NRI, and each Person that receives the prior approval of the Commission to acquire any of the Appendix A Clinic Assets pursuant to Paragraphs II or V of this Order.

E. "Appendix A Clinics" means the Clinics listed in Appendix A to this Order.

F. "Appendix A Clinic Assets" means the Appendix A Clinics, and all Assets Associated with each of those Clinics;

G. "Assets Associated" means the following assets Relating To the Operation Of A Clinic:

1. all rights under the Clinic's Physician Contracts;

2. leases for the Real Property Of The Clinic;

3. consumable or disposable inventory, including, but not limited to, janitorial, office, and medical supplies, and at least ten (10) normal treatment day requirements of dialysis supplies and pharmaceuticals, including, but not limited to, erythropoietin;

4. all rights, title, and interest of Fresenius in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since October 1, 2005, including, but not limited to, all equipment, furnishings, fixtures, improvements, and appurtenances;

5. any interest (other than leases) held by Fresenius in the Real Property Of The Clinic;

6. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of The Clinic located on the premises of the Clinic or in the possession of the Regional Manager responsible for such Clinic (or copies thereof where Fresenius has a legal obligation to maintain the original document), including, but not limited to:

   a. documents containing information Relating To patients (to the extent transferable under applicable law), including, but not limited to, medical records,

   b. financial records,

   c. personnel files,

   d. Physician lists and other records of the Clinic's dealings with Physicians,

e. maintenance records,

f. documents Relating To policies and procedures,

g. documents Relating To quality control,

h. documents Relating To Payors,

i. documents Relating To Suppliers,

j. documents Relating To the Clinic To Be Divested that are also related to the Operation Of A Clinic that is not a Clinic To Be Divested, *PROVIDED, HOWEVER*, if such documents are located other than on the premises of the Clinic To Be Divested, Fresenius may submit a copy of the document with the portions not Relating To the Clinic To Be Divested redacted, and

k. copies of contracts with Payors and Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Fresenius to make such disclosure;

7. Fresenius's Medicare and Medicaid provider numbers, to the extent transferable;

8. all permits and licenses, to the extent transferable;

9. Intangible Property (other than Software, Licensed Intangible Property, and Unrelated Intangible Property) relating exclusively to the Operation Of The Clinic;

10. any contract Fresenius or RCG has to provide in-hospital dialysis services Relating To the Clinic To Be Divested; and

11. assets that are used in, or necessary for, the Operation Of The Clinic.

PROVIDED, HOWEVER, that "Assets Associated" does not include Excluded Assets.

H. "Assets To Be Divested" means the Appendix A Clinic Assets.

I. "Clinic" means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

J. "Clinic's Physician Contracts" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical

director for the Clinic and "joiner" agreements with Physicians in the same medical practice as a medical director of the Clinic.

K. "Clinic To Be Divested" and "Clinics To Be Divested" means the Appendix A Clinics.

L. "Contract Services" means services performed pursuant to any Clinic's Physician Contract.

M. "Divestiture Agreement" and "Divestiture Agreements" mean any agreement pursuant to which Fresenius divests any Appendix A Clinic Assets and the Joint Venture Equity Interests pursuant to this Order and with the prior approval of the Commission.

N. "Effective Date" means the date on which Fresenius acquires RCG.

O. "Employee Of A Clinic To Be Divested" and "Employee Of The Clinic To Be Divested" mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, or social worker) who is not a Regional Manager, who is employed by Fresenius, by an Acquirer, or by another manager or owner of such Clinic To Be Divested, and who has worked part-time or full-time on the premises of such Clinic To Be Divested at any time since October 1, 2005, regardless of whether the individual has also worked on the premises of any other Clinic.

P. "Excluded Assets" means:

1. all cash, cash equivalents, and short term investments of cash;

2. accounts receivable;

3. income tax refunds and tax deposits due Fresenius;

4. unbilled costs and fees, and Medicare bad debt recovery claims, arising before a Clinic is divested to an Acquirer;

5. Fresenius's Medical Protocols (except if requested by an Acquirer pursuant to Paragraph II.B.17.b. of this Order);

6. rights to the names "Fresenius," and "Renal Care Group" and any variation of those names, and any names, phrases, marks, trade names, and trademarks to the extent they include the following, "fresenius medical care," "fresenius medical services, "bio-medical applications," everest healthcare," "spectra," "national medical care," "ultraCare;"or "national nephrology associates," "neomedica," and "qualicenters," and any variation of those names.

7. insurance policies and all claims thereunder, except as set forth in the NRI Divestiture Agreements;

8. prepaid items or rebates;

9. minute books (other than governing body minute books of the Clinic To Be Divested), tax returns, and other corporate books and records;

10. any inter-company balances due to or from Fresenius or its affiliates;

11. all benefits plans;

12. all writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the Operation Of A Clinic that is divested;

13. telecommunication systems equipment and applications, and information systems equipment including, but not limited to computer hardware, not physically located at a Clinic To Be Divested but shared with the Clinic To Be Divested through local and/or wide area networking systems;

14. e-mail addresses and telephone numbers of Fresenius's employees;

15. Software;

16. computer hardware used in the Operation Of The Clinic that is (a) not located at the Clinic, and (b) not otherwise to be divested pursuant to a Divestiture Agreement;

17. all Supplier or provider numbers issued to Fresenius or RCG by a Supplier or Payor with respect to any Clinic To Be Divested, except for Fresenius's Medicare and Medicaid provider numbers for each Clinic To Be Divested, to the extent transferable;

18. rights under agreements with Payors and Suppliers that are not assignable even if Fresenius and RCG approve such assignment or, that, according to their terms, cannot be disclosed to third parties even with the permission of Fresenius or RCG to make such disclosures;

19. office equipment and furniture that (a) is not, in the Ordinary Course Of Business, physically located at the Clinic To Be Divested, (b) is shared with Clinics other than the Clinic To Be Divested, and (c) is not necessary to the Operation Of The Clinic To Be Divested;

20. Licensed Intangible Property (subject to the requirements of Paragraph II.B.15);

21. Unrelated Intangible Property;

22. Intangible Property not relating exclusively to the Operation Of The Clinic (subject to the requirements of Paragraph II.B.18); and

23. strategic planning documents that

    a. Relate To the Operation Of The Clinic other than the Clinic To Be Divested, and

    b. are not located on the premises of the Clinic To Be Divested.

Q. "Fresenius Employee Of A Clinic To Be Divested" and "Fresenius Employee Of The Clinic To Be Divested" means an Employee Of A Clinic To Be Divested who is employed by Fresenius.

R. "Fresenius's Medical Protocols" means medical protocols promulgated by either Fresenius or RCG, whether in hard copy or embedded in software, that have been in effect at any time since October 1, 2005. *PROVIDED, HOWEVER*, "Fresenius's Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by either Fresenius or RCG

S. "Governmental Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

T. "Government Approvals For Continued Operation" means any Governmental Approvals, other than Government Approvals For Divestiture, that an Acquirer must have to continue to operate a Clinic To Be Divested.

U. "Governmental Approvals For Divestiture" means any Governmental Approvals that an Acquirer must have to own, and to initially operate, a Clinic To Be Divested, including, but not limited to, state-issued licenses and state-issued certificates of need.

V. "Illinois Clinic Assets" means the Clinics listed in Appendix C, and all Assets Associated with those Clinics.

W. "Illinois Governmental Approvals For Divestiture" means any Governmental Approvals For Divestiture issued by the State of Illinois.

X. "Illinois Joint Venture Equity Interest" means the joint venture equity interest owned by RCG in each of the following joint ventures located in the State of Illinois: (1) Renal Care Group Buffalo Grove, LLC, and (2) Renal Care Group Schaumburg, LLC.

Y. "Intangible Property" means intangible property Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property.

Z. "Joint Venture Equity Interest" means the joint venture equity interest owned by RCG in each of the following joint ventures: (1) RCG Brandon LLC (Brandon, MS), (2) Renal Care Group Schaumburg, LLC, (3) Brownsville Kidney Center, Ltd., (4) El Paso Kidney Center East, Ltd., (5) Renal Care Group Buffalo Grove, LLC, (6) Renal Care Group South Tampa, LLC, (7) Renal Care Group Canton, LLC (Georgia), (8) Renal Care Group Galleria, LLC., and (9) Summit Renal Care, LLC. The joint ventures are more fully described in Appendix D.

AA. "Licensed Intangible Property" means intangible property licensed to Fresenius from a third party Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to Fresenius. "Licensed Intangible Property" does not mean modifications and improvements to intangible property that are not licensed to Fresenius, or Unrelated Intangible Property.

BB. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.

CC. "Monitor Agreement" means the Monitor Agreement dated March 7, 2006, between Fresenius, and Richard A. Shermer, of R. Shermer & Co. The Monitor Agreement is attached as Appendix E to this Order.

DD. "NRI" means National Renal Institutes, Inc., located at 511 Union Street, Suite 1800, Nashville, TN 37219, and which is a wholly owned subsidiary of DSI Holding Company, Inc.

EE. "NRI Divestiture Agreements" means the Amended and Restated Asset Purchase Agreement dated March 9, 2006, but effective as of February 14, 2006, by and among National Renal Institutes, Inc., Renal Care Group, Inc. and Fresenius Medical Care Holdings, Inc., including

all Exhibits (including, but not limited to, the Assignment and Assumption Agreement, Bill of Sale, License Agreement, Transition Services Agreement, Escrow Agreement, Lab Services Agreement, Supply Agreement, Transfer Documents for Real Property, and Partial Waiver Agreement) and Schedules.

FF. "Operation Of A Clinic" and "Operation Of The Clinic" mean all activities Relating To the business of a Clinic, including, but not limited to:

1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of the Clinic;

3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;

4. purchasing supplies and equipment for the Clinic;

5. negotiating leases for the premises of the Clinic;

6. providing counseling and support services to patients receiving products or services from the Clinic;

7. contracting for the services of medical directors for the Clinic;

8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and

9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.

GG. "Ordinary Course Of Business" means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of The Clinic that are consistent with past practices of

such Person in the Operation Of The Clinic, including, but not limited to past practice with respect to amount, timing, and frequency.

HH. "Other Contracts Of Each Clinic To Be Divested" means all contracts Relating To the Operation Of A Clinic, where such Clinic is a Clinic To Be Divested – including, but not limited to, contracts for goods and services provided to the Clinic and contracts with Payors – but does not mean the Clinic's Physician Contracts and the leases for the Real Property Of The Clinic.

II. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

JJ. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

KK. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

LL. "Real Property Of The Clinic" means real property on which, or in which, the Clinic is located, including real property used for parking and for other functions Relating To the Operation Of The Clinic.

MM. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

NN. "Regional Manager" means any individual who has been employed by Fresenius or RCG with supervisory responsibility for three or more Clinics.

OO. "Regional Manager Of A Clinic To Be Divested" and "Regional Manager Of The Clinic To Be Divested" mean a Regional Manager who has had direct supervisory responsibility for a Clinic To Be Divested at any time since October 1, 2005.

PP. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

QQ. "Supplier" means any Person that has sold to Fresenius or RCG any goods or services, other than Physician services, for use in a Clinic To Be Divested. *PROVIDED, HOWEVER,* "Supplier" does not mean an employee of Fresenius or RCG.

RR. "Time Of Divestiture" means with respect to an Appendix A Clinic or a Joint Venture Equity Interest, the date upon which a Clinic or a Joint Venture Equity Interest is divested to an Acquirer pursuant to this Order.

SS. "Unrelated Intangible Property" means Intangible Property that is Relating To:

1. Renal products produced and sold by Fresenius including, but not limited to, dialyzers, bloodlines, hemodialysis machines, peritoneal dialysis cyclers, catheters and tubing, concentrates, water treatment systems and dialysis fluids;

2. Clinical laboratory testing services provided by Fresenius-owned laboratories;

3. Perfusion services provided by Fresenius, including without limitation, operation of heart and lung machines during surgery;

4. Auto transfusion services and products provided by Fresenius, including without limitation, blood processing devices allowing reinfusion of blood lost during surgery;

5. Ambulatory surgery services performed by Fresenius;

6. Disease and case management administrative and coordination services provided by Fresenius;

7. Pharmaceuticals produced and sold by Fresenius, including without limitation, peritoneal dialysis solutions, Vitamin D analogues and phosphate binders;

8. Biologicals produced and sold by Fresenius, including without limitation, therapies and products for the treatment of cancer and immunosuppression in organ and bone marrow transplantation;

9. Hospital and pharmaceutical industry facility development, engineering and management services provided by Fresenius;

10. Infusion therapy and products provided by Fresenius, including without limitation, anesthesia, electrolyte and glucose infusion solutions and nutritional infusion solutions;

11. Nutrition therapies and products provided by Fresenius, including without limitation, feeding tubes, feeding pumps, artificial feeding products and services;

12. Cell separation therapy and products provided by Fresenius, including without limitation, removal of diseased cells from blood in leukemia and auto-immune disease applications;

13. Adsorption therapies and products provided by Fresenius, including without limitation, products and therapies for the removal of undesirable substances from the blood (e.g., cholesterol) and products and therapies for the treatment of arthritis;

14. Blood bank products and services provided by Fresenius, including without limitation, blood collection and storage services and products and blood transfusion services and products;

15. Hydroxyethyl starch (HES) substitutes produced and sold by Fresenius, which are maize-based solutions that can compensate for deficient blood volume and improve blood viscosity; and/or

16. Genetic engineering, antibody and cell therapy products for the treatment of cancer currently under development by Fresenius.

II.

IT IS FURTHER ORDERED that:

A. Fresenius shall:

1. within ten (10) days after the Effective Date, divest to NRI, absolutely, and in good faith, pursuant to and in accordance with the NRI Divestiture Agreements:

   a. all the Appendix A Clinic Assets, except for the Illinois Clinic Assets, as on-going businesses; and

   b. all of its Joint Venture Equity Interests, except for the Illinois Joint Venture Equity Interests;

   PROVIDED, HOWEVER, if, at the time the Commission makes this Order final, the Commission determines that NRI is not an acceptable acquirer or that the NRI Divestiture Agreements are not an acceptable manner of divestiture, and so notifies Fresenius, then Fresenius shall within six (6) months of the date Fresenius receives notice of such determination from the Commission, divest the Appendix A Clinic Assets, except for the Illinois Clinic Assets, absolutely and in good faith, at no minimum price, as on-going businesses and the Joint Venture Equity Interests, except for the Illinois Joint Venture Equity Interests, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission;

2. within ninety (90) days after the Effective Date, divest to NRI, absolutely, and in good faith, pursuant to and in accordance with the NRI Divestiture Agreements, the Illinois Clinic Assets, as on-going businesses, and the Illinois Joint Venture Equity Interests;

   PROVIDED, HOWEVER, if, at the time the Commission makes this Order final, the Commission determines that NRI is not an acceptable acquirer or that the NRI Divestiture Agreements are not an acceptable manner of divestiture, and so notifies Fresenius, then Fresenius shall within eight (8) months of the date Fresenius receives notice of such determination from the Commission, divest the Illinois Clinic Assets absolutely and in good faith, at no minimum price, as on-going businesses, and the Illinois Joint Venture Equity Interests absolutely and in good faith, at no minimum price, to an Acquirer or

Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

3. The NRI Divestiture Agreements are incorporated by reference into this Order and made a part hereof as Non-Public Appendix F. Any failure by Fresenius to comply with the NRI Divestiture Agreements shall constitute a failure to comply with the Order. The NRI Divestiture Agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of NRI, or any obligations of Fresenius, under the NRI Divestiture Agreements.

4. If Fresenius has divested the Appendix A Clinic Assets and the Joint Venture Equity Interests to NRI prior to the date this Order becomes final, and if, at the time the Commission makes this Order final, the Commission determines that NRI is not an acceptable acquirer or that the NRI Divestiture Agreements are not an acceptable manner of divestiture, and so notifies Fresenius, then Fresenius shall within three (3) business days of receiving such notification, rescind the transaction with NRI and shall divest the Appendix A Clinic Assets and the Joint Venture Equity Interests in accordance with the provisos to Paragraphs II.A.1 and II.A.2 of this Order.

5. If Fresenius has divested to NRI the following Clinics in Rhode Island: North Providence (1635 Mineral Spring Avenue, Providence, RI 02904) and Providence (45 Hemingway Drive, Providence, RI 02915) and the Assets Associated with such Clinics (collectively, the "Rhode Island Clinic Assets"), and:

   a. if, after such divestiture, the Rhode Island Department of Health determines that NRI is not an acceptable acquirer or that the NRI Divestiture Agreements relating to the Rhode Island Clinic Assets are not an acceptable manner of divestiture, and

   b. the Rhode Island Department of Health so notifies Fresenius that it must reacquire the Rhode Island Clinic Assets,

   c. then Fresenius shall, within six (6) months of the date Fresenius receives notice of such determination from the Rhode Island Department of Health, divest the Rhode Island Clinic Assets absolutely and in good faith, at no minimum price, as on-going businesses, to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. *PROVIDED, HOWEVER,* unless otherwise prohibited by the Rhode

Island Department of Health, NRI shall continue to manage such Clinics pending divestiture.

B. Fresenius shall divest the Assets To Be Divested on the terms set forth in this Paragraph II.B, in addition to other terms that may be required by this Order and by the Divestiture Agreements; and Fresenius shall agree with the Acquirers, as part of the Divestiture Agreements, to comply with the terms set forth in this Paragraph II.B.

1. Fresenius shall place no restrictions on the use by any Acquirer of any of the Assets To Be Divested or any of the Clinics To Be Divested.

2. Fresenius shall cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, at the Time Of Divestiture of each Clinic To Be Divested, in obtaining all Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested.

3. Fresenius shall, at the Time Of Divestiture of each Clinic To Be Divested and each Joint Venture Equity Interest:

   a. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; *PROVIDED, HOWEVER*, that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then Fresenius shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph II.B.3.a; and

   b. assign to the Acquirer all of the Clinic's Physician Contracts, and shall obtain all approvals necessary for such assignment; *PROVIDED, HOWEVER*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Fresenius shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph II.B.3.b; and

c. shall obtain all approvals by joint venture partners necessary for the Acquirer to acquire the Clinics To Be Divested that are owned by a joint venture, and shall assign all such approvals to the Acquirer; and

d. shall obtain all approvals by joint venture partners necessary for the Acquirer of Joint Venture Equity Interests to jointly own and operate the Clinics owned by the joint venture, and shall assign all such approvals to the Acquirer.

4. With respect to all Other Contracts Of Each Clinic To Be Divested, Fresenius shall, at the Acquirer's option and at the Time Of Divestiture of each Clinic To Be Divested:

a. if such contract can be assigned without third party approval, assign its rights under the contract to the Acquirer; and

b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:

(1) such third party approval and in assigning the contract to the Acquirer; or

(2) a new contract.

5. Fresenius shall:

a. at the Time Of Divestiture of each Clinic To Be Divested, provide to the Acquirer of such Clinic contact information about Payors and Suppliers for the Clinic; and

b. not object to the sharing of Payor and Supplier contract terms Relating To the Clinics To Be Divested (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Fresenius not to disclose the information to any third party.

6. Until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested, Fresenius shall:

a. facilitate interviews between each Fresenius Employee Of A Clinic To Be Divested and the Acquirer of the Clinic, and shall not discourage such employee from participating in such interviews; and

b. not interfere in employment negotiations between each Fresenius Employee Of A Clinic To Be Divested and the Acquirer of the Clinic.

7. With respect to each Fresenius Employee Of A Clinic To Be Divested who receives, within sixty (60) days of the Time Of Divestiture of any Clinic at which he or she is employed, an offer of employment from the Acquirer of that Clinic:

a. Fresenius shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Fresenius Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the Fresenius Employee Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic;

b. if the Fresenius Employee Of The Clinic To Be Divested accepts such offer of employment from the Acquirer, Fresenius shall cooperate with the Acquirer of the Clinic in effecting transfer of the Fresenius Employee Of The Clinic To Be Divested to the employ of the Acquirer of the Clinic;

c. Fresenius shall eliminate any contractual provisions or other restrictions that would otherwise prevent the Fresenius Employee Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic;

d. Fresenius shall eliminate any confidentiality restrictions that would prevent the Fresenius Employee Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic; and

e. Fresenius shall pay, for the benefit of any Fresenius Employee Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic, all accrued bonuses, vested pensions, and other accrued benefits, except extended sick leave, as to which NRI shall be solely responsible for its payment in full.

8. For a period of two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Fresenius shall not, directly or indirectly, solicit, induce, or attempt to solicit

or induce any Employee Of A Clinic To Be Divested who is employed by the Acquirer to terminate his or her employment relationship with the Acquirer, unless that employment relationship has already been terminated by the Acquirer; *PROVIDED, HOWEVER*, Fresenius may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's employees; *PROVIDED, FURTHER, HOWEVER*, Fresenius may hire employees who apply for employment with Fresenius, as long as such employees were not solicited by Fresenius in violation of this Paragraph II.B.8; *PROVIDED, FURTHER, HOWEVER*, Fresenius may offer employment to an Employee Of A Clinic To Be Divested who is employed by the Acquirer in only a part-time capacity, if the employment offered by Fresenius would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer.

9. For a period of not less than forty-five (45) days, which period may begin prior to the signing of the Consent Agreement and which shall end no earlier than ten (10) days after the Time Of Divestiture of each Clinic To Be Divested ("Forty-Five Day Hiring Period"), Fresenius shall:

    a. facilitate interviews between each Regional Manager Of A Clinic To Be Divested and the Acquirer of the Clinic, and shall not discourage such Regional Manager from participating in such interviews; and

    b. not interfere in employment negotiations between each Regional Manager Of A Clinic To Be Divested and the Acquirer of the Clinic.

PROVIDED, HOWEVER, the terms of this Paragraph II.B.9 shall not apply after Acquirers have hired ten (10) Regional Managers who were each previously employed by Fresenius or RCG at any time since October 1, 2005.

10. With respect to each Regional Manager Of A Clinic To Be Divested who receives, within the Forty-Five Day Hiring Period required by Paragraph II.B.9. of this Order an offer of employment from the Acquirer of that Clinic:

    a. Fresenius shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Regional Manager Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic, and shall not offer any incentive to the Regional Manager Of The Clinic To Be Divested to decline employment with the Acquirer of the Clinic;

b. if the Regional Manager Of The Clinic To Be Divested accepts such offer of employment from the Acquirer, Fresenius shall cooperate with the Acquirer of the Clinic in effecting transfer of the Regional Manager Of The Clinic To Be Divested to the employ of the Acquirer of the Clinic;

c. Fresenius shall eliminate any contractual provisions or other restrictions that would otherwise prevent the Regional Manager Of The Clinic To Be Divested from being employed by the Acquirer of the Clinic;

d. Fresenius shall eliminate any confidentiality restrictions that would prevent the Regional Manager Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic;

e. Fresenius shall pay, for the benefit of any Regional Manager Of The Clinic To Be Divested who accepts employment with the Acquirer of the Clinic, all accrued bonuses, vested pensions and other accrued benefits, except extended sick leave, as to which NRI shall be solely responsible for its payment in full; and

f. for a period of two (2) years following the Time Of Divestiture of the Clinic To Be Divested, Fresenius shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Regional Manager of the Acquirer who was previously a Regional Manager of A Clinic To Be Divested to terminate his or her employment relationship with the Acquirer unless the individual has been terminated by the Acquirer; *PROVIDED, HOWEVER*, Fresenius may make general advertisements for Regional Managers including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at Acquirer's Regional Managers; *PROVIDED, FURTHER, HOWEVER*, Fresenius may hire Regional Managers who apply for employment with Fresenius, as long as such Regional Managers were not solicited by Fresenius in violation of this Paragraph II.B.10.f.

PROVIDED, HOWEVER, after the Acquirer has hired ten (10) Regional Managers who were each previously employed by Fresenius or RCG at any time since October 1, 2005, the terms of this Paragraph II.B.10 shall apply only to those ten (10) Regional Managers hired by the Acquirer.

11. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):

a. Fresenius shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; and

b. For a period of three (3) years following the Time Of Divestiture of each Clinic To Be Divested, Fresenius shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in any of the areas listed in Appendix B of this Order that correspond to such Clinic. *PROVIDED, HOWEVER*, if the Contract Physician, or the Contract Physician's practice group, or other members of the Contract Physician's practice group were providing services to one or more Clinics, other than or in addition to a Clinic To Be Divested, pursuant to a contract with Fresenius or RCG in effect as of October 1, 2005, then Fresenius may continue to contract with such Contract Physicians, or the Contract Physician's practice group, or other members of the Contract Physician's practice group for services to be provided to such other or additional Clinics;

12. With respect to Material Confidential Information relating exclusively to any of the Clinics To Be Divested, Fresenius shall:

a. not disclose such information to any Person other than the Acquirer of such Clinic;

b. after the Time Of Divestiture of such Clinic:

(1) not use such information for any purpose other than complying with the terms of this Order or with any law; and

(2) destroy all records of such information, except to the extent that: (1) Fresenius is required by law to retain such information, and (2) Fresenius's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Fresenius.

13. At the Time Of Divestiture of each Clinic To Be Divested, Fresenius shall provide the Acquirer of the Clinic with manuals, instructions, and specifications sufficient for the Acquirer to access and use any information

a. divested to the Acquirer pursuant to this Order, or

b. in the possession of the Acquirer, and previously used by Fresenius or RCG in the Operation Of The Clinic.

14. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Fresenius shall not solicit the business of any patients that received any goods or services from such Clinic between October 1, 2005, and the date of such divestiture, *PROVIDED, HOWEVER,* Fresenius may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any Fresenius employee.

15. Fresenius shall convey to each Acquirer of a Clinic To Be Divested the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of The Clinic by the Acquirer and if the Acquirer is unable, using commercially reasonable efforts, to obtain equivalent rights from other third parties on commercially reasonable terms and conditions.

16. Fresenius shall do nothing to prevent or discourage Suppliers that, prior to the Time Of Divestiture of any Clinic To Be Divested, supplied goods and services for use in any Clinic To Be Divested from continuing to supply goods and services for use in such Clinic.

17. With respect to Fresenius's Medical Protocols:

a. Fresenius shall retain a copy of Fresenius's Medical Protocols until six (6) months after all of the Assets To Be Divested have been divested pursuant to this Order;

b. If any Acquirer of a Clinic To Be Divested requests in writing to Fresenius, within six (6) months of the Time Of Divestiture of that Clinic to that Acquirer, that Fresenius license a copy of Fresenius's Medical Protocols to that Acquirer, Fresenius shall within five (5) business days of such request, grant to that Acquirer a royalty-free, perpetual, worldwide license for the use, without any limitation, of Fresenius's Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means); and

c. Fresenius shall create no disincentive for any Acquirer of a Clinic To Be Divested to make such a request for a license for Fresenius's Medical Protocols, and shall not enter into any agreement or understanding with any Acquirer that the Acquirer not make such a request.

18. Fresenius shall grant a royalty-free perpetual worldwide license for the use, without any limitation, of all Intangible Property (other than Software, Licensed Intangible Property, and Unrelated Intangible Property) not relating exclusively to the Operation Of The Clinic (including the right to transfer or sublicense such license rights in such Intangible Property, exclusively or nonexclusively, to others by any means).

C. Fresenius shall not acquire RCG until it has obtained for all Clinics To Be Divested and all Joint Venture Equity Interests:

1. all Governmental Approvals For Divestiture necessary for the Acquirers of such Clinics to be able to own, and immediately operate, the Clinics; *PROVIDED, HOWEVER,* Fresenius shall not be required to obtain Illinois Governmental Approvals For Divestiture prior to acquiring RCG;

2. all approvals for assignment of the leases for the Real Property Of The Clinics, as required by Paragraph II.B.3.a of this Order;

3. all approvals for the assignment of the Clinic's Physician Contracts, as required by Paragraph II.B.3.b of this Order; and

4. all approvals by joint venture partners necessary for (a) the Acquirer of such Clinics to be able to acquire the Clinics from the joint venture, and (b) the Acquirer of such Joint Venture Equity Interests to jointly own and operate the Clinics with the joint venture partners, as required by Paragraphs II.B.3.c and II.B.3.d of this Order.

Copies of all such approvals shall be incorporated into the Divestiture Agreements as appendices.

D. The purpose of Paragraph II of this Order is to ensure the continuation of the Clinics To Be Divested as, or as part of, ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition by Fresenius of RCG, to ensure that the Clinics To Be Divested are operated independently of, and in

competition with, Fresenius, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order is issued, Fresenius shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

A. acquire any assets of or financial interest in any Clinic located in any of the areas listed in Appendix B of this Order; or

B. enter into any contract to participate in the management or Operation Of A Clinic located in any of the areas listed in Appendix B of this Order, except to the extent that the contract relates exclusively to:

1. off-site lab services or social worker support materials; or

2. billing services, collection services, bookkeeping services, accounting services, supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively "Such Services"), where appropriate firewalls and confidentiality agreements are implemented to prevent Material Confidential Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by Fresenius or any Clinic other than the Clinic to which Such Services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as "the Notification), *PROVIDED, HOWEVER*, (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Fresenius and not from any other party to the transaction. Fresenius shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting

period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Fresenius shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

PROVIDED, HOWEVER, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

IT IS FURTHER ORDERED that:

A. Richard Shermer, of R. Shermer & Co., shall be appointed Monitor to assure that Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. No later than one (1) day after this Order is made final, Fresenius shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Fresenius, which consent shall not be unreasonably withheld. If Fresenius has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Fresenius of the identity of any proposed Monitor, Fresenius shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Fresenius's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. Fresenius shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Fresenius's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

    a. Assuring that Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order, the Order to Maintain Assets, and the Divestiture Agreements;

    b. Monitoring any transition services agreements;

    c. Assuring that Material Confidential Information is not received or used by Fresenius or the Acquirers, except as allowed in this Order and in the Order to Maintain Assets, in this matter.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Fresenius's compliance with the provisions of this Order, the Order to Maintain Assets, and the Divestiture Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Fresenius's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitors may reasonably request, related to Fresenius's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. Fresenius shall cooperate with any reasonable request of the Monitors and shall take no action to interfere with or impede the Monitor's ability to monitor Fresenius's compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Fresenius on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Fresenius, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitors' duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Fresenius shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Fresenius shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Fresenius, and any reports submitted by the Acquirer with respect to the performance of Fresenius's obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Fresenius of its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.

9. Fresenius may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Order to Maintain Assets, and the Divestiture Agreements.

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph V of this Order and may be the same Person or Persons appointed as Monitor under the Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that:

A. If Fresenius has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Assets To Be Divested pursuant to Paragraph II of this Order, the Commission may appoint a trustee to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Fresenius shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Fresenius to comply with this Order.

B. The Commission shall select the trustee, subject to the consent of Fresenius, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Fresenius has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Fresenius of the identity of any proposed trustee, Fresenius shall be deemed to have consented to the selection of the proposed trustee.

C. Within ten (10) days after appointment of a trustee, Fresenius shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.

D. If a trustee is appointed by the Commission or a court pursuant to this Order, Fresenius shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II of this Order.

2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *PROVIDED, HOWEVER*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order, and to any other relevant information, as the trustee may request. Fresenius shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Fresenius shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Fresenius shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Fresenius's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer or Acquirers as required by this Order; *PROVIDED, HOWEVER*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Fresenius from among those approved by the Commission; *PROVIDED, FURTHER, HOWEVER*, that Fresenius shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of Fresenius, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Fresenius, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the

case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Fresenius, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Fresenius shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. The trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The trustee shall report in writing to Fresenius and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

9. Fresenius may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the trustee from providing any information to the Commission.

E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph V.

F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

VI.

IT IS FURTHER ORDERED that:

A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Fresenius has fully complied with Paragraphs II.A., II.B.3, II.B.5.a, II.B.6, II.B.9, II.B.13, and II.B.17 of this Order, Fresenius shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements. Fresenius shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next four (4) years, Fresenius shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements. Fresenius shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

VII.

IT IS FURTHER ORDERED that Fresenius shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Fresenius,

B. Any proposed acquisition, merger, or consolidation of Fresenius, or

C. Any other change in Fresenius that may affect compliance obligations arising out of this Order, including but, not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Fresenius.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Fresenius, Fresenius shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Fresenius and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Fresenius related to compliance with this Order; and

B. Upon five (5) days' notice to Fresenius and without restraint or interference from Fresenius, to interview officers, directors, or employees of Fresenius, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on June 30, 2016.

By the Commission.

Donald S. Clark

Secretary

SEAL

ISSUED: June 30, 2006

APPENDIX A

APPENDIX A CLINICS

	Clinic Name (Medicare Provider Number)	Clinic Address
1	FMC-Norwood Clinic Dialysis Unit (012516)	1424 North Carraway Blvd. Birmingham, AL 35234
2	FMC-Chilton Peach (012587)	107 Medical Center Dr. Clanton, AL 35045
3	FMC-Walker County Dialysis (012533)	589 Highway 78W Jasper, AL 35501
4	RCG-Marion (042573)	2921 Highway 77, Suite 8 Marion, AR 72364
5	RCG-Osceola Dialysis Center (231656)	1420 West Keiser Avenue Osceola, AR 72370
6	RCG-Avondale (032608)	13055 West McDowell Road Avondale, AZ 85323
7	RCG-Mesa (032551)	1337 South Gilbert Road Mesa, AZ 85204
8	RCG-Southwest Mesa (032526)	1457 West Southern Avenue Mesa, AZ 85202
9	RCG-Northeast Phoenix (032596)	3305 East Greenway Road Phoenix, AZ 85032
10	RCG-Phoenix North (032555)	8046 North 19th Avenue Phoenix, AZ 85021
11	RCG-South Phoenix (032583)	4621 South Central Avenue Phoenix, AZ85040
12	FMC-Tempe (032586)	8820 South Kyrene Road Tempe, AZ 85284
13	RCG-Cottonwood (032562)	203 South Candy Lane Cottonwood, AZ 86326
14	RCG-Prescott (R032523)	980 Willow Creek Road Prescott, AZ 86301

	Clinic Name (Medicare Provider Number)	Clinic Address
15	RCG-Naples (102809)	6625 Hillway Circle Naples, FL 34112
16	FMC-Lakewood (102733)	8131 Cooper Creek Boulevard University Park, FL 34201
17	RCG-Tampa Central (102761)	4705 North Armenia Avenue Tampa, FL 33603
18	RCG-Cartersville (112691)	203 South Tennessee Street Cartersville, GA 30120
19	RCG-Covington (112708)	4179 Baker Street Covington, GA 30014
20	RCG-Cobb County (112675)	506 Roswell Street Marietta, GA 30060
21	FMC-Neomedica Evanston (142511)	1715 Central Street Evanston, IL 60201
22	RCG- Arlington Heights (142628)	17 West Gulf Road Arlington, IL 60006
23	RCG-Scottsdale (142518)	7929 South Cicero Chicago, IL 60652
24	RCG-Markham (142575)	3053-3055 West 159th Street Markham, IL 60426
25	RCG- Hazelcrest (142622)	3470 West 183rd Street Hazelcrest, IL 60429
26	RCG-South Holland (142544)	16136 South Park Avenue South Holland, IL 60473
27	RCG-Loop (142505)	55 East Washington Street Chicago, IL 60602
28	RCG-Waukegan (142577)	1616 Grand Avenue Waukegan, IL 60085
29	RCG Waukegan Home (142567)	1616 Grand Avenue Waukegan, IL 60085

	Clinic Name (Medicare Provider Number)	Clinic Address
30	FMC-Quad Counties Dialysis (152539)	528 North Grandstaff Auburn, IN 46706
31	FMC-Central Fort Wayne (152580)	1940 Blufton Road Fort Wayne, IN 46809
32	FMC-Lake Avenue Dialysis (152508)	3525 Lake Avenue Fort Wayne, IN 46805
33	FMC-Lake Avenue Home (152563)	2414 Lake Avenue Fort Wayne, IN 46805
34	FMC-South Anthony (152533)	7017 South Anthony Boulevard Fort Wayne, IN 46816
35	FMC-Huntington (152575)	3040 West Park Drive Huntington, IN 46750
36	FMC-Noblesville (152555)	865 Westfield Road Noblesville, IN 46060
37	FMC-Blue River Valley Dialysis (152545)	2309 South Miller Street Shelbyville, IN 46176
38	FMC-Marion County (152512)	3834 South Emerson Avenue Indianapolis, IN 46203
39	FMC-Greenwood (152572)	125 Airport Parkway Greenwood, IN 46143
40	FMC-Northwest Indianapolis (152524)	6488 Corporate Way Indianapolis, IN 46278
41	FMC Logansport (152570)	1025 Michigan Logansport, IN 46947
42	FMC Scottsburg (152529)	1451 North Gardner Scottsburg, IN 47170
43	RCG-Louisville (182537)	635 South 3rd Street Louisville, KY 40202
44	RCG-Baton Rouge (192616)	1333 Oneal Lane Baton Rouge, LA 70816

	Clinic Name (Medicare Provider Number)	Clinic Address
45	RCG-Houma (192509)	108 Picone Road Houma, LA 70363
46	RCG-Thibodaux (192535)	406 North Acadia Road Thibodaux, LA 70301
47	RCG-Amesbury (222532)	24 Morrill Place Amesbury, MA 01913
48	RCG-North Andover (222545)	201 Sutton Street North Andover, MA 01845
49	RCG-Canton (252521)	620 East Peace Street Canton, MS 39046
50	RCG-Hazlehurst (252551)	201 North Haley Street Hazlehurst, MS 39083
51	RCG-Jackson North (252501)	571 East Beasely Road Jackson, MS 39206
52	RCG-Jackson South (252535)	2460 Terry Road Jackson, MS 39204
53	RCG-Jackson Southwest (252533)	1828 Raymond Road Jackson, MS 39204
54	FMC-Carthage (252562)	312 Ellis Street Carthage, MS 39051
55	RCG-Lexington (252539)	22579 Dept Street Lexington, MS 39095
56	RCG-Lees Summit (no CMS number)	100 N.E. Missouri Road Lees Summit, MO 64086
57	RCG-Kansas City (262564)	4333 Madison Kansas City, MO 64111
58	FMC Las Cruces (322527)	3961 East Lohman Las Cruces, NM 88011
59	FMC-Preferred Dialysis of Green Valley (292517)	1489 West Warm Springs Henderson, NV 89014

	Clinic Name (Medicare Provider Number)	Clinic Address
60	FMC-Preferred Owned (292507)	2333 Renaissance Drive Las Vegas, NV 89119
61	FMC-Northeast Portland (382540)	703 NE Hancock Street Portland, OR 97212
62	FMC-Oregon Kidney Center (382500)	5318 NE Irving Portland, OR 97213
63	FMC-Sunnyside/SE Portland/Lake Rd (382534)	6902 SE Lake Road Milwaukie, OR 97267
64	FMC-Willamette Valley (382520)	1510 Division Street Oregon City, OR 97045
65	FMC-Sellersville (392617)	700 Lawn Avenue Sellersville, PA 18960
66	RCG-Philadelphia (392601)	3310-24 Memphis Street Philadelphia, PA 19134
67	FMC-Northern Philadelphia (392509)	5933 North Broad Street Philadelphia, PA 19141
68	FMC-North Providence (412506)	1635 Mineral Spring Avenue North Providence, RI 02904
69	FMC-Providence (412500)	40 Hemingway Drive East Providence, RI 02915
70	FMC-Easley D.C. (152541)	125 Whitmire Road Easley, SC 29640
71	FMC-Greenville (422503)	3 Butternut Drive Greenville, SC 29605
72	FMC-Simpsonville (422579)	209 North Maple Street Simpsonville, SC 29681
73	RCG-Memphis North (442640)	4913 Raleigh common Drive Memphis, TN 38128
74	RCG-Memphis Central (442637)	1331 Union Avenue Memphis, TN 38104

	Clinic Name (Medicare Provider Number)	Clinic Address
75	RCG-Memphis Whitehaven (442655)	3420 Elvis Presley Boulevard Memphis, TN 38116
76	RCG-Memphis Midtown (442646)	1166 Monroe Avenue Memphis, TN 38104
77	RCG-Memphis Graceland (442650)	4180 Auburn Road Memphis, TN 38116
78	RCG-Memphis South (442605)	3960 Knight Arnold Road Memphis, TN 38118
79	FMC-Alice (452537)	2345 Alice Regional Boulevard Alice, TX 78332
80	FMC-Corpus Christi (452514)	2733 Swantner Drive Corpus Christi, TX 78404
81	FMC-D.S. of Riverside (452751)	13434 Up River Road Corpus Christi, TX 78410
82	FMC-D.S. of South Texas (452715)	4300 South Padre Island Corpus Christi, TX 78411
83	FMC-D.S. of South Texas-Central (452800)	2222 South Morgan Corpus Christi, TX 78405
84	FMC-North East Texas (452694)	4805 Wesley Street Greenville, TX 75401
85	RCG-El Paso West (452809)	3100 North Stanton Street El Paso, TX 79902
86	RCG-Weslaco (452672)	910 South Utah Street Weslaco, TX 78596
87	RCG-McAllen (452654)	411 Lindberg Avenue McAllen, TX 78501
88	FMC-Edinburg Kidney Center (452764)	4302 South Sugar Road Edinburg, TX 78539
89	FMC-Downtown Spokane (502547)	601 West 5th Avenue Spokane, WA 99204

	Clinic Name (Medicare Provider Number)	Clinic Address
90	**FMC-North Spokane (502538)**	**7407 North Division Street** **Spokane, WA 99208**
91	**FMC-Spokane Valley (502537)**	**12610 East Mirabeau** **Spokane, WA99208**

APPENDIX B

AREA DEFINITIONS

! Five digit numbers refer to zip codes.

! Geographic areas bounded by roads include all properties abutting the referenced road (*i.e.*, properties on both sides of the road).

! Zip codes or other areas fully surrounded by areas included in the area definition shall be considered part of the area definition.

! Area definitions are based on maps submitted to the Commission staff by Fresenius.

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
1	FMC-Norwood Clinic Dialysis Unit (012516)	The area in and/or near Birmingham, Alabama, consisting of: 35060, 35064, 35068, 35204, 35205, 35206, 35207, 35208, 35209, 35210, 35211, 35212, 35213, 35214, 35215, 35217, 35218, 35221, 35222, 35223, 35224, 35228, 35233, 35234, 35235.
2	FMC-Chilton Peach (012587)	The area in and/or near Clanton, Alabama, consisting of: Chilton County (Alabama).
3	FMC-Walker County Dialysis (012533)	The area in and/or near Jasper, Alabama, consisting of: Walker County (Alabama), and 35062, 35575, 35553, 35565.
4	RCG-Osceola Dialysis Center (231656)	The area in and/or near Osceola, Arkansas, consisting of Mississippi County (Arkansas).
5	RCG-Avondale (032608)	The area in and/or near Avondale, Arizona, consisting of: 85035, 85037, 85043, 85307, 85323, 85329, 85338, 85340, 85353.
6	RCG-Mesa (032551), Southwest Mesa (032526)	The area in and/or near Mesa, Arizona, consisting of: 85201, 85202, 85203, 85204, 85205, 85206, 85208, 85210, 85213, 85224, 85225, 85233, 85234, 85236, 85281, 85282, 85283, 85296.
7	RCG-Northeast Phoenix (032596)	The area in and/or near Phoenix, Arizona, consisting of: 85020, 85022, 85023, 85024, 85027, 85028, 85032, 85050, 85254.
8	RCG-Phoenix North (032555)	The area in and/or near Phoenix, Arizona, consisting of: 85012, 85013, 85014, 85015, 85016, 85017, 85019, 85020, 85021, 85022, 85023, 85028, 85029, 85051; the portions of 85003, 85004, 85007, 85009 that lie to the north of I-10.

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
9	RCG-South Phoenix (032583)	The area in and/or near Phoenix, Arizona, consisting of: 85040, 85041, 85042, 85339; the portion of 85009 that lies to the south of West Buckeye Road; the portions of 85007, 85003, 85004, and 85034 that lie to the south of I-17.
10	FMC-Tempe (032586)	The area in and/or near Tempe, Arizona, consisting of: 85202, 85040, 85044, 85048, 85224, 85225, 85226, 85248, 85281, 85282, 85283, 85284.
11	RCG-Cottonwood (032562), Prescott (R032523)	The area in and/or near Prescott, Arizona, consisting of Yavapai County (Arizona), and 86336.
12	RCG-Naples (102809)	The area in and/or near Naples, Florida, consisting of: 34102, 34103, 34104, 34105, 34108, 34109, 34110, 34112, 34113, 34114, 34116, 34117, 34119, 34120.
13	FMC-Lakewood (102733)	The area in and/or near Sarasota, Florida, consisting of: 34201, 34203, 34207, 34231, 34232, 34233, 34234, 34235, 34236, 34237, 34238, 34239, 34240, 34243; the portion of 34202 that lies to the south of State Road 64; the portion of 34208 that lies to the east of 57th Street East, the portion of 34241 that lies to the north of Clark Road/State Road 72.
14	RCG-Brandon (no CMS number)	The area in and/or near Brandon, Florida, consisting of: 33510, 33511, 33527, 33569, 33584, 33594, 33610, 33619.
15	RCG-Tampa Central (102761)	The area in and/or near Tampa, Florida, consisting of: 33602, 33603, 33604, 33605, 33606, 33607, 33609, 33610, 33611, 33614, 33615, 33616, 33619, 33629, 33634.
16	RCG-Canton (no CMS number)	The area in and/or near Canton, Georgia, consisting of: Cherokee County, Pickens County (Georgia), and 30102, 30139, 30171, and 30184.
17	RCG-Cartersville (112691)	The area in and/or near Cartersville, Georgia, consisting of: Bartow County (Georgia), and 30101, 30102, 30103, 30132, 30139, 30145, 30171, 30184.
18	RCG-Covington (112708)	The area in and/or near Covington, Georgia, consisting of: Newton County, Rockdale County (Georgia), and 30014, 30025, 30038, 30052, 30054, 30055, 30056, 30058, 30252, 30663; the portions of 30233 and 31064 that lie to the north of Route 16.
19	RCG-Cobb County (112675)	The area in and/or near Marietta, Georgia, consisting of: Cobb County (Georgia), and 30101, 30127, 30132, 30141, 30157.

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
20	FMC-Neomedica Evanston (142511)	The area in and/or near Chicago, Illinois, consisting of: 0022, 60025, 60029, 60043, 60053, 60062, 60076, 60077,60091 60093, 60201, 60202, 60203, 60625, 60626, 60640, 60645, 60646, 60659, 60660, 60712, 60714.
21	RCG-Buffalo Grove (142650), Schaumburg (142654), Schaumburg Home (141626), Arlington Heights (142628)	The area in and/or near Chicago, Illinois, consisting of: 60004, 60005, 60007, 60008, 60015, 60016, 60018, 60025, 60047, 60056, 60061, 60062, 60067, 60069, 60070, 60074, 60089, 60090, 60101, 60103, 60106, 60107, 60108, 60010, 60133, 60139, 60143, 60157, 60172, 60173, 60188, 60191, 60193, 60194, 60195.
22	RCG-Scottsdale (142518)	The area in and/or near Chicago, Illinois, consisting of: 60402, 60406, 60415, 60419, 60453, 60455, 60456, 60457, 60458, 60459, 60465, 60482, 60501, 60608, 60609, 60615, 60616, 60617, 60619, 60620, 60621, 60623, 60628, 60629, 60632, 60633, 60636, 60637, 60638, 60643, 60652, 60653, 60655, 60803, 60804, 60805, 60827.
23	RCG-Markham (142575), Hazelcrest (142622), South Holland (142544)	The area in and/or near Chicago, Illinois, consisting of: 60406, 60409, 60411, 60419, 60422, 60425, 60426, 60429, 60430, 60438, 60443, 60445, 60452, 60461, 60466, 60469, 60471, 60472, 60473, 60475, 60476, 60477, 60478, 60617, 60619, 60620, 60628, 60633,60643, 60655, 60803, 60805, 60827, 46320, 46321, 46324.
24	RCG-Loop (142505)	The area in and/or near Chicago, Illinois, consisting of: 60406, 60601, 60602, 60603, 60604, 60605, 60606, 60607, 60608, 60609, 60610, 60611, 60612, 60614, 60615, 60616, 60617, 60619, 60620, 60621, 60622, 60623, 60624, 60628, 60629, 60632, 60633, 60636, 60637, 60642, 60643, 60647, 60649, 60652, 60653, 60654, 60655, 60657, 60661, 60827.
25	RCG-Waukegan (142577), Waukegan Home (142567)	The area in and/or near Waukegan, Illinois, consisting of: Lake County (Illinois).
26	FMC-Quad Counties Dialysis (152539)	The area in and/or near Auburn, Indiana, consisting of: DeKalb County (Indiana).
27	FMC-Central Fort Wayne (152580), Lake Avenue Dialysis (152508), Lake Avenue Home (152563), South Anthony (152533)	The area in and/or near Fort Wayne, Indiana, consisting of: Allen, Wells, and Whitley Counties (Indiana).
28	FMC-Huntington (152575)	The area in and/or near Huntington, Indiana, consisting of: Huntington County (Indiana).
29	FMC-Noblesville (F152555)	The area in and/or near Indianapolis, Indiana, consisting of: Hamilton County (Indiana).

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
30	FMC-Blue River Valley Dialysis (152545)	The area in and/or near Indianapolis, Indiana, consisting of: Shelby County (Indiana).
31	FMC-Marion County (152512)	The area in and/or near Indianapolis, Indiana, consisting of: 46107, 46142, 46201, 46203, 46217, 46219, 46221, 46225, 46226, 46227, 46229, 46237, 46239; the portion of 46218 that lies to the south of E. Massachusetts Avenue.
32	FMC-Greenwood (152572)	The area in and/or near Indianapolis, Indiana, consisting of: 46113, 46131, 46142, 46143, 46184, 46217, 46221, 46227, 46237, 46259.
33	FMC- Northwest Indianapolis (152524)	The area in and/or near Indianapolis, Indiana, consisting of: 46214, 46222, 46224, 46228, 46234, 46241, 46254, 46260, 46268, 46278.
34	FMC Logansport (152570)	The area in and/or near Logansport, Indiana, consisting of: Cass County (Indiana), and 46917, 46916, 46939, 46947, 46951, 46970,46975, 46985, 46996.
35	FMC Scottsburg (152529)	The area in and/or near Scottsburg, Indiana, consisting of: 47102, 47170, 47220, 47270, 47229, 47274.
36	RCG-Louisville (182537)	The area in and/or near Louisville, Kentucky, consisting of: Jefferson County (Kentucky).
37	RCG-Baton Rouge (192616)	The area in and/or near Baton Rouge, Louisiana, consisting of: East Baton Rouge Parish, Livingston Parish (Louisiana), and 70776, 70769.
38	RCG-Houma (192509)	The area in and/or near Houma, Louisiana, consisting of: Terrebonne Parish and Lifework Parish (Louisiana).
39	Thibodaux (192535)	The area in and/or near Thibodaux, Louisiana, consisting of: Terrebonne Parish and Lifework Parish (Louisiana).
40	RCG-Amesbury (222532)	The area in and/or near Amesbury, Massachusetts, consisting of: 01830, 01832, 01833, 01834, 01835, 01860, 01913, 01938, 01950, 01951, 01952, 01969, 01985, 03827 03848, 03858, 03865, 03874
41	RCG-North Andover (222545)	The area in and/or near North Andover, Massachusetts, consisting of: 01810, 01826, 01830, 01832, 01835, 01840, 01841, 01843, 01844, 01845, 01864, 01876, 01887, 01921, 01949, 03079, 03811, 03858, 03865.
42	FMC-Carthage (252562)	The area in and/or near Carthage, Mississippi, consisting of: Leake County and Neshoba County (Mississippi).

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
43	RCG-Brandon (252549), Canton (252521), Hazlehurst (252551), Jackson North (252501), Jackson South (252535), Jackson Southwest (252533)	The area in and/or near Jackson, Mississippi, consisting of: Madison County, Hinds County, Rankin County, Copiah County, and Simpson County (Mississippi).
44	RCG-Lexington (252539)	The area in and/or near Lexington, Mississippi, consisting of: Attala County and Holmes County (Mississippi).
45	RCG-Kansas City (262564), Lees Summit (no CMS number)	The area in and/or near Kansas City, Missouri, consisting of: Jackson County (Missouri), and 64012, 64034, 64080, 64082, 64083, 64116, 64117, 66102, 66103, 66106, 66118, 66205, 66206, 66207, 66208.
46	FMC Las Cruces (322527)	The area in and/or near Las Cruces, New Mexico, consisting of: Dona Ana County (New Mexico).
47	FMC-Preferred Dialysis of Green Valley (292517), Preferred Owned (292507)	The area in and/or near Las Vegas, Nevada, consisting of: 89005, 89011, 89012, 89014, 89015, 89030, 89052, 89101, 89102, 89103, 89104, 89106, 89107, 89109, 89110, 89118, 89119, 89120, 89121, 89122, 89123, 89139, 89141, 89142, 89156.
48	RCG-Munroe Falls (362651), Summit (362613), White Ponds (362623)	The area in and/or near Akron, OH, consisting of: Portage County and Summit County (Ohio).
49	FMC-Northeast Portland (382540), Oregon Kidney Center (382500)	The area in and/or near Portland, Oregon, consisting of: 97202, 97203, 97206, 97211, 97212, 97213, 97214, 97215, 97216, 97217, 97218, 97220, 97222, 97230, 97232, 97233, 97236, 97266.
50	FMC- Sunnyside/SE Portland/Lake Rd (382534), Willamette Valley (382520)	The area in and/or near Portland, Oregon, consisting of: 97015, 97027, 97034, 97045, 97062, 97068, 97070, 97202, 97206, 97222, 97233, 97236, 97266, 97267.
51	FMC-Sellersville (392617)	The area in and/or near Philadelphia, Pennsylvania, consisting of: 18054, 18073, 18914, 18915, 18917, 18927, 18932, 18936, 18944, 18951, 18955, 18960, 18962, 18964, 18969,18970, 19438. 19440, 19446.
52	RCG-Philadelphia (392601)	The area in and/or near Philadelphia, Pennsylvania, consisting of: 19111, 19120, 19121, 19122, 19123, 19124, 19125, 19129, 19130, 19132, 19133, 19134, 19137, 19140, 19141, 19144, 19149.
53	FMC-Northern Philadelphia (392509)	The area in and/or near Philadelphia, Pennsylvania, consisting of: 19012, 19095, 19111, 19027, 19038, 19118, 19119, 19120, 19124, 19126, 19128, 19129, 19132, 19138, 19140, 19141, 19144, 19150.

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
54	FMC-North Providence (412506), Providence (412500)	The area in and/or near Providence, Rhode Island, consisting of: 02703, 02760, 02763, 02769, 02771, 02777, 02806, 02809, 02814, 02826, 02828, 02838, 02857, 02860, 02861, 02863, 02864, 02865, 02876, 02885, 02888, 02895, 02896, 02901, 02903, 02904, 02905, 02906, 02907, 02908, 02909, 02910, 02911, 02914, 02915, 02916, 02917, 02919, 02920, 02921, 02940; the portion of 02830 that lies south of Route 102.
55	FMC-Easley D.C. (152541), Greenville (422503), Simpsonville (422579)	The area in and/or near Greenville, South Carolina, consisting of the following South Carolina Counties: Greenville County, Pickens County, Anderson County, Laurens County (South Carolina).
56	RCG-Galleria (442660), Memphis Central (442637), Memphis South (442605), Whitehaven (442655), Memphis Midtown (442646), Graceland (442650), Memphis North (442640)	The area in and/or near Memphis, Tennessee, consisting of Shelby County (Tennessee), and 38002, 38004, 38011, 38017, 38023, 38028, 38036, 38053, 38058.
57	RCG-Marion (042573)	The area in and/or near Marion, Arkansas, consisting of Crittenden County (Arkansas).
58	FMC-Alice (452537)	The area in and/or near Alice, Texas, consisting of: Jim Wells County (Texas), and 78349, 78357, 38384.
59	RCG-Brownsville (452737)	The area in and/or near Brownsville, Texas, consisting of: 78520, 78521, 78526, 78566, 78575, 78578, 78583, 78586.
60	FMC-Corpus Christi (452514), D.S. of Riverside (452751), D.S. of South Texas (452715), D.S. of South Texas-Central (452800)	The area in and/or near Corpus Christi, Texas, consisting of: Nueces County, San Patricio County, and Aransas County (Texas).
61	FMC-North East Texas (452694)	The area in and/or near Terrell, Texas, consisting of: Hunt County, Delta County, Rains County, Hopkins County, Rockwell County Texas); 75164, 75189, 75424, 75442; and the portion of Fannin County (Texas) south of I-82/Route 18.
62	RCG-El Paso East and El Paso Home (452749), El Paso West (452809)	The area in and/or near El Paso, Texas, consisting of: El Paso County (Texas).
63	RCG-Weslaco (452672)	The area in and/or near Weslaco, Texas, consisting of: 78516, 78537, 78538, 78539, 78543, 78558, 78559, 78562, 78570, 78579, 78589, 78592, 78593, 78596, 78594; the portion of 78569 that lies to the west of US-77.

	Divested Clinics (Medicare provider numbers)	Corresponding Area Definition
64	RCG-McAllen (452654)	The area in and/or near McAllen, Texas, consisting of: 78501, 78503, 78504, 78516, 78537, 78538, 78539, 78543, 78557, 78558, 78562, 78570, 78577, 78579, 78589, 78596; the portion of 78569 that lies within Hidalgo County (Texas).
65	FMC-Edinburg Kidney Center (452764)	The area in and/or near Edinburg, Texas, consisting of: 78501, 78503, 78504, 78516, 78537, 78538, 78539, 78543, 78557, 78558, 78562, 78570, 78577, 78579, 78589, 78596; the portion of 78572 that lies to the east of Doffing Road until Doffing Road's northeast terminus; the portion of 78569 that lies within Hidalgo County (Texas).
66	FMC Downtown Spokane (502547), North Spokane (502538), Spokane Valley (502537)	The area in and/or near Spokane, Washington, consisting of: Spokane County (Washington).

APPENDIX C

ILLINOIS CLINICS

	Clinic Name (Medicare provider number)	Clinic Address
1	FMC-Neomedica Evanston (142511)	1715 Central Street Evanston, IL 60201
2	RCG- Arlington Heights (142628)	17 West Gulf Road Arlington, IL 60006
3	RCG-Scottsdale (142518)	7929 South Cicero Chicago, IL 60652
4	RCG-Markham (142575)	3053-3055 West 159th Street Markham, IL 60426
5	RCG- Hazelcrest (142622)	3470 West 183rd Street Hazelcrest, IL 60429
6	RCG-South Holland (142628)	16136 South Park Avenue South Holland, IL 60473
7	RCG-Loop (142505)	55 East Washington Street Chicago, IL 60602
8	RCG-Waukegan (142577)	1616 Grand Avenue Waukegan, IL 60085
9	RCG Waukegan Home (142567)	1616 Grand Avenue Waukegan, IL 60085

APPENDIX D

JOINT VENTURES FROM WHICH FRESENIUS WILL DIVEST ITS JOINT VENTURE EQUITY INTERESTS AND CLINICS OWNED BY JOINT VENTURES

	Joint Venture Name	Clinic Name (Medicare provider number)	Clinic Address
1	Renal Care Group Canton, LLC	RCG-Canton (no CMS number)	260 Hospital Road Canton, GA 30114
2	Brownsville Kidney Center, Ltd.	RCG-Brownsville (452737)	2945 Central Boulevard Brownsville, TX 78520
3	Renal Care Group Buffalo Grove, LLC	RCG-Buffalo Grove (142650)	1291 West Dundee Road Buffalo Grove, IL 60089
4	Renal Care Group Schaumburg, LLC	RCG-Schaumburg (142654)	1156 South Roselle Road Schaumburg, IL 60193
5	Renal Care Group Schaumburg, LLC	RCG-Schaumburg Home (142654)	17 West Golf Road Arlington Heights, IL 60006
6	El Paso Kidney Center East, Ltd.	RCG-El Paso East (452749)	10737 Gateway Boulevard West El Paso, TX 79935
7	RCG Brandon, LLC	RCG-Brandon (252549)	101 Christian Drive Brandon, MS 39042
8	Renal Care Group Galleria, LLC	RCG-Galleria (422660)	8592 Ricky Bell Cove Memphis, TN 38133
9	RCG Brandon LLC	RCG-Brandon (no CMS number)	731 West Lumsden Road Brandon, FL 33511
10	Summit Renal Care, LLC	RCG-Munroe Falls (362651)	265 North Main Street Munroe Falls, OH 44262
11	Summit Renal Care, LLC	RCG-Summit (362613)	73 Massillon Road Akron, OH 44312
12	Summit Renal Care, LLC	RCG-White Ponds (362623)	534 White Pond Drive Akron, OH 44320

APPENDIX E

MONITOR AGREEMENT

[PUBLIC RECORD VERSION]

CONFIDENTIAL EXHIBIT A AND CONFIDENTIAL EXHIBIT B
TO THE MONITOR AGREEMENT

[REDACTED FROM THE PUBLIC RECORD VERSION OF THE DECISION AND ORDER BUT INCORPORATED BY REFERENCE]

NON-PUBLIC APPENDIX F

NRI DIVESTITURE AGREEMENTS

[REDACTED FROM THE PUBLIC RECORD VERSION OF THE DECISION AND ORDER BUT INCORPORATED BY REFERENCE]

0510108

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of	)	
DAN L. DUNCAN,	)	
a natural person,	)	
EPCO, INC.,	)	
a corporation,	)	**Docket No. C-**
TEXAS EASTERN PRODUCTS PIPELINE COMPANY, LLC,	)	
a limited liability company,	)	
and	)	
TEPPCO PARTNERS, L.P.,	)	
a limited partnership.	)	

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Dan L. Duncan, through EPCO, Inc. and Enterprise Products Partners L.P., acquired a controlling interest in Texas Eastern Products Pipeline Company, LLC and limited partnership interests in TEPPCO Partners, L.P. in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE PARTIES

A. Respondents Dan L. Duncan and EPCO, Inc.

1. Dan L. Duncan is a natural person whose office and principal place of business is located at 1100 Louisiana Street, Suite 1800, Houston, Texas 77002.

2. EPCO, Inc. ("EPCO") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 1100 Louisiana Street, Suite 1800, Houston, Texas 77002.

3. Dan L. Duncan is the ultimate parent entity of EPCO. Dan L. Duncan controls EPCO.

4. Dan L. Duncan and EPCO control, and at all times relevant herein have controlled, the general partner of Enterprise Products Partners, L.P. ("Enterprise").

5. Enterprise is, and at all times relevant herein has been, engaged in the midstream energy business, including the transportation, fractionation, and storage of natural gas liquids.

6. As part of its midstream operations Enterprise owns and operates salt dome storage for natural gas liquids in Mont Belvieu, Texas.

7. Dan L. Duncan and EPCO are, and at all times relevant herein have been, engaged in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. Respondents Texas Eastern Products Pipeline Company, LLC and TEPPCO Partners, L.P.

8. Texas Eastern Products Pipeline Company, LLC ("Texas Eastern") is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1100 Louisiana Street, Suite 1300, Houston, Texas 77002.

9. TEPPCO Partners, L.P. ("TEPPCO") is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1100 Louisiana Street, Suite 1300, Houston, Texas 77002.

10. Texas Eastern is, and at all times relevant herein has been, the general partner of TEPPCO.

11. TEPPCO is, and at all times relevant herein has been, engaged in the midstream energy business, including the transportation, fractionation, and storage of natural gas liquids.

12. As part of its midstream operations, TEPPCO, through its wholly-owned subsidiary TE Products Pipeline Company, Limited Partnership, holds a 50% interest in a joint venture called Mont Belvieu Storage Partners which owns salt dome storage for natural gas liquids in Mont Belvieu, Texas.

13. TEPPCO, through its wholly-owned subsidiary TE Products Pipeline Company, Limited Partnership, carries out the day-to-day operations of the Mont Belvieu Storage Partners storage facility.

14. TEPPCO and Texas Eastern are, and at all times relevant herein have been, engaged in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

15. On February 24, 2005, Dan L. Duncan and EPCO, Inc., through DFI GP Holdings L.P., acquired from Duke Energy Field Services, LLC: (1) TEPPCO Partners, L.P.'s general partner, Texas Eastern Products Pipeline Company, LLC, and (2) 2.5 million limited partnership units of TEPPCO Partners, L.P. (collectively "the Acquisition").

III. TRADE AND COMMERCE

A. Relevant Product Market

16. A relevant product market in which to evaluate the effects of the Acquisition is salt dome storage for natural gas liquids.

17. There is no economic alternative to salt dome storage for storing natural gas liquids.

B. Relevant Geographic Market

18. A relevant geographic market in which to evaluate the effects of the Acquisition is Mont Belvieu, Texas.

19. Customers of Mont Belvieu salt dome storage for natural gas liquids have no economic alternative to storing in Mont Belvieu.

C. Market Structure

20. The market for salt dome storage for natural gas liquids in Mont Belvieu was highly concentrated prior to the Acquisition and is significantly more concentrated as a result of the Acquisition.

21. Enterprise and TEPPCO compete in the market for salt dome storage for natural gas liquids in Mont Belvieu.

22. The Acquisition combined two of four providers of commercial salt dome storage for natural gas liquids in Mont Belvieu.

23. The pre-Acquisition Herfindahl-Hirschman Index was more than 3,400, and increased post-Acquisition by more than 3,000 points to a level exceeding 6,400.

D. Entry Conditions

24. Entry into the market for salt dome storage for natural gas liquids in Mont Belvieu would not be timely, likely, or sufficient to prevent the anticompetitive effects that are likely to result from the Acquisition.

25. Construction of a salt dome storage facility and its necessary infrastructure, including pipelines and brine storage and handling facilities, is subject to significant regulatory and other legal constraints, and requires significant sunk costs and substantial time to accomplish.

IV. ANTICOMPETITIVE EFFECTS

26. The Acquisition may substantially lessen competition in the following ways, among others:

    a. by eliminating competition between Enterprise and TEPPCO;

    b. by enhancing Enterprise's ability unilaterally to exercise market power; and

    c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between or among the remaining firms;

    each of which increases the likelihood that customers would be forced to pay higher prices for or would experience degradations in service for salt dome storage for natural gas liquids in Mont Belvieu.

V. VIOLATIONS CHARGED

27. The effect of the Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____, 2006, issues its complaint against Respondents.

By the Commission.

Donald S. Clark
Secretary

SEAL:

0510234

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of **American Renal Associates, Inc.,** **a corporation,** **and** **Fresenius Medical Care Holdings, Inc.,** **a corporation.**	**Docket No. C-4202**

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent American Renal Associates, Inc., of certain assets owned by Respondent Fresenius Medical Care Holdings, Inc., (hereinafter "Respondents") and of certain acts and practices of the Respondents, and the Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should

issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent American Renal Associates Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 66 Cherry Hill Drive, Beverly, Massachusetts 01915.

2. Respondent Fresenius Medical Care Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 95 Hayden Avenue, Lexington, Massachusetts 02420.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "ARA" means American Renal Associates, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by ARA including, but not limited to, ARA-East Providence Dialysis LLC, ARA-Johnston Dialysis LLC, ARA-Fall River Dialysis LLC, and Dialysis Center of West Warwick LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Fresenius" means Fresenius Medical Care Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Fresenius Medical Care Holdings, Inc. (including Renal Care Group, Inc. and Bio-Medical Applications of Rhode Island, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Clinic" means a facility that provides Dialysis Services.

D. "Clinic Operator" means a person who owns or engages in the Operation of a Clinic, or who attempts to own or engage in the Operation of a Clinic.

E. "Commission" means the Federal Trade Commission.

F. "Cranston-Warwick Area" means the area within ZIP codes 02818, 02886, 02888, 02889, 02893, 02905, 02907, 02909, 02910, 02920, 02921, that portion of 02919 south of U.S. Route 6, and those portions of 02831 and 02816 east of Route 116, which are the ZIP codes in and around the cities of Cranston and Warwick, Rhode Island.

G. "Dialysis Services" means the provision of outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

H. "Governmental Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

I. "Joint Venture Clinic" means a Clinic in which a Respondent owns an interest of at least 50%, but less than 100%.

J. "Joint Venture Partner" means a Person other than a Respondent that owns an interest in a Joint Venture Clinic.

K. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.

L. "Operation Of A Clinic" means all activities Relating To the business of a Clinic, including, but not limited to:

1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of the Clinic;

3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;

4. purchasing supplies and equipment for the Clinic;

5. negotiating leases for the premises of the Clinic;

6. providing counseling and support services to patients receiving products or services from the Clinic;

7. contracting for the services of medical directors for the Clinic;

8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and

9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.

M. "Ordinary Patient Transfer" means the occasional or periodic transfer of an individual patient from one Clinic to another Clinic at the request of the patient, or the patient's family, care giver or physician.

N. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other Person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other Persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

O. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

P. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

Q. "Relating To" or "Related To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

II.

IT IS FURTHER ORDERED that each Respondent shall not, expressly or implicitly, directly or indirectly, enter into, continue, maintain, enforce, or offer to enter into any agreement with any Clinic Operator to (1) close any Clinic, or (2) allocate any Dialysis Services market, territory, or customer.

PROVIDED, HOWEVER, that nothing in this Paragraph shall prohibit each Respondent from (i) unilaterally deciding to close any of its own Clinics (or, in the case of a Joint Venture Clinic, from making any such decision with its Joint Venture Partner for that Clinic), (ii) assisting the owner of any Clinic managed by such Respondent with respect to the closure of such managed Clinic, (iii) entering into non-competition agreements of reasonable duration and geographic

scope (a) ancillary to a lawful sale, acquisition, or formation of a Clinic or Joint Venture Clinic, or (b) ancillary to a contract for employment or professional services of an employee or medical director, or (iv) continuing the current non-competition agreements of employees, medical directors, Clinics and Joint Venture Clinics.

PROVIDED FURTHER, HOWEVER, that nothing in this Paragraph shall apply to any agreement entered into for an Ordinary Patient Transfer.

III.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent ARA shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

A. acquire any assets of or financial interest in any Clinic located in the Cranston-Warwick Area, except to the extent that the acquisition is in:

   1. Clinics owned or operated by Respondent ARA at the time this Order becomes final; or

   2. in *de novo* Clinics opened by Respondent ARA.

B. enter into any contract to participate in the management or Operation Of A Clinic located in the Cranston-Warwick Area, except to the extent that the contract relates exclusively to:

   1. off-site lab services or social worker support materials;

   2. the management of Clinics owned or operated by Respondent ARA at the time this Order becomes final;

   3. the management of a *de novo* Clinic opened by Respondent ARA; or

   4. billing services, collection services, bookkeeping services, accounting services, supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively "Such Services"), where appropriate firewalls and confidentiality agreements are implemented to prevent Material Confidential Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by ARA or any Clinic other than the Clinic to which such services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules,

16 C.F.R. § 801-803, relating to the proposed transaction (hereinafter referred to as "the Notification), *PROVIDED, HOWEVER,* (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from ARA and not from any other party to the transaction. ARA shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), ARA shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

PROVIDED, HOWEVER, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

IT IS FURTHER ORDERED that ninety (90) days after the date this order becomes final, twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next ten (10) years, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they are complying and have complied with this Order.

V.

IT IS FURTHER ORDERED that, each Respondent shall notify the Commission at least thirty (30) days prior to any proposed:

A. dissolution of Respondent;

B. acquisition, merger, or consolidation of Respondent; or

C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that, with respect to its own organization, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, each Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on October 17, 2017.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: October 17, 2007

0610123

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **William E. Kovacic, Chairman**
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch

In the Matter of	)	
INVERNESS MEDICAL INNOVATIONS, INC., a corporation.	)	**Docket No. C-**

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Respondent Inverness Medical Innovations, Inc., hereinafter referred to as "Respondent," and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Inverness Medical Innovations, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 51 Sawyer Road, Suite 200, Waltham, Massachusetts 02453.

2. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "Inverness" or "Respondent" means Inverness Medical Innovations, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Inverness Medical Innovations, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "ACON" means ACON Laboratories, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its headquarters address located at 4108 Sorrento Valley Boulevard, San Diego, California 92121. The term "ACON" includes ACON Laboratories, Inc., its parent, directors, officers, employees, agents, representatives, successors and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by ACON Laboratories, Inc., and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

D. "Acquisition" means Respondent Inverness's acquisition of certain assets and rights of ACON pursuant to an Acquisition Agreement by and among Inverness Medical Innovations, Inc., ACON Laboratories, Inc., Azure Institute, Inc., LBI, Inc., Oakville Hong Kong Co., Ltd., ACON Biotech (Hangzhou) Co., Ltd., and Karsson Overseas, Ltd., dated as of February 24, 2006, and includes certain "Noncompetition Agreements" attached as exhibits thereto.

E. "Aemoh" means Aemoh Products, LLC, a limited liability company, organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its headquarters address at 12 Hopewell Farm Road, South Natick, MA 01760.

F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of

a product. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

G. "Assays" means any qualitative or quantitative analysis of a substance to determine its components or characteristics, the results of such analysis, and all information necessary to replicate such analysis, including without limitation, the following: all data, observations, and records relating to the analysis, the methodologies and procedures used in such analysis, all experiments performed, all information related to the development and qualification of such an analysis, and the identities of the person or persons responsible for such development and qualification of such an analysis.

H. "Bayer" means Bayer Healthcare LLC, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 511 Benedict Avenue, Tarrytown, New York 10591-5097. The term "Bayer" includes Bayer Healthcare LLC, its parent, directors, officers, employees, agents, representatives, successors and assigns; and its joint ventures, subsidiaries (including Metrika, Inc.), divisions, groups and affiliates in each case controlled by Bayer Healthcare LLC, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

I. "Church & Dwight" means Church & Dwight Co., Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 469 N. Harrison Street, Princeton, New Jersey 08543-5297.

J. "Church & Dwight/ACON R&D Agreement" shall mean the "Research and Development Agreement" between ACON and Church & Dwight (dated April 27, 2005), as amended.

K. "Church & Dwight/ACON Supply Agreement" shall mean the "Supply Agreement" between ACON and Church & Dwight (dated June 23, 2006), as amended.

L. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support or use of the Digital Consumer Pregnancy Test Products and was created, generated, or Developed by either ACON or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement; *provided, however*, that the restrictions contained in this Order regarding the use, conveyance, provision or disclosure of "Confidential Business Information" shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent;

2. information related to the Digital Consumer Pregnancy Test Products that Respondent can demonstrate it obtained without the assistance of ACON prior to the Acquisition; and

3. information that is required by Law to be publicly disclosed.

M. "Consumer Pregnancy Test(s)" means any product marketed, or designed to be marketed, to an end user in the over-the-counter market that uses a lateral flow strip to detect the presence or absence of a pregnancy-indicating hormone in a urine sample.

N. "Contract Manufacture" means the testing and manufacture of a Digital Consumer Pregnancy Test Product to be supplied by Respondent, ACON, or a Designee to Church & Dwight.

O. "Designee" means any entity other than Respondent or ACON that will manufacture a Digital Consumer Pregnancy Test Product on behalf of Church & Dwight.

P. "Development" means all product development activities, including: test method development and stability testing; toxicology; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; conducting tests or trials for any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a product (including any government price or reimbursement approvals); and regulatory affairs related to the foregoing. "Develop" means to engage in Development.

Q. "Digital Consumer Pregnancy Test Product(s)" means the Consumer Pregnancy Test products that are the subject of Appendix 1 of Church & Dwight/ACON R&D Agreement and/or Attachment A-1 of the Church & Dwight/ACON Supply Agreement.

R. "Digital Consumer Pregnancy Test Product Assets" means all rights, title and interest in and to the following assets:

1. all Digital Consumer Pregnancy Test Product Intellectual Property;

2. all Product Approvals directly related to the Digital Consumer Pregnancy Test Products;

3. all Product Manufacturing Technology that was created, generated, or Developed by ACON and/or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement;

4. all Product Development Reports directly related to the Digital Consumer Pregnancy Test Products;

5. all Trademarks used prior to, up to, and including, the Order Date by Church and Dwight and/or ACON to market or sell the Digital Consumer Pregnancy Test Products;

6. all options acquired by Respondent from ACON to acquire or exercise rights in the Digital Consumer Pregnancy Test Products;

7. all contingent interests or claims acquired by Respondent from ACON in the Digital Consumer Pregnancy Test Products; and

8. all of ACON's books, records, and files directly related to the foregoing;

9. *Provided, however*, that the Digital Consumer Pregnancy Test Product Assets:

    a. shall not include any and all technology, intellectual property or intellectual property right that was not created, generated, or Developed by ACON and/or Church & Dwight under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement including the Reserved Patent Rights or the Metrika Patents;

    b. shall not include administrative, financial, and accounting records;

    c. shall include copies or relevant excerpts of documents and materials containing information relating to the Digital Consumer Pregnancy Test Product Assets in cases in which the documents or other materials included in the relevant assets to be provided to Church & Dwight contain information: (1) that relates both to any Digital Consumer Pregnancy Test Product and to other products or businesses of ACON or Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Digital Consumer Pregnancy Test Product; or (2) for which ACON or Respondent has a legal obligation to retain the original copies; and

    d. shall include access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.

S. "Digital Consumer Pregnancy Test Product Core Employees" means the employees listed on Appendix A attached hereto.

T. "Digital Consumer Pregnancy Test Product Intellectual Property" means all of the following intellectual property to the extent owned, controlled, held, or otherwise possessed by Respondent:

1. any and all Patents that were or are filed by either Church & Dwight or ACON, after April 27, 2005, do not claim priority to a patent application filed before April 27, 2005 and claim an invention conceived, created, generated, or Developed under the Church & Dwight/ACON R&D Agreement;

2. any and all Other Intellectual Property, including the rights to obtain, file, and prosecute applications for patents and copyrights and registrations thereof, that was, or the subject matter of which was, created, generated, or Developed, by Church & Dwight and/or ACON under the Church & Dwight/ACON R&D Agreement or Church & Dwight/ACON Supply Agreement; and

3. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

U. "Government Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

V. "Interim Monitor" means any monitor appointed pursuant to Paragraph V of this Order.

W. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

X. "May-Davis Patents" means any United States Patent claiming priority from British patent application numbers GB 8725457 and GB 8709873 (May), or GB 8903627 (Davis).

Y. "Metrika Patents" means the following United States Patents:

1. US Patent No. 5,580,794; and

2. US Patent No. 5,837,546.

Z. "Order Date" means the date on which this Order becomes final.

AA. "Other Intellectual Property" means trade secrets, copyrights (and right to obtain, file and prosecute copyrights and registrations thereof), know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information.

BB. "Ownership Interest" means any and all rights, present or contingent, of Respondent to hold any voting or nonvoting stock, share capital, assets, equity or other interests or beneficial ownership in a Person.

CC. "Patents" means all patents, patent applications, including provisional patent applications, statutory invention registrations, and inventor's certificates, and rights to obtain, file and prosecute applications for patents, in each case existing as of the Order Date (*except* where this Order specifies a different date or time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

DD. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

EE. "Premarket Approval(s)" means the applications for a product filed or to be filed with the FDA pursuant to 21 C.F.R. § 814, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, all information submitted with or incorporated by reference, and all correspondence between Respondent and the FDA related thereto. The term "Premarket Approval(s)" includes all orders of approval and all reports and documents submitted to the FDA under postapproval requirements.

FF. "Premarket Notification(s)" means a premarketing submission for a product filed or to be filed with the FDA pursuant to 21 C.F.R. § 807, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, all information submitted with or incorporated by reference, and all correspondence between Respondent and the FDA related thereto, to demonstrate that a device to be marketed is as safe and effective as, or substantially equivalent to, a legally marketed device that is not subject to Premarket Approval. The term "Premarket Notification(s)" includes all notices of registration and all reports and documents required to be submitted to the FDA related to the marketing of such product.

GG. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Premarket Approval and/or Premarket Notification.

HH. "Product Development Reports" means all of the following documents to the extent directly related to the Digital Consumer Pregnancy Test Products and Water Soluble Consumer Pregnancy Test Products:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how;

2. all correspondence to or from the FDA related to such product(s);

3. annual and periodic reports;

4. approved product labeling;

5. currently used product package inserts;

6. customer circulars and information;

7. summary of product complaints from customers; and

8. product recall reports.

II. "Product Manufacturing Technology" means, to the extent owned, controlled, held, or otherwise possessed by Respondent, any and all of the following:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) directly related to the manufacture of the specified products including, without limitation, the following: all techniques and specifications, quality control processes, analytical methods for process controls, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the Product Approvals, and labeling and all other information related to the manufacturing process;

2. the identity of all suppliers and subcontractors;

3. all Assays; and

4. all Product Development Reports.

JJ. "Reserved Patent Rights" means, collectively, any and all Respondent's rights in, to or under any and all patents and patent applications claiming the benefit of or priority to (i) U.S. Patent Application Serial No. 07/211,582, including, without limitation, U.S. Patent Nos. 5,714,389; 5,989,921; and 6,485,982; (ii) one or more of GB Patent Application Serial Nos. 8709873 and 8725457, including, without limitation, U.S. Patent Nos. 5,602,040; 5,622,871; 5,656,503; 6,187,598; 6,228,660; 6,818,455; and 7,109,042; (iii) GB Patent Application Serial No. 8903627, and including, without limitation, U.S. Patent Nos. 6,352,862; 7,238,537; 7,384,796; and 7,407,813; (iv) U.S. Patent Application Serial No. 07/072,459, including, without limitation, U.S. Patent Nos. 5,120,643; 5,578,577; and 6,534,320; and (v) any and all continuations, divisionals, reissues, reexaminations, and foreign counterparts or equivalents of any and all of the foregoing.

KK. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements may include, *inter alia*,

a. designating employees knowledgeable about the Product Manufacturing Technology and intellectual property included in either the Digital Consumer Pregnancy Test Assets or the Water Soluble Consumer Pregnancy Test Assets, as applicable, who will be responsible for communicating directly with any Person designated to receive such information and assets, including the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

b. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified product(s) that are acceptable to any Person designated to receive such information and assets;

c. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology and all such intellectual property to any Person designated to receive such information and assets; and

d. providing, in a timely manner, assistance and advice to enable any Person designated to receive such information and assets (or its Designee) to:

(1) manufacture the specified product(s) in the quality and quantities achieved by ACON;

(2) obtain any Product Approvals necessary for any Person designated to receive such information and assets to manufacture, distribute, market, and sell the specified product(s) in commercial quantities; and

(3) receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified product(s).

LL. "Third Party(ies)" means any private entity other than the following: (1) Respondent; (2) ACON; (3) Church & Dwight or (4) Aemoh.

MM. "Trademark(s)" means all United States proprietary names or designations, trademarks, tradenames, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith.

NN. "Water Soluble Consumer Pregnancy Test Product(s)" means the lateral flow immunoassay Consumer Pregnancy Tests based on the use of water-soluble dyes Developed or under Development by ACON prior to February 24, 2006 for sale in the United States and any improvement to such tests. The term "Water Soluble Consumer Pregnancy Test Product(s)" shall not include lateral flow immunoassay pregnancy tests that use particulate labels, *e.g.*, colloidal gold or latex particles.

OO. "Water Soluble Consumer Pregnancy Test Product ACON Patents" means the following United States Patents:

1. US Patent No. 6627460; and

2. US Patent No. 5543332.

PP. "Water Soluble Consumer Pregnancy Test Product Assets" means all Respondent's rights, title in and interest in and to the following assets related directly to the Water Soluble Consumer Pregnancy Test Products:

1. The sublicense described in Paragraph III.A.1 of this Order;

2. all Product Approvals directly related to the Water Soluble Consumer Pregnancy Test Products;

3. all Product Manufacturing Technology that was created, generated, or Developed by ACON for the Water Soluble Consumer Pregnancy Test Products;

4. copies of all Product Development Reports directly related to the Water Soluble Consumer Pregnancy Test Products; and

5. copies of all of Respondent books, records, and files directly related to the foregoing;

6. *Provided, however*, that the Water Soluble Consumer Pregnancy Test Product Assets:

   a. shall not include the administrative, financial, and accounting records;

   b. shall include copies or relevant excerpts of documents and materials containing information relating to the Water Soluble Consumer Pregnancy Test Product Assets in cases in which the documents or other materials included in the relevant assets to be provided to Aemoh contain information: (1) that relates both to any Water Soluble Consumer Pregnancy Test Product and to other products or businesses of Respondent or ACON and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Water Soluble Consumer Pregnancy Test Product; or (2) for which Respondent or ACON has a legal obligation to retain the original copies; and

   c. shall include access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes.

QQ. "Water Soluble Consumer Pregnancy Test Product Core Employees" means the employees listed in Appendix B attached hereto.

RR. "Water Soluble Consumer Pregnancy Test Product Intellectual Property" means all of the following intellectual property to the extent owned, controlled, held, or otherwise possessed by Respondent:

1. any and all Water Soluble Consumer Pregnancy Test Product ACON Patents and Patents that ACON filed that contain subject matter that relates directly to the Water Soluble Consumer Pregnancy Test Product(s);

2. any and all Other Intellectual Property, including the rights to obtain, file, and prosecute applications for patents and copyrights and registrations thereof, that was, or the subject matter of which was, created, generated, or Developed, by ACON for the Water Soluble Consumer Pregnancy Test Product(s); and

3. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

SS. "Water Soluble Consumer Pregnancy Test Product Releasee(s)" means Aemoh or any entity controlled by or under common control with Aemoh ("affiliated entities"), or any licensees, sublicensees, manufacturers, suppliers, distributors, or customers of Aemoh or its affiliated entities.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Order Date, Respondent shall:

1. disclaim in writing any and all rights, title and interest in or to the Digital Consumer Pregnancy Test Product Assets in favor of Church & Dwight;

2. to the extent owned or controlled, directly or indirectly, by or otherwise in the possession of Respondent, and at the expense of Respondent, transfer and deliver all Digital Consumer Pregnancy Test Product Assets to Church & Dwight;

3. amend, or provide written clarification of, any contract(s) or agreement(s) between the Respondent and ACON, and enter into such other contract(s) or agreement(s) as may be necessary with ACON, in order to:

    a. permit ACON fully to transfer and deliver all of the Digital Consumer Pregnancy Test Product Assets to Church & Dwight to the extent such assets are owned or controlled, directly or indirectly, by ACON, or are otherwise in the possession of ACON, in a manner consistent with the Technology Transfer Standards;

b. remove any prohibitions or impediments that would prevent ACON from transferring and delivering such Digital Consumer Pregnancy Test Product Assets to Church & Dwight;

c. permit, and provide all rights within Respondent's control necessary to allow, ACON to perform the Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight on an uninterrupted basis for a period of time continuing at least until December 22, 2010;

d. remove any prohibitions or impediments that would prevent ACON from performing the Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period of time continuing at least until December 22, 2010;

e. remove any financial disincentives to the extent that such financial disincentives would prevent ACON from making and retaining a profit on any Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period continuing at least until December 22, 2010;

f. permit, and provide all rights within Respondent's control necessary to allow, ACON to maintain the manufacturing and related testing, storage, and shipping facilities necessary to manufacture the Digital Consumer Pregnancy Test Products in finished form suitable for commercial sale for a period of time continuing at least until December 22, 2010; *provided however*, this requirement shall end if Church & Dwight exercises any rights it may have or otherwise determines to discontinue purchasing Digital Consumer Pregnancy Test Products from ACON at an earlier date;

g. to the extent the foregoing ACON manufacturing and related testing, storage, and shipping facilities are subject to any rights held by the Respondent, permit Church & Dwight to continue purchasing Digital Consumer Pregnancy Test Products for a period of time continuing at least until December 22, 2010, or to discontinue purchasing Digital Consumer Product Pregnancy Test Products, from such facilities, without penalty, upon Church & Dwight providing agreed-to or otherwise reasonable notification to ACON or Respondent; and

h. permit, and provide all rights within Respondent's control necessary to allow, ACON to provide all records that relate to the manufacture of the Digital Consumer Pregnancy Test Products by ACON on behalf of Church & Dwight that are generated or created after the Order Date, as such records are requested by Church & Dwight or the Interim Monitor (if one has been appointed);

provided, however, Paragraph II shall not require Respondent to transfer, disclaim, license, grant, or not assert, any technology, intellectual property or intellectual property right that was not created, generated, or Developed by ACON and/or Church & Dwight

under the Church & Dwight/ACON R&D Agreement or the Church & Dwight/ACON Supply Agreement, including the Reserved Patent Rights.

B. Respondent shall:

1. cooperate with, and take no action that interferes with or impedes:

   a. ACON's transfer and delivery of such Digital Consumer Pregnancy Test Product Assets to Church & Dwight in a manner consistent with the Technology Transfer Standards; or

   b. ACON's performance of the Contract Manufacture of Digital Consumer Pregnancy Test Products on behalf of Church & Dwight during the period of time continuing until December 22, 2010; and

2. not seek to enforce, directly or indirectly, any of Respondent's rights under any contract or agreement with ACON that would interfere with or impede ACON's ability to transfer and deliver such Digital Consumer Pregnancy Test Product Assets to Church & Dwight, or that would interfere with or impede ACON's ability to Contract Manufacture Digital Consumer Pregnancy Test Products on behalf of Church & Dwight for a period of time continuing at least until December 22, 2010;

3. not enforce any agreement between Respondent and ACON, a Third Party, or Church & Dwight against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Church & Dwight to acquire the Digital Consumer Pregnancy Test Product Intellectual Property or the Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Product Assets from any Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information directly related to such Product Manufacturing Technology; and

4. not later than ten (10) days after the Order Date, grant a release to each Third Party that is subject to any agreement described in Paragraph II.B.3 allowing such Third Party to provide all such Digital Consumer Pregnancy Test Product Intellectual Property and/or, all such Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Product Assets to Church & Dwight. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to Church & Dwight.

C. For a period of up to twelve (12) months from the Order Date, Respondent shall not interfere with the hiring or employing by Church & Dwight of the Digital Consumer Pregnancy Test Product Core Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with Church & Dwight, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with Respondent that would affect the ability or incentive

of those individuals to be employed by Church & Dwight. In addition, Respondent shall not make any counteroffer to such a Digital Consumer Pregnancy Test Product Core Employee who has received a written offer of employment from Church & Dwight of which Respondent is aware.

D. Respondent shall take no action that would interfere with or prohibit knowledgeable employees of ACON from assisting Church & Dwight to defend against, respond to, or otherwise participate in any litigation directly related to the Digital Consumer Pregnancy Test Product Intellectual Property.

E. Respondent shall:

1. submit to Church & Dwight all Confidential Business Information;

2. deliver such Confidential Business Information:

   a. in good faith;

   b. as soon as practicable, avoiding any delays in transmission of the respective information; and

   c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all Confidential Business Information to Church & Dwight, provide Church & Dwight and the Interim Monitor (if one has been appointed) with access to all such Confidential Business Information, and to employees who possess or are able to locate such information, for the purpose of identifying the books, records and files related to the Digital Consumer Pregnancy Test Products that contain such Confidential Business Information and facilitating the delivery of such information in a manner consistent with this Order.

F. Respondent shall not:

1. use, directly or indirectly, any such Confidential Business Information directly related to the research, Development, manufacturing, marketing, or sale of the Digital Consumer Pregnancy Test Products other than as necessary to comply with the following:

   a. the requirements of this Order;

   b. obligations to Church & Dwight under the terms of any pre-existing agreement between ACON and Church & Dwight; or

   c. applicable Law;

2. disclose or convey any Confidential Business Information, directly or indirectly, to any private-entity Person (including the Respondent) except Church & Dwight; and

3. provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information to the employees of the Respondent associated with its business(es) related to rapid detection pregnancy tests.

G. Respondent shall require that each Digital Consumer Pregnancy Test Product Core Employee hired or retained by Respondent, the direct supervisor(s) of any such employee, and any other employee hired or retained by Respondent and designated by the Interim Monitor (if one has been appointed) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information directly related to the Digital Consumer Pregnancy Test Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).

H. Respondent shall assure, in any instance wherein its counsel (including in-house counsel under appropriate confidentiality arrangements) either retains unredacted copies of documents or other materials provided to Church & Dwight, or accesses original documents (under circumstances where copies of documents are insufficient or otherwise unavailable) provided to Church & Dwight, that Respondent's counsel does so only for the following purposes:

1. to assure Respondent's compliance with this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals), any agreement with Church & Dwight, any data retention requirement of any applicable Government Entity, or any taxation requirements; or

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the transfer of the Product Manufacturing Technology directly related to the research, Development, or manufacture of the Digital Consumer Pregnancy Test Products or the Digital Consumer Pregnancy Test Product Intellectual Property or businesses associated with the Digital Consumer Pregnancy Test Products; *provided*, *however*, that Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however,* that pursuant to this Paragraph, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with Church & Dwight (but shall not be deemed to have violated this requirement if Church & Dwight withholds such agreement unreasonably); and (2) use its best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

I. Not later than ten (10) days after the Order Date, Respondent shall amend any contract(s) or agreement(s) between the Respondent and Bayer (including, without limitation such contract(s) or agreement(s) with Metrika, Inc.), and enter such other contract(s) or agreement(s) as may be necessary with Bayer, in order to authorize Bayer to sell a co-exclusive license to the Metrika Patents, in the United States, to Church & Dwight (*i.e.*, a license to the Metrika Patents under which license the Respondent and Church & Dwight would be co-exclusive licensees); *provided however*, that Respondent may condition the authorization granted to Bayer upon payment to Respondent of an amount not to exceed the lesser of: (1) one-half of Respondent's original purchase price for Respondent's exclusive license to the Metrika Patents, or (2) one half of the license fee paid to Metrika by Church & Dwight.

J. Respondent shall not enforce any agreement between Respondent and Bayer, a Third Party, or Church & Dwight against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Church & Dwight to acquire the above-described co-exclusive license to the Metrika Patents, and shall not interfere with, or take any action that might delay, such licensing of these patents to Church & Dwight.

K. The purpose of Paragraph II of this Order is to ensure the continued use of the Digital Consumer Pregnancy Test Product Assets in the research, Development, and manufacture of the Digital Consumer Pregnancy Test Products, including variations and improvements thereto, fully independent of the Respondent, and to remedy the lessening of competition resulting from the acts and practices of the Respondent as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Order Date, Respondent shall:

1. grant to Aemoh an exclusive, perpetual, fully paid-up and royalty-free sub-license in the United States, with rights to sub-license of all of Respondent's rights to the Water Soluble Consumer Pregnancy Test Product Intellectual Property to the full extent of the fields of use for which Respondent is licensed to use such Water Soluble Consumer Pregnancy Test Product Intellectual Property including, without limitation, the right and sub-license:

   a. to use, make, distribute, offer for sale, promote, advertise, sell, import, or export the Water Soluble Consumer Pregnancy Test Products; and

   b. to have used, made, distributed, offered for sale, promoted, advertised, sold, imported, or exported the Water Soluble Consumer Pregnancy Test Products;

2. deliver all Water Soluble Consumer Pregnancy Test Product Assets, or copies thereof, in the possession of or under the control of Respondent to Aemoh in a manner consistent with the Technology Transfer Standards;

3. amend, and/or provide written clarification of, any contract(s) or agreement(s) between the Respondent and ACON, and enter such other contract(s) or agreement(s) as may be necessary with ACON, in order to permit ACON fully to deliver any and all Water Soluble Consumer Pregnancy Test Product Assets to Aemoh to the extent such assets are owned or controlled, directly or indirectly, by ACON, or otherwise in the possession of ACON, in a manner consistent with the Technology Transfer Standards.

B. Respondent shall take all actions within its control to secure all consents and waivers from Third Party(ies) to the extent such consents are necessary to permit Respondent and/or ACON to grant, transfer or deliver such Water Soluble Consumer Pregnancy Test Product Assets to Aemoh, in a timely manner, and/or to permit Aemoh to research, Develop, manufacture, sale, market or distribute Water Soluble Consumer Pregnancy Test Products;

provided, however, Respondent may satisfy this requirement by certifying that Aemoh has executed all such agreements directly with each of the relevant Third Parties.

C. Respondent shall:

1. not enforce any agreement between Respondent and ACON, a Third Party, or Aemoh against the applicable counterparty to the extent that such agreement may limit or otherwise impair the ability of Aemoh to acquire the Water Soluble Consumer Pregnancy Test Product Intellectual Property or the Product Manufacturing Technology included in the Water Soluble Consumer Pregnancy Test Product Assets from any Third Party; and

2. not later than ten (10) days after the Order Date, grant a release to each Third Party that is subject to any agreement described in Paragraph III.C.1 allowing such Third Party to provide all such Water Soluble Consumer Pregnancy Test Product Intellectual Property and/or all such Product Manufacturing Technology included in the Water Soluble Consumer Pregnancy Test Product Assets to Aemoh. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to Aemoh.

D. For a period of up to twelve (12) months from the Order Date, Respondent shall not interfere with the hiring or employing by Aemoh of the Water Soluble Consumer Pregnancy Test Product Core Employees, and shall remove any impediments within the control of Respondent that may deter these employees from accepting employment with Aemoh, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with Respondent that would affect the ability or incentive of those individuals to be employed by Aemoh. In addition, Respondent shall not make any counteroffer to such a Water Soluble Consumer Pregnancy Test Product Core Employee

who has received a written offer of employment from Aemoh of which Respondent is aware.

E. Respondent shall take no action which would interfere with or prohibit knowledgeable employees of ACON from assisting Aemoh to defend against, respond to, or otherwise participate in any litigation directly related to the Water Soluble Consumer Pregnancy Test Product Intellectual Property.

F. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against Aemoh or the Water Soluble Consumer Pregnancy Test Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Water Soluble Consumer Pregnancy Test Product(s) under the following:

1. any Patent owned or licensed by Respondent as of the Order Date that claims a method of making, using, or administering, or a composition of matter, relating to lateral flow immunoassay technology, or that claims a device relating to the use thereof, including, without limitation, the Reserved Patent Rights; or

2. any Patent owned or licensed by Respondent at any time after the Order Date that claims any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the relevant lateral flow immunoassay technology, including, without limitation, the Reserved Patent Rights, other than Patents that claim inventions conceived by and reduced to practice after the Order Date;

if such suit would have the potential to interfere with Aemoh's freedom to practice the following: (1) the research, Development, or manufacture of the relevant Water Soluble Consumer Pregnancy Test Product(s); or (2) the use, import, export, supply, distribution, sale, or offer for sale of the relevant Water Soluble Consumer Pregnancy Test Product(s) within the United States. Respondent shall also covenant to Aemoh that as a condition of any assignment, transfer, or exclusive license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant to Aemoh whereby the Third Party covenants not to sue Aemoh or the related Water Soluble Consumer Pregnancy Test Product Releasee(s) under such Patents, if the suit would have the potential to interfere with Aemoh's freedom to practice the following: (1) the research, Development, or manufacture of the relevant Water Soluble Consumer Pregnancy Test Product(s); or (2) the use, import, export, supply, distribution, sale, or offer for sale of the relevant Water Soluble Consumer Pregnancy Test Product(s) within the United States;

provided however, this Paragraph III.F shall have no force or effect with respect to any product that uses particulate labels, *e.g.*, colloidal gold or latex particles, whether or not such product uses (i) conjugates claimed or described in the Water Soluble Consumer Pregnancy Test Product Intellectual Property and/or (ii) Water Soluble Consumer Pregnancy Test Product Intellectual Property created, generated, or Developed by ACON for the Water Soluble Consumer Pregnancy Test Products.

G. The purpose of Paragraph III of this Order is to provide for the future use of the Water Soluble Consumer Pregnancy Test Product Assets in the research, Development, manufacture, distribution, sale and marketing of Consumer Pregnancy Tests, and to remedy the lessening of competition resulting from the acts and practices of the Respondent as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that for a period commencing on the Order Date and continuing for the term of this Order, Respondent shall not, without providing advance written notification to the Commission, acquire, through subsidiaries or otherwise, directly or indirectly (including, without limitation, acquisitions by any joint venture in which Inverness is a partner from any other partner(s) of such joint venture), the following:

A. any Ownership Interest in any Person that is not already included within the definition of Respondent and that engages in manufacture, distribution, marketing of Consumer Pregnancy Tests for sale in the United States; *provided, however,* that this provision shall not apply to an acquisition of assets that are not used in the manufacture, distribution, or marketing of Consumer Pregnancy Tests for sale in the United States;

B. any right, title, or interest under exclusive license or assignment from any Person that is not already included within the definition of Respondent under a United States Patent that: (1) includes the term "hCG" or "chorionic gonadotropin," and (2) contains a claim directed to a lateral flow immunoassay technology for the detection of human chorionic gonadotropin (hCG); or

C. any right, title, or interest under exclusive license or assignment from any Person that is not already included within the definition of Respondent under a United States Trademark that has been used to market, sell or distribute a Consumer Pregnancy Test of such Person in the United States at any time since February 24, 2006.

Said notifications shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission with a copy to the Assistant Director, Bureau of Competition, Division of Compliance. Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide three (3) complete copies (with all attachments and exhibits) of the Notification at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"), as follows: one (1) such copy to the Assistant Director of the Bureau of Competition, Division of Compliance, and two (2) such copies to the Secretary of the Commission. If, within the first waiting period, representatives of the

Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a; *provided however*, that the notification requirements of this Paragraph IV shall not apply to the acquisition by Respondent of any of the assets and rights of ACON that are or were the subject of the Acquisition.

V.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

   1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the transfer of the Product Manufacturing Technology and the related intellectual property, and with the asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.

   2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Interim Monitor shall serve until the later of:

    a. the completion of Respondent's obligations regarding the transfer of the Product Manufacturing Technology included in the Digital Consumer Pregnancy Test Assets and the Digital Consumer Pregnancy Test Product Intellectual Property to Church & Dwight (or the Designee(s) of Church & Dwight) in a manner that fully satisfies the requirements of the Order; or

    b. the completion of Respondent's obligations regarding the transfer of the Product Manufacturing Technology included in the Water Soluble Consumer Pregnancy Test Assets and the Water Soluble Consumer Pregnancy Test Product Intellectual Property to Aemoh (or the Designee(s) of Aemoh) in a manner that fully satisfies the requirements of the Order;

   provided, however, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Order.

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

6. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by

Respondent, and any reports submitted by Church & Dwight with respect to the performance of Respondent's obligations under the Order. Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order.

8. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

VI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II.A., II.E., II.I. and III.A of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if an Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order.

B. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it is complying and has complied with this Order.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in Respondent including, without limitation, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on the earlier of the following dates:

A. the date ten (10) years from the Order Date; or

B. the date on which the last of the May-Davis Patents to expire expires.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

CONFIDENTIAL APPENDIX A

Digital Consumer Pregnancy Test Product Core Employees

[Redacted From the Public Record Version But Incorporated By Reference]

CONFIDENTIAL APPENDIX B

Water Soluble Consumer Pregnancy Test Product Core Employees

[Redacted From the Public Record Version But Incorporated By Reference]

0910064

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of	)	
	)	
Thoratec Corporation,	)	
a corporation,	)	
	)	
and	)	**Docket No. 9339**
	)	
HeartWare International, Inc.,	)	
a corporation.	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondents Thoratec Corporation ("Thoratec") and HeartWare International, Inc. ("HeartWare") have entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, for the acquisition of HeartWare by Thoratec, which acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

SUMMARY

1. Thoratec's proposed $282 million acquisition of HeartWare threatens to eliminate the one company poised to seriously challenge Thoratec's monopoly of the U.S. left ventricular assist device ("LVAD") market. LVADs are a life-sustaining technology for treating end-stage heart failure patients who have failed other courses of treatment and are likely to die while waiting for a donor heart or are ineligible for a heart transplant.

2. Thoratec's flagship product, the HeartMate II, and its first-generation LVAD, the HeartMate XVE, are the only LVADs approved for commercial sale by the U.S. Food and Drug

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Administration ("FDA"). HeartWare is one of a small number of companies developing LVADs, and one of an even smaller number of companies that are permitted by the FDA to sell limited amounts of these devices pursuant to Investigational Device Exemptions. Of these companies, HeartWare alone represents a significant threat to Thoratec's LVAD monopoly.

3. HeartWare's HVAD, which is positioned to be the next LVAD approved by the FDA, offers a novel design that promises superior reliability with fewer surgical complications. [redacted] of Thoratec's competitors, only HeartWare poses a potential significant threat. [redacted] the HVAD will rapidly erode Thoratec's monopoly following the HVAD's projected FDA approval. [redacted] Likewise, [redacted] HVAD will quickly take market share from Thoratec. [redacted]

4. Competition from HeartWare has already forced Thoratec to innovate even though the HVAD is still in clinical trials. The intensity of this rivalry will only increase once HeartWare obtains FDA approval and [redacted] Competition through lower prices and enhanced features will increase the availability and quality of these lifesaving devices.

5. By acquiring HeartWare, Thoratec willfully seeks to maintain its LVAD monopoly, thereby denying patients the potentially life-saving benefits of competition between Thoratec and HeartWare. This conduct is reasonably capable of contributing significantly to Thoratec's maintenance of monopoly power.

6. Thoratec's acquisition of HeartWare will lead to an increase in market concentration that is presumptively unlawful whether the increase in concentration is based on [redacted] market share projections or based on current sales.

7. No other firm has the ability to replace the current and future competition eliminated by the merger. Any merger specific and cognizable efficiencies resulting from the transaction will not offset the transaction's profound anticompetitive effects.

PARTIES AND JURISDICTION

8. Respondent Thoratec is a corporation, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at 6035 Stoneridge Drive, Pleasanton, California 94588.

9. Thoratec is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is an entity whose business is in or affects "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. Respondent HeartWare is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 205 Newbury Street, Suite 101, Framingham, Massachusetts 01701.

11. HeartWare is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is an entity whose business is in or affects "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

THE TRANSACTION

12. On February 12, 2009, Thoratec and HeartWare signed an Agreement and Plan of Merger ("Merger") through which Thoratec proposes to acquire 100% of the voting securities of HeartWare in a cash and stock transaction valued at approximately $282 million.

PRODUCT MARKET

13. There are three product markets in which to assess the effects of the Merger:
    a. LVADs;
    b. LVADs as a bridge to transplant therapy; and
    c. LVADs as a destination therapy.

14. By replacing the function of the left ventricle, LVADs provide full circulatory support for end-stage heart failure patients awaiting a donor heart (bridge to transplant) or function as a permanent therapy for patients ineligible for a heart transplant (destination therapy). LVADs are used only after all other potential treatments, including drugs, surgery, and other medical devices, have been exhausted. For that reason, other products used to treat heart failure are not substitutes for LVADs.

GEOGRAPHIC MARKET

15. The geographic market in which to analyze the effects of the Merger is the United States.

MARKET STRUCTURE

16. Thoratec maintains a monopoly in the U.S. LVAD market. It is the only company with LVADs approved for commercial sale in the United States. The HeartMate II accounts for the vast majority of Thoratec's LVAD sales.

17. HeartWare's LVAD device, the HVAD, is in the latter stages of clinical development and poised to be the first and most significant threat to Thoratec's Heartmate II when the HVAD is approved, as expected, in late 2011 or early 2012.

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18. In addition to the HeartWare HVAD, there are several other companies working to develop LVADs. Each of these firms faces significant challenges before their LVADs can be approved. Even if they were to overcome these challenges and gain approval, none of these firms appears to have HeartWare's potential to challenge Thoratec's dominant market position. Moreover, it is unlikely that any other LVADs currently in development will reach the market before the HeartWare HVAD.

19. Under both case law and the government's Merger Guidelines, the Merger is presumptively unlawful. At current sales rates, Thoratec currently accounts for over [redacted] of sales in this market, while HeartWare accounts for [redacted] or more of sales, if measured by all sales, including sales for patients participating in clinical trials.

20. The Merger Guidelines measure concentration using the Herfindahl-Hirschman Index ("HHI"). Under that test, a merger is presumed likely to create or enhance market power (and is presumed illegal) when the post-merger HHI exceeds 1,800 and the merger increases the HHI by more than 100.

21. [redacted] HeartWare's HVAD will take significant market share from Thoratec once the HVAD is approved by the FDA in late 2011 or early 2012. As such, [redacted] the Merger would lead to profound increases in market concentration beginning in 2012. [redacted] HHI increases will range from over [redacted] points in 2012 to over [redacted] points in 2013.

22. Moreover, even with HeartWare's sales currently limited to sales for patients participating in the HVAD's clinical trial, the most recent historical market shares show a post-acquisition HHI of more than [redacted] reflecting an HHI increase of at least [redacted] over pre-acquisition levels.

ANTICOMPETITIVE EFFECTS

23. The proposed acquisition may substantially lessen competition in the relevant markets by, among other things:

a. eliminating current and future competition between Thoratec and HeartWare;
b. maintaining Thoratec's existing monopoly position;
c. increasing the likelihood that Thoratec will exercise market power unilaterally;
d. increasing the likelihood that end-stage heart failure patients will be denied life-sustaining treatments and forced to pay higher prices;
e. eliminating innovation competition; and
f. enhancing the likelihood of collusion or coordinated interaction between Thoratec and other LVAD manufacturers.

ENTRY

24. De novo entry into the relevant markets would not be timely, likely, or sufficient in its magnitude, character and scope to prevent or defeat the anticompetitive effects of the proposed acquisition.

25. De novo entry would take more than two years and is difficult, costly, and risky because of the research, development, and regulatory hurdles that companies seeking to market medical devices, such as LVADs, typically face. The FDA classifies LVADs as Class III medical devices, which are subject to its most rigorous medical device approval process.

EFFICIENCIES

26. Extraordinarily great merger-specific efficiencies would be necessary to justify the Merger in light of its potential to harm competition and decrease the availability of these lifesaving devices. Such efficiencies are not present in this transaction.

VIOLATIONS

COUNT I – ILLEGAL ACQUISITION

27. The allegations of paragraphs 1 through 26 above are incorporated by reference as though fully set forth.

28. The Merger would, if consummated, substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – MONOPOLIZATION

29. The allegations of paragraphs 1 through 28 above are incorporated by reference as though fully set forth.

30. Thoratec has, and at all relevant times has had, monopoly power in the relevant markets.

31. Through the Merger, Respondent Thoratec is willfully attempting to and conspiring to maintain its monopoly in the relevant markets. Eliminating HeartWare, [redacted] a significant competitive threat, is conduct reasonably capable of contributing to Respondent Thoratec's maintenance of monopoly power.

32. Respondent Thoratec's acts and practices are anticompetitive in nature and tendency and constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT III – ILLEGAL MERGER AGREEMENT

33. The allegations of paragraphs 1 through 32 above are incorporated by reference as though fully set forth.

34. Respondents Thoratec and Heartware, through the merger agreement described in paragraph 12, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that December 28, 2009, at 10:00 a.m., or such earlier date as is determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580, as the place, when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial pre-hearing scheduling conference to be held not later than ten days after the answer is filed by the last answering respondent. The scheduling conference and further proceedings will take place at the Federal Trade Commission,

600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (and in any event no later than five days after the answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition challenged in this complaint violates Section 7 of the Clayton Act, as amended, or Section 5 of the FTC Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores competition between distinct, separate, viable, and independent businesses in the relevant markets, with the ability to offer such products and services as Thoratec and HeartWare were offering and planning to offer prior to the transaction.

2. A prohibition against any transaction between Thoratec and HeartWare that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Thoratec and HeartWare provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in that market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to ensure the creation of one or more viable, independent entities to compete against Thoratec-HeartWare in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this twenty-eighth day of July 2009.

By the Commission.

Donald S. Clark
Secretary

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
J. Thomas Rosch
Edith Ramirez
Julie Brill
Maureen K. Ohlhausen

In the Matter of **FRESENIUS MEDICAL CARE AG & CO. KGaA,** **a partnership limited by shares.**	**Docket No. C- 4348**

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Fresenius Medical Care AG & Co. KGaA of Liberty Dialysis Holdings, Inc. ("Liberty"), and Fresenius Medical Care AG & Co. KGaA (hereafter referred to as "Respondent Fresenius") having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Fresenius with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent Fresenius, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent Fresenius of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Fresenius that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Fresenius has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets ("Hold Separate Order"), and having accepted the

executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America ("FMCNA") with its office and principal place of business located at 920 Winter St., Waltham, MA 02451-1457.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Fresenius, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Fresenius" means Fresenius Medical Care AG & Co. KGaA, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to Fresenius Medical Care AG & Co. KGaA, a partnership limited by shares organized under the laws of the Federal Republic of Germany, and Fresenius Medical Care Holdings, Inc.), divisions, groups, and affiliates controlled by Fresenius Medical Care AG & Co. KGaA (including, after the Effective Date, Liberty Dialysis Holdings, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, "Fresenius" includes Liberty.

B. "Liberty" means Liberty Dialysis Holdings, Inc., a corporation organized under the laws of Delaware, with its office and principal place of business located at 7650 SE 27th St., Suite 200, Mercer Island, WA 98040. Liberty Dialysis Holdings, Inc., includes Renal Advantage Inc. ("RAI").

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" and "Acquirers" means each Person that receives the prior approval of the Commission to acquire particular Clinic Assets pursuant to Paragraph II or Paragraph V of this Order.

E. "Alaska Clinic Assets" means the Liberty Dialysis Clinic located at 901 East Dimond Blvd, Anchorage, Alaska, 99515, and all Assets Associated with that Clinic.

F. "Alaska Clinic Assets Acquirer" means Alaska Investment Partners (HC) LLC, or any Person that receives the prior approval of the Commission to acquire the Alaska Clinic Assets pursuant to Paragraph II or Paragraph V of this Order.

G. "Appendix A Clinics" means Clinics listed in Appendix A to this Order.

H. "Appendix A Clinic Assets" means the Appendix A Clinics, the Appendix A-2 Joint Venture Equity Interests, and all Assets Associated with each of the Appendix A Clinics.

I. "Appendix A-2 Joint Venture Equity Interests" means the joint venture equity interest in Clinics owned by Liberty and Respondent Fresenius described in Appendix A-2.

J. "Appendix F Clinics" means the clinics identified in Non-Public Appendix F that are (1) owned by Respondent Fresenius in locations proximate to the Liberty Clinics listed in Appendix A, or (2) Liberty Clinics in locations proximate to the Fresenius Clinics listed in Appendix A. In any given location, there may be a greater, smaller, or equal number of Fresenius Clinics in Non-Public Appendix F that correspond to Liberty Clinics in any given location, or greater, smaller, or equal number of Liberty Clinics in Non-Public Appendix F that correspond to Fresenius Clinics in any given location.

K. "Appendix F Clinic Assets" means the Appendix F Clinics, the Appendix F-2 Joint Venture Equity Interests and all Assets Associated with each of the Appendix F Clinics.

L. "Appendix F-2 Joint Venture Equity Interests" means the joint venture equity interest owned by Respondent Fresenius or Liberty described in Appendix F-2.

M. "Assets Associated" means the following assets Relating To the Operation Of A Clinic:

1. all rights under the Clinic's Physician Contracts;

2. leases for the Real Property of the Clinic;

3. consumable or disposable inventory consistent with the Ordinary Course of Business at the Clinics To Be Divested including, but not limited to, janitorial, office, medical supplies, dialysis supplies, and pharmaceuticals including, but not limited to, erythropoietin;

4. all rights, title and interest of Respondent Fresenius or Liberty in any tangible property (except for consumable or disposable inventory) that has been on the premises of the Clinic at any time since July 1, 2011, including, but not limited to, all equipment, furnishings, fixtures, improvements, and appurtenances;

5. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of The Clinic located on the premises of the Clinic or in the possession of the Regional Manager responsible for such Clinic (or copies thereof where Respondent Fresenius or Liberty has a legal obligation to maintain the original document), including, but not limited to:

    a. documents containing information Relating To patients (to the extent transferable under applicable law), including, but not limited to, medical records,

    b. financial records,

    c. personnel files,

    d. Physician lists and other records of the Clinic's dealings with Physicians,

    e. maintenance records,

    f. documents Relating To policies and procedures,

    g. documents Relating To quality control,

    h. documents Relating To Payors,

    i. documents Relating To Suppliers,

    j. documents Relating To the Clinics to be Divested that are also Related To the Operation Of Clinics other than the Clinic To Be Divested, *PROVIDED, HOWEVER,* if such documents are located other than on the premises of the Clinic To Be Divested, Respondent Fresenius may submit a copy of the document with the portions not Relating To the Clinic To Be Divested redacted, and

    k. copies of contracts with Payors and Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of Respondent Fresenius to make such disclosure;

6. Respondent Fresenius's and Liberty's Medicare and Medicaid provider numbers, to the extent transferable;

7. all permits and licenses, to the extent transferable;

8. Intangible Property relating exclusively to the Operation Of The Clinic; and a royalty-free perpetual worldwide license for the use, without any limitation, of all other Intangible Property Relating To the Operation Of The Clinic (including the right to transfer or sublicense such Intangible Property, exclusively or nonexclusively, to others by any means); and

9. assets that are used in, or necessary for, the Operation Of The Clinic.

PROVIDED, HOWEVER, that "Assets Associated" does not include Excluded Assets.

N. "Assets To Be Divested" means the Appendix A Clinic Assets, and any Appendix F Clinic Assets divested pursuant to Paragraph V.A. of the Order.

O. "Clinic" means a facility that provides hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

P. "Clinic's Physician Contracts" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.

Q. "Clinic To Be Divested" and "Clinics To Be Divested" means the Appendix A Clinics, the Appendix A-2 Joint Venture Equity Interests, and where applicable, the Alaska Clinic Assets, Memphis Clinics Joint Venture Interests, or the Dallas Clinics Joint Venture Interests, and any Appendix F Clinics or Appendix F-2 Joint Venture Equity Interests divested pursuant Paragraph V.A. of the Order.

R. "Confidential Business Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.

S. "Connecticut Governmental Approvals For Divestiture" means any Governmental Approvals For Divestiture issued by the State of Connecticut.

T. "Connecticut Clinic Assets" means the following: Liberty Orange Clinic, 240 Indian River Rd., Orange, CT; and Liberty North Haven Clinic, 510 Washington Avenue, North Haven, CT; and all Assets Associated with each of those Clinics.

U. "Contract Services" means services performed pursuant to any Clinic's Physician Contract.

V. "Dallas Clinics Joint Ventures" means the following limited liability companies that own Clinics in and around Dallas, Texas: (1) Liberty Rockwall LLC; (2) Liberty Mesquite LLC; (3) WAXLD Holdings LLC; (4) Liberty Duncanville LLC; and (5) Liberty Lancaster LLC.

W. "Dallas Clinics Joint Venture Interests" means all of Liberty's equity and other interests held in each of the Dallas Joint Ventures.

X. "Dallas Clinics Joint Venture Interests Acquirer" means Gibralter 12 Holdings LLC, or the person who receives prior Commission approval to acquire the Dallas Clinics Joint Venture Interests pursuant to Paragraph II or Paragraph V of this Order.

Y. "Designated Fresenius Employee" means:

1. each Fresenius Employee Of A Clinic To Be Divested for the Acquirer of the Assets To Be Divested, the Acquirer of the Alaska Clinic Assets, the Acquirer of the Memphis Clinic Joint Venture Interests, and the Acquirer of the Dallas Clinic Joint Venture Interests, and

2. for the Acquirer of the Assets To Be Divested:

   a. any Regional Manager of a Clinic To Be Divested, and

   b. any of the additional Persons or a Person filling the job description (if the Person listed is no longer employed at that particular job) listed in Non-Public Appendix G to this Order.

Z. "Divestiture Agreement" and "Divestiture Agreements" mean any agreement pursuant to which Respondent Fresenius or a Divestiture Trustee divests any of the Assets To Be Divested pursuant to this Order and with the prior approval of the Commission.

AA. "Divestiture Trustee" means the person appointed to act as trustee by the Commission pursuant to Paragraph II.A or Paragraph V of this Order.

BB. "DSI" means Dialysis Newco, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 424 Church Street, Ste. 1900, Nashville, TN 37219.

CC. "DSI-Fresenius Divestiture Agreements" means the following agreements:

1. the Asset Purchase Agreement dated February 1, 2012, by and among DSI and Respondent Fresenius, and all attachments and exhibits, thereto, and

2. the Transition Services Agreement, which is an exhibit to the Asset Purchase Agreement, between DSI and Respondent Fresenius, and all attachments and exhibits, thereto.

The DSI-Fresenius Divestiture Agreements are attached as Non-Public Appendix E to this Order.

DD. "Effective Date" means the date on which Respondent Fresenius acquires Liberty.

EE. "Employee Of A Clinic To Be Divested" and "Employee Of The Clinic To Be Divested" mean any individual (including, but not limited to, a clinic director, manager, nurse, technician, clerk, dietician, or social worker) who is not a Regional Manager, who is employed by Respondent Fresenius, or before the Acquisition, by Liberty, by an Acquirer, or by another manager or owner of such Clinic To Be Divested, and who has worked part-time or full-time on the premises of such Clinic To Be Divested at any time since July 1, 2011, regardless of whether the individual has also worked on the premises of any other Clinic.

FF. "Excluded Assets" means:

1. all cash, cash equivalents, and short term investments of cash;

2. accounts receivable;

3. income tax refunds and tax deposits due Respondent Fresenius or Liberty;

4. unbilled costs and fees, and Medicare bad debt recovery claims, arising before a Clinic is divested to an Acquirer;

5. rights to the names "Fresenius," "Liberty Dialysis," and "Renal Advantage," (unless otherwise licensed to an Acquirer pursuant to the Order), and any variation of that name, and any names, phrases, marks, trade names, and trademarks to the extent they include the marks and designs in Exhibit D to this Order;

6. insurance policies and all claims thereunder;

7. prepaid expenses;

8. minute books (other than governing body minute books of the Clinic To Be Divested), tax returns, and other corporate books and records;

9. any inter-company balances due to or from Respondent Fresenius and Liberty or their affiliates;

10. all benefits plans;

11. all writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the Operation Of A Clinic that is divested;

12. telecommunication systems equipment and applications, and information systems equipment including, but not limited to computer hardware, not physically located at a Clinic To Be Divested but shared with the Clinic To Be Divested through local and/or wide area networking systems;

13. e-mail addresses and telephone numbers of Respondent Fresenius's and Liberty's employees;

14. Software;

15. computer hardware used in the Operation Of The Clinic that is (a) not located at the Clinic, and (b) not otherwise to be divested pursuant to a Divestiture Agreement;

16. all Supplier or provider numbers issued to Respondent Fresenius or Liberty by a Supplier or Payor with respect to any Clinic To Be Divested, except for Respondent Fresenius's or Liberty's Medicare and Medicaid provider numbers for each Clinic To Be Divested;

17. rights under agreements with Payors and Suppliers that are not assignable even if Respondent Fresenius and Liberty approve such assignment;

18. office equipment and furniture that (a) is not, in the Ordinary Course Of Business, physically located at the Clinic To Be Divested, (b) is shared with Clinics other than the Clinic To Be Divested, and (c) is not necessary to the Operation Of The Clinic To Be Divested.

19. Licensed Intangible Property;

20. Fresenius Medical Protocols and Liberty Medical Protocols, subject to the licensing provisions in this Order;

21. Contracts to which Respondent Fresenius or Liberty or their affiliates (other than the Clinics To Be Divested) are a party and are not otherwise included in the Assets Associated with a Clinic To Be Divested; and

22. strategic planning documents that

    a. relate to the Operation Of The Clinic other than the Clinic To Be Divested, and

    b. are not located on the premises of the Clinic To Be Divested.

GG. "Florida Governmental Approvals for Divestiture" means any Governmental Approvals for Divestiture issued by the State of Florida.

HH. "Florida Viera Clinic Asset" means the FMC Viera Clinic, located at 8041 Spyglass Road, Viera, FL 32940; and all Assets Associated with such Clinic.

II. "Fresenius Employee Of A Clinic To Be Divested" and "Fresenius Employee Of The Clinic To Be Divested" means an Employee Of A Clinic To Be Divested who is employed by Respondent Fresenius or, before the acquisition by Respondent Fresenius, by Liberty.

JJ. "Fresenius's Medical Protocols" means medical protocols promulgated by Respondent Fresenius, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *PROVIDED, HOWEVER,* "Fresenius's Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by Respondent Fresenius.

KK. "Good Samaritan Hospital" means a hospital that is part of the Bons Secours Charity Health System located at 255 Lafayette Ave. (Route 59), Suffern, NY 10901.

LL. "Good Samaritan Hospital Dialysis Clinic" means the Regional Kidney Center Clinic owned by Good Samaritan Hospital and located at 331 Route 17M, Harriman, NY 10926.

MM. "Good Samaritan Management Agreement" means collectively:

1. the Administrative Services Agreement dated January 1, 2010, by and between Good Samaritan Hospital and Renal Research Institute, LLC, an affiliate of Respondent Fresenius, and

2. any other agreements between Good Samaritan Hospital and Respondent Fresenius Relating To the management of the dialysis clinics at Good Samaritan Hospital located at 255 Lafayette Ave. (Route 59), Suffern, NY 10901, and 331 Route 17M, Harriman, NY 10926.

NN. "Good Samaritan Management Termination Letter" means the February 1, 2012, letter from Renal Research Institute, LLC, an affiliate of Respondent Fresenius, and Good Samaritan Hospital giving sixty (60) days advance notice of termination of the Good Samaritan Management Agreement.

OO. "Governmental Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

PP. "Government Approvals For Continued Operation" means any Governmental Approvals, other than Government Approvals For Divestiture, that an Acquirer must have to continue to operate a Clinic To Be Divested.

QQ. "Governmental Approvals For Divestiture" means any Governmental Approvals that an Acquirer must have to own, and to initially operate, a Clinic To Be Divested, including, but not limited to, state-issued licenses and state-issued certificates of need.

RR. "Hawaii Governmental Approvals For Divestiture" means any Governmental Approvals For Divestiture issued by the State of Hawaii.

SS. "Hawaii Clinic Assets" means the following clinics and all Assets Associated with each of those Clinics:

1. FMC Aloha Clinic, 1520 Liliha Street, Honolulu, HI;

2. FMC Kapahulu Clinic, 750 Palani Avenue, Honolulu, HI;

3. FMC Pearlridge Clinic, 98-1005 Moanaloa Road, Suite 420, Aiea, HI;

4. FMC Honolulu Clinic, 226 N. Kuakini Street, Honolulu, HI;

5. FMC Kapolei Clinic, 555 Farrington Highway, Kapolei, HI;

6. FMC Ko'Olau Clinic, 47-388 Hui Iwa Street, Kaneohe, HI;

7. FMC Wahiawa Clinic, 850 Kilani Avenue, Wahiawa, HI;

8. FMC Windward Clinic, 45-480 Kaneohe Bay Drive #D09, Kaneohe, HI; and

9. FMC Waipahu Clinic (de novo), location to be determined, Waipahu, HI.

TT. "Intangible Property" means intangible property Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property.

UU. "Liberty's Medical Protocols" means medical protocols promulgated by Liberty, whether in hard copy or embedded in software, that have been in effect at any time since July 1, 2010. *PROVIDED, HOWEVER,* "Liberty's Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by Liberty.

VV. "Licensed Intangible Property" means intangible property licensed to Respondent Fresenius from a third party Relating To the Operation Of A Clinic To Be Divested including, but not limited to, intellectual property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to Respondent Fresenius. ("Licensed Intangible Property" does not mean modifications and improvements to intangible property that are not licensed to Respondent Fresenius.)

WW. "Memphis Clinics Joint Ventures" means the following limited liability companies that own Clinics in and around Memphis, TN: (1) NRA Memphis (South) Tennessee, LLC, owner of

the Liberty Pace Road Clinic at 4185 Pace Road, Memphis, TN 38116; and (2) NRA Memphis (Midtown) Tennessee LLC, owner of the Liberty Poplar Clinic at 1333 Poplar Avenue, Memphis, TN 38104.

XX. "Memphis Clinics Joint Venture Interests" means all of Liberty's equity and other interests held in each of the Memphis Clinics Joint Ventures. The "Memphis Clinics Joint Venture Interests" are also considered Secondary Divestiture Assets for purposes of Paragraphs I.H., I.I., and II of the Hold Separate Order.

YY. "Memphis Clinics Joint Venture Interests Acquirer" means Satellite Healthcare, Inc., a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 300 Santana Row, Suite 300, San Jose, California, 95128, or another person who receives the Commission's prior approval to acquire the Memphis Clinics Joint Venture Interests pursuant to Paragraph II or Paragraph V of this Order.

ZZ. "Monitor Agreement" means the Monitor Agreement dated January 21, 2012, between Fresenius, and Richard A. Shermer, of R. Shermer & Company. (The Monitor Agreement is attached as Appendix C to this Order. The Monitor Agreement Compensation is attached as Confidential Appendix C-1 to this Order.)

AAA. "New York Governmental Approvals For Divestiture" means any Governmental Approvals For Divestiture issued by the State of New York.

BBB. "New York Clinic Assets" means the FMC Dutchess Clinic located at 2585 South Rd., Poughkeepsie, NY, and all Assets Associated with that Clinic.

CCC. "Operation Of A Clinic" and "Operation Of The Clinic" mean all activities Relating To the business of a Clinic, including, but not limited to:

1. attracting patients to the Clinic for dialysis services, providing dialysis services to patients of the Clinic, and dealing with their Physicians, including, but not limited to, services Relating To hemodialysis and peritoneal dialysis;

2. providing medical products to patients of the Clinic;

3. maintaining the equipment on the premises of the Clinic, including, but not limited to, the equipment used in providing dialysis services to patients;

4. purchasing supplies and equipment for the Clinic;

5. negotiating leases for the premises of the Clinic;

6. providing counseling and support services to patients receiving products or services from the Clinic;

7. contracting for the services of medical directors for the Clinic;

8. dealing with Payors that pay for products or services offered by the Clinic, including but not limited to, negotiating contracts with such Payors and submitting claims to such Payors; and

9. dealing with Governmental Approvals Relating To the Clinic or that otherwise regulate the Clinic.

DDD. "Ordinary Course Of Business" means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of The Clinic that is consistent with past practices of such Person in the Operation Of The Clinic, including, but not limited to past practice with respect to amount, timing, and frequency.

EEE. "Other Contracts Of Each Clinic To Be Divested" means all contracts Relating To the Operation Of A Clinic, where such Clinic is a Clinic To Be Divested – including, but not limited to, contracts for goods and services provided to the Clinic and contracts with Payors – but does not mean the Clinic's Physician Contracts and the leases for the Real Property Of The Clinic.

FFF. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; health maintenance organizations; government health benefits programs; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

GGG. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

HHH. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

III. "Real Property Of The Clinic" means real property on which, or in which, the Clinic is located, including real property used for parking and for other functions Relating To the Operation Of The Clinic.

JJJ. "Regional Manager" means any individual who has been employed by Respondent Fresenius, RAI, or Liberty with a geographic regional, or area supervisory, or management responsibility for one or more Clinics. A Regional Manager may go by various names including, but not limited to, director of operations.

KKK. "Regional Manager Of A Clinic To Be Divested" and "Regional Manager Of The Clinic To Be Divested" mean a Regional Manager with a geographic regional, or area supervisory, or management responsibility for a Clinic To Be Divested at any time since July 1, 2011.

LLL. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

MMM. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

NNN. "Supplier" means any Person that has sold to Respondent Fresenius, RAI, or Liberty any goods or services, other than Physician services, for use in a Clinic To Be Divested.

OOO. "Time Of Divestiture" means the date upon which an Appendix A Clinic or an Appendix F Clinic is divested to an Acquirer pursuant to this Order.

PPP. "University of California, San Diego Clinic" means the Clinic currently located at 200 W. Arbor Dr., San Diego, CA 92103.

II.

IT IS FURTHER ORDERED that:

A. Respondent Fresenius shall:

1. within thirty-two (32) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements all the Appendix A Clinic Assets, except for the Connecticut Clinic Assets, Hawaii Clinic Assets, the New York Clinic Assets, and the Florida Viera Clinic Assets, as on-going businesses, and grant to the Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Fresenius Medical Protocols and the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). Any failure by Respondent Fresenius to comply with the DSI-Fresenius Divestiture Agreements shall constitute a failure to comply with the Order. The DSI-Fresenius Divestiture Agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of DSI, or any obligations of Respondent Fresenius, under the DSI-Fresenius Divestiture Agreements.

2. within ninety (90) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Connecticut Clinic Assets, as an on-going business;

3. within ninety (90) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Hawaii Clinic Assets, as an on-going business;

4. within one (1) year after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the New York Clinic Assets, as an on-going business;

5. within sixty (60) days after the Effective Date, divest to DSI, absolutely, and in good faith, pursuant to and in accordance with the DSI-Fresenius Divestiture Agreements, the Florida Viera Clinic Assets, as an on-going business;

6. within fifteen (15) days after the Effective Date:

    a. pursuant to and in accordance with the Good Samaritan Management Termination Letter, give notice to terminate the Good Samaritan Management Agreement, and pursuant to such letter and such management agreement, transfer management of the Good Samaritan Hospital Dialysis Clinic to Good Samaritan Hospital, who will either operate the Good Samaritan Hospital Dialysis Clinic itself or seek a new operator through a request for proposal process.

    b. enter into a transition services agreement with Good Samaritan Hospital which shall be submitted to the Commission for approval within the fifteen-day time period, and shall include, but not be limited to:

        (1) providing services consistent with, or similar to, the services currently provided to Good Samaritan under the Good Samaritan Management Agreement;

        (2) a term not to extend beyond December 31, 2012;

        (3) the unilateral option of Good Samaritan Hospital to terminate such agreement or phase out particular services or parts of such agreement upon notice as determined by Good Samaritan Hospital;

        (4) assigning values or costs for particular services, such that if the services are phased out before the end of the transition services agreement, there will be no dispute on remaining costs;

        (5) a firewall to protect Confidential Business Information Relating To the Good Samaritan Dialysis Clinic; and

        (6) a prohibition on Respondent Fresenius from assigning such agreement.

The Good Samaritan Management Termination Letter and the Good Samaritan transition services agreement, when final and approved by the Commission, are incorporated by reference into this Order and made a part hereof as Non-Public Appendix J. If Respondent Fresenius fails to submit an executed transition services agreement to the Commission for approval within fifteen (15) days after the Effective Date, or if the Commission denies its approval of any agreement submitted for approval, then the Monitor, in consultation with Commission staff, shall be given the immediate and absolute authority to negotiate all terms of the transition services agreement with Good Samaritan, consistent with the terms of this Order, and subject to the Commission's prior approval. After the Effective Date and until the transition services agreement terminates, Respondent Fresenius shall not disclose Confidential Business Information Relating To the Good Samaritan Hospital Dialysis Clinic; and Respondent Fresenius shall assure that any employee who obtains or possesses Confidential Business Information Relating To the Good Samaritan Hospital Dialysis Clinic shall not disclose it to any employee who does not have primary responsibility for providing transition services to the Good Samaritan Hospital Dialysis Clinic.

Any failure by Respondent Fresenius to comply with the Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement shall constitute a failure to comply with the Order. The Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Good Samaritan Hospital, or any obligations of Respondent Fresenius, under the Good Samaritan Management Termination Letter and the final Good Samaritan transition services agreement.

7. Within ten (10) days after the Effective Date, divest to the Alaska Clinic Acquirer, absolutely, and in good faith, pursuant to and in accordance with the Alaska Clinic Divestiture Agreement, the Alaska Clinic Assets as an on-going business, and grant to the Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). The Alaska Clinic Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix H. Any failure by Respondent Fresenius to comply with the Alaska Clinic Divestiture Agreement shall constitute a failure to comply with the Order. However, in the event that the Alaska Clinic Divestiture Agreement varies from or contradicts, or be construed to vary or contradict, the terms of this Order, the terms of this Order shall control. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Alaska Clinic Acquirer, or any obligations of Respondent Fresenius, under the Alaska Clinic Divestiture Agreement.

8. Within thirty-two (32) days after the Effective Date, divest to the Dallas Clinics Joint Venture Interests Acquirer, absolutely, and in good faith, pursuant to and in accordance with the Dallas Clinics Joint Venture Interests Divestiture Agreement, the Dallas Clinics

Joint Venture Interests, and grant to the Dallas Clinics Joint Venture Interests Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). The Dallas Clinics Joint Venture Interests Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix I. Any failure by Respondent Fresenius to comply with the Dallas Clinics Joint Venture Interests Divestiture Agreement shall constitute a failure to comply with the Order. The Dallas Clinics Joint Venture Interests Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Dallas Clinics Joint Venture Interests Acquirer, or any obligations of Respondent Fresenius, under the Dallas Clinics Joint Venture Interests Divestiture Agreement.

9. Within twenty-five (25) days after the date this Order becomes final, divest the Memphis Clinics Joint Venture Interests to the Memphis Clinics Joint Venture Interests Acquirer, absolutely, and in good faith pursuant to and in accordance with the Memphis Clinics Joint Venture Interests Divestiture Agreement, and grant to the Memphis Clinics Joint Venture Interests Acquirer a royalty-free, worldwide non-exclusive license for the use, without any limitation, of the Liberty Medical Protocols (including the right to transfer or sublicense such protocols, exclusively or nonexclusively, to others by any means). The Memphis Clinics Joint Venture Interests Divestiture Agreement is incorporated by reference into this Order and made a part hereof as Non-Public Appendix K. Any failure by Respondent Fresenius to comply with the Memphis Clinics Joint Venture Interests Divestiture Agreement shall constitute a failure to comply with the Order. The Memphis Clinics Joint Venture Interests Divestiture Agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of the Memphis Clinics Joint Venture Interests Acquirer, or any obligations of Respondent Fresenius, under the Memphis Clinics Joint Venture Interests Divestiture Agreement.

PROVIDED, HOWEVER, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Fresenius that DSI, the Dallas Clinics Joint Venture Interests Acquirer**,** Memphis Clinics Joint Venture Interests Acquirer, or the Alaska Clinic Acquirer is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent Fresenius shall immediately notify DSI, the Dallas Clinics Joint Venture Interests Acquirer**,** Memphis Clinics Joint Venture Interests Acquirer, or the Alaska Clinic Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, effect the rescission of the applicable Divestiture Agreement; and (2) Respondent Fresenius shall, within six (6) months of the date Respondent Fresenius receives notice of such determination from the Commission, divest the Appendix A Clinic Assets, the Dallas Clinics Joint Venture Interests, Memphis Clinics Joint Venture Interests, or the Alaska Clinic Assets, as applicable, absolutely and in good faith, at no minimum price, as on-going businesses to an

Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

PROVIDED FURTHER, HOWEVER, that if Respondent Fresenius has complied with the terms of this Paragraph before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Fresenius that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondent Fresenius or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent Fresenius shall not acquire Liberty until it has obtained for all the Appendix A Clinics:

   1. all approvals for the assignment of the Clinic's Physician Contracts to the Acquirer;

   2. all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture; and

   3. all approvals by joint venture partners necessary for the Acquirer of Appendix A-2 Joint Venture Equity Interests to jointly own and operate the Clinics that are owned by the joint venture.

   Copies of all such approvals shall be incorporated into the DSI-Fresenius Divestiture Agreements as appendices.

C. Respondent Fresenius shall hold separate the entirety of Liberty, and not take control over or possession of Liberty, until it has obtained for all the Appendix A Clinics all approvals for the assignment of the rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested to the Acquirer. The specific terms of the hold separate are in the Order to Maintain Assets and Hold Separate attached to the Agreement Containing Consent Orders.

D. Respondent Fresenius shall:

   1. place no restrictions on the use by any Acquirer of any of the Assets To Be Divested to such Acquirer or any of the Clinics To Be Divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the Assets To Be Divested to such Acquirer or any of the Clinics To Be Divested to such Acquirer including, but not limited to, seeking or requesting the imposition of Governmental Approvals or other governmental restrictions on the Acquirer's business operations relating to the Assets To Be Divested or any of the Clinics To Be Divested.

   2. cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer,

a. at the Time Of Divestiture of each Clinic To Be Divested, in obtaining all Government Approvals For Divestiture, and

b. all Government Approvals For Continued Operation, for each Clinic To Be Divested to such Acquirer.

3. at the Time Of Divestiture of each Clinic To Be Divested:

a. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic divested to such Acquirer. *PROVIDED, HOWEVER*, that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested to such Acquirer pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then Respondent Fresenius shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph; and

b. assign to the Acquirer all of the Clinic's Physician Contracts for the Clinics divested to such Acquirer. *PROVIDED HOWEVER*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of this Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondent Fresenius shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph.

c. assign to the Acquirer all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture; and

d. assign to the Acquirer all approvals by joint venture partners necessary for the Acquirer of Appendix A Joint Venture Equity Interests to jointly own and operate the Appendix A Clinics that are owned by the joint venture.

4. With respect to all Other Contracts Of Each Clinic To Be Divested, at the Acquirer's option and at the Time Of Divestiture of each Clinic To Be Divested:

a. if such contract can be assigned without third party approval, assign Respondent Fresenius's rights under the contract to the Acquirer; and

b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining:

(1) such third party approval and in assigning the contract to the Acquirer; or

(2) a new contract.

E. Respondent Fresenius shall:

1. at the Time Of Divestiture of each Clinic To Be Divested, provide to the Acquirer of such Clinic contact information about Payors and Suppliers for the Clinic, and

2. not object to the sharing of Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent Fresenius not to disclose the information to any third party.

F. Respondent Fresenius shall:

1. if requested by an Acquirer, facilitate interviews between each Designated Fresenius Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;

2. not interfere in employment negotiations between each Designated Fresenius Employee and an Acquirer.

3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated Fresenius Employee from being employed by an Acquirer, and shall not offer any incentive to the Designated Fresenius Employee to decline employment with an Acquirer;

4. cooperate with an Acquirer of a Clinic in effecting transfer of the Designated Fresenius Employee to the employ of the Acquirer, if the Designated Fresenius Employee accepts such offer of employment from an Acquirer;

5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated Fresenius Employee from being employed by an Acquirer;

6. eliminate any confidentiality restrictions that would prevent the Designated Fresenius Employee who accepts employment with the Acquirer from using or transferring to an Acquirer any information Relating To the Operation Of The Clinic; and

7. pay, for the benefit of any Designated Fresenius Employee who accepts employment with an Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Respondent Fresenius shall comply with the terms of this Paragraph II.F. from the time Respondent Fresenius signs the Agreement Containing Consent Order until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested for the employees who are Designated Fresenius Employees described in Paragraph I.Y.1.

Respondent Fresenius shall comply with the terms of this Paragraph II.F. from the time Respondent Fresenius signs the Agreement Containing Consent Order until one-hundred twenty

(120) days after the divestiture required pursuant to Paragraph II.A.1. is completed for the employees who are Designated Fresenius Employees described in Paragraph I.Y.2.

PROVIDED, HOWEVER, that the terms of this Paragraph II.F. as it relates to the interviewing and hiring of Regional Managers shall not apply after the Acquirer has hired five (5) Regional Managers.

PROVIDED, FURTHER, HOWEVER, that if, at any time after the Time of Divestiture, DSI or the Acquirer of the Appendix A Clinic Assets gives Respondent Fresenius an unsolicited list of employees from the Non-Public Appendix G to whom the Acquirer does not intend to offer employment, then such employees may be hired by Respondent Fresenius as full time employees without violating this Paragraph II.F. *PROVIDED, FURTHER, HOWEVER*, that no earlier than fifteen (15) days after the Time of Divestiture, Respondent Fresenius may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G to whom Respondent Fresenius wishes to offer full time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then Respondent Fresenius may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire such employees, or (ii) chooses to defer a hiring decision and keep the requested employees on the Non-Public Appendix G, then Respondent Fresenius shall continue to comply with the terms of this Paragraph II.F. with regard to such employees.

G. For a period of:

1. two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any employee who is employed by any of the Acquirers to terminate his or her employment relationship with such Acquirer, unless that employment relationship has already been terminated by the Acquirer; *PROVIDED, HOWEVER*, Respondent Fresenius may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at any of an Acquirer's employees; *PROVIDED, FURTHER, HOWEVER,* Respondent Fresenius may hire employees who apply for employment with Respondent Fresenius, as long as such employees were not solicited by Respondent Fresenius in violation of this Paragraph; *PROVIDED, FURTHER, HOWEVER,* Respondent Fresenius may offer employment to a Designated Fresenius Employee who is employed by the Acquirer in only a part-time capacity, if the employment offered by Respondent Fresenius would not, in any way, interfere with the employee's ability to fulfill his or her employment responsibilities to the Acquirer; and

2. six (6) months following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not, directly or indirectly, employ, directly or indirectly, including as a paid or unpaid consultant, any Person who owns any interest in any of the Clinics or interests in Clinics divested pursuant to Paragraph II or Paragraph V of this Order; *PROVIDED HOWEVER,* for purposes of this Paragraph II.G.2., a Person does

not include an individual who is part of the Alaska Clinic Assets Acquirer or the Dallas Clinics Joint Venture Interests Acquirer, and is employed or engaged as a medical director at a Respondent Fresenius Clinic, or otherwise engaged as a medical advisor for Respondent Fresenius.

H. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"):

1. Respondent Fresenius shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic; and

2. For a period of three (3) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not contract for the services of the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group for the provision of Contract Services to be performed in any of the areas listed in Appendix B of this Order that correspond to such Clinic. *PROVIDED, HOWEVER*, if the Contract Physician, or the Contract Physician's practice group, or other members of the Contract Physician's practice group were providing services to a Clinic pursuant to a contract with Respondent Fresenius or Liberty in effect as of July 1, 2011, then Respondent Fresenius may contract with such Contract Physicians, or the Contract Physician's practice group, or other members of the Contract Physician's practice group for services to be provided to that particular Clinic.

I. Respondent Fresenius shall:

1. not disclose Confidential Business Information relating exclusively to any of the Clinics To Be Divested to any Person other than the Acquirer of such Clinic;

2. after the Time Of Divestiture of such Clinic:

   a. shall not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying with the terms of this Order or with any law; and

   b. shall destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested, except to the extent that: (1) Respondent Fresenius is required by law to retain such information, and (2) Respondent Fresenius's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Respondent Fresenius.

J. At the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall provide the Acquirer of the Clinic with manuals, instructions, and specifications sufficient for the Acquirer to access and use any information,

1. divested to the Acquirer pursuant to this Order, or

2. in the possession of the Acquirer, and previously used by Respondent Fresenius or Liberty in the Operation Of The Clinic.

K. For two (2) years following the Time Of Divestiture of each Clinic To Be Divested, Respondent Fresenius shall not solicit the business of any patient who received any goods or services from such Clinic between July 1, 2011, and the date of such divestiture, *PROVIDED, HOWEVER,* Respondent Fresenius may (i) make general advertisements for the business of such patients including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any Respondent Fresenius employee.

L. Respondent Fresenius shall convey to each Acquirer of a Clinic To Be Divested the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of The Clinic by the Acquirer and if the Acquirer is unable, using commercially reasonable efforts, to obtain equivalent rights from other third parties on commercially reasonable terms and conditions.

M. Respondent Fresenius shall do nothing to prevent or discourage Suppliers that, prior to the Time Of Divestiture of any Clinic To Be Divested, supplied goods and services for use in any Clinic To Be Divested from continuing to supply goods and services for use in such Clinic.

N. Respondent Fresenius shall not terminate any transition services agreement that is a part of any of the Divestiture Agreements before the end of the term approved by the Commission without:

1. the written agreement of the Acquirer and thirty (30) days prior notice to the Commission; or,

2. in the case of a proposed unilateral termination by Respondent Fresenius due to an alleged breach of an agreement by the Acquirer, sixty (60) days notice of such termination. *PROVIDED, HOWEVER,* such sixty (60) days notice shall be given only after the parties have:

   a. attempted to settle the dispute between themselves, and

   b. engaged in arbitration and received an arbitrator's decision, or

c. received a final court decision after all appeals.

O. The purpose of Paragraph II of this Order is to ensure the continuation of the Clinics To Be Divested as, or as part of, an ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition by Respondent Fresenius of Liberty, to ensure that the Clinics To Be Divested are operated independently of, and in competition with, Respondent Fresenius, and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. For a period of five (5) years from the date this Order is issued, Respondent Fresenius shall not, without providing advance written notification to the Commission in the manner described in this paragraph, directly or indirectly:

1. acquire any assets of or financial interest in any Clinic located in any of the areas listed in Appendix B of this Order; or

2. enter into any contract to participate in the management or Operation Of A Clinic located in any of the areas listed in Appendix B of this Order, except to the extent that the contract relates exclusively to:

   a. off-site lab services or social worker support materials; or

   b. billing services, collection services, bookkeeping services, accounting services, supply purchasing and logistics services, or the preparation of financial reports and accounts receivable reports (collectively "Such Services"), where appropriate firewalls and confidentiality agreements are implemented to prevent Confidential Business Information of the Clinic from being disclosed to anyone participating in any way in the operation or management of any Clinic owned by Respondent Fresenius or any Clinic other than the Clinic to which Such Services are being provided.

Said advance written notification shall contain (i) either a detailed term sheet for the proposed acquisition or the proposed agreement with all attachments, and (ii) documents that would be responsive to Item 4(c) of the Premerger Notification and Report Form under the Hart-Scott-Rodino Premerger Notification Act, Section 7A of the Clayton Act, 15 U.S.C. § 18a, and Rules, 16 C.F.R. § 801-803, Relating To the proposed transaction (hereinafter referred to as "the Notification), *PROVIDED, HOWEVER,* (i) no filing fee will be required for the Notification, (ii) an original and one copy of the Notification shall be filed only with the Secretary of the Commission and need not be submitted to the United States Department of Justice, and (iii) the Notification is required from Respondent Fresenius and not from any other party to the

transaction. Respondent Fresenius shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Fresenius shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

PROVIDED, HOWEVER, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.indirectly:

B. For the duration of the Order, Respondent Fresenius shall not:

1. acquire, directly or indirectly, any interest in the University of California, San Diego Clinic, where currently located, or wherever subsequently located within San Diego County, California; or

2. enter into any agreement or otherwise agree to manage, operate, expand, or move such University of California, San Diego Clinic, wherever it may be located within San Diego County, California.

3. shall not acquire, directly or indirectly, without receiving prior Commission approval, any interest in the Clinics divested, or any Clinics divested, pursuant to the terms of this Order including, but not limited to, entering into a management or operation agreement with such Clinics.

IV.

IT IS FURTHER ORDERED that:

A. Richard A. Shermer, of R. Shermer & Company, shall be appointed Monitor to assure that Respondent Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. No later than one (1) day after the Effective Date, Respondent Fresenius shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius has not opposed, in writing, including the reasons for

opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Fresenius of the identity of any proposed Monitor, Respondent Fresenius shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Fresenius's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. Respondent Fresenius shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent Fresenius's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

   a. Assuring that Respondent Fresenius expeditiously complies with all of its obligations and perform all of its responsibilities as required by the this Order, the Order to Maintain Assets, and the Divestiture Agreements;

   b. Monitoring any transition services agreements;

   c. Assuring that Confidential Business Information is not received or used by Respondent Fresenius or the Acquirers, except as allowed in this Order and in the Order to Maintain Assets, in this matter.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Respondent Fresenius's compliance with the provisions of this Order, the Order to Maintain Assets, and the Divestiture Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Fresenius's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Fresenius's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Fresenius shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Fresenius's compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent Fresenius on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Fresenius, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondent Fresenius shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondent Fresenius shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Fresenius, and any reports submitted by the Acquirer with respect to the performance of Respondent Fresenius's obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent Fresenius of its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.

9. Respondent Fresenius may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with

the requirements of this Order, the Order to Maintain Assets, and the Divestiture Agreements.

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a trustee pursuant to Paragraph V of this Order and may be the same Person appointed as Monitor under the Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that:

A. If Respondent Fresenius has not divested, absolutely and in good faith and with the Commission's prior approval,

1. all of the Appendix A Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest any of the Appendix A Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order, which may include negotiations with landlords holding leases to the Assets to be Divested; or, in the event the Appendix A Clinics cannot be divested for whatever reason, (2) divest selected Appendix F Clinic Assets at the option of the Divestiture Trustee and the Commission.

2. all of the Dallas Clinics Joint Venture Interests pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest the Dallas Clinics Joint Venture Interests that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order; or, in the event the Dallas Clinics Joint Venture Interests cannot be divested for whatever reason, (2) divest the Appendix F-3 Clinics in the Dallas area at the option of the Divestiture Trustee and the Commission.

3. all of the Alaska Clinic Assets pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest the Alaska Clinic Assets that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order; or, in the event the Alaska Clinic Assets cannot be divested for whatever reason, (2) divest the Appendix F-4 Clinics in the Alaska area at the option of the Divestiture Trustee and the Commission.

4. all of the Memphis Clinics Joint Venture Interests pursuant to Paragraph II of this Order, the Commission may appoint a trustee to (1) divest the Memphis Clinics Joint Venture Interests that have not been divested pursuant to Paragraph II of this Order in a manner that satisfies the requirements of Paragraph II of this Order; or, in the event the Memphis Clinics Joint Venture Interests cannot be divested for whatever reason, (2) divest the Appendix F-5 Clinics in the Memphis area at the option of the Divestiture Trustee and the Commission.

In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent Fresenius shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Fresenius to comply with this Order.

B. The Commission shall select the trustee, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. The trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Fresenius has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent Fresenius of the identity of any proposed trustee, Respondent Fresenius shall be deemed to have consented to the selection of the proposed trustee.

C. Within ten (10) days after appointment of a trustee, Respondent Fresenius shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.

D. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent Fresenius shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the Appendix A Assets that have not been divested pursuant to Paragraph II of this Order and, subject to the provisions of Paragraph V.A. of the Order, divest Appendix F Clinic Assets.

2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a divestiture plan or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *PROVIDED, HOWEVER*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the trustee may request. Respondent Fresenius shall develop such

financial or other information as the trustee may request and shall cooperate with the trustee. Respondent Fresenius shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Fresenius shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Fresenius's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer or Acquirers that receives the prior approval of the Commission, as required by this Order; *PROVIDED, HOWEVER*, if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Respondent Fresenius from among those approved by the Commission; *PROVIDED, FURTHER, HOWEVER*, that Respondent Fresenius shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of Respondent Fresenius, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent Fresenius, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be paid at the direction of Respondent Fresenius, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Fresenius shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

7. The trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The trustee shall report in writing to Respondent Fresenius and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

9. Respondent Fresenius may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the trustee from providing any information to the Commission.

E. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph V.

F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

VI.

IT IS FURTHER ORDERED that:

A. Beginning thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Fresenius has fully complied with Paragraphs II.A., II.B., II.C., II.D.1., II.D.2.a., II.D.3., II.D.4., II.E., II.F., II.G.2., II.I.2., II.J., II.L., and IV.B. of this Order, Respondent Fresenius shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Fresenius shall submit at the same time a copy of these reports to the Monitor.

B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next four (4) years, Respondent Fresenius shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Fresenius shall submit at the same time a copy of these reports to the Monitor.

VII.

IT IS FURTHER ORDERED that Respondent Fresenius shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondent Fresenius,

B. Any proposed acquisition, merger or consolidation of Respondent Fresenius, or

C. Any other change in Respondent Fresenius that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent Fresenius.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Fresenius, Respondent Fresenius shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Fresenius and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Fresenius related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. Upon five (5) days' notice to Fresenius and without restraint or interference from Fresenius, to interview officers, directors, or employees of Fresenius, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on May 23, 2022.

By the Commission, Commissioner Ohlhausen not participating.

Donald S. Clark
Secretary

SEAL
ISSUED: May 23, 2012

APPENDIX A

APPENDIX A CLINICS

APPENDIX A CLINICS

	Clinic Name	Clinic Address
1	Liberty Flagstaff De Novo	2268 North Walgreens Street Flagstaff, AZ 86004
2	FMC Berkeley	2895 7th Street Berkeley, CA 94710
3	Liberty Broadway Chula Vista	1181 Broadway, Suite 5 Chula Vista, CA 91911
4	Liberty El Camino Real	2227 El Camino Real, Suite B Oceanside, CA 92054
5	Liberty Pueblo	850 Eagle Ridge Boulevard Pueblo, CO 81008
6	Liberty Orange	240 Indian River Road Orange, CT 06477
7	Liberty North Haven	510 Washington Avenue North Haven, CT 06473
8	Liberty Seaford	600 Health Services Drive Seaford, DE 19973
9	Liberty Wilmington	913 Delaware Avenue Wilmington, DE 19806
10	Liberty Sarasota	1921 Waldemere Street, Suite 107 Sarasota, FL 34239
11	FMC Viera	8041 Spyglass Road, Unit 101 Viera, FL 32940
12	FMC Pine Street	745 Pine Street Macon, GA 31210
13	BMA of Macon Inc.	280 Clinton Street Macon, GA 31217
14	FMC South Macon Dialysis	2500 Second Street Macon, GA 31205
15	FMC Milledgeville	411 North Jefferson Street Milledgeville, GA 31061
16	Liberty Drayton Savannah	1020 Drayton Street Savannah, GA 31401
17	FMC Aloha	1520 Liliha Street, 1st Floor Honolulu, HI 96817

	Clinic Name	Clinic Address
18	FMC Kapahulu	750 Palani Avenue Honolulu, HI 96816
19	FMC Pearlridge	98-1005 Moanaloa Road, Suite 420 Aiea, HI 96701
20	FMC Honolulu	226 North Kuakini Street, 2nd Floor Honolulu, HI 96817
21	FMC Kapolei	555 Farrington Highway Kapolei, HI 96707
22	FMC Ko'Olau	47-388 Hui Iwa Street Kaneohe, HI 96744
23	FMC Wahiawa	850 Kilani Avenue Wahiawa, HI 96786
24	FMC Waipahu De Novo	94-862 Kahuailani Street Waipahu, HI 96797
25	FMC Windward	45-480 Kaneohe Bay, Drive D09 Kaneohe, HI 96744
26	FMC Idaho Panhandle	204 North Triangle Drive Ponderay, ID 83852
27	Liberty Hayden	8556 North Wayne Drive Hayden, ID 83835
28	Liberty Daleville	14520 West Davis Drive Daleville, IN 47334
29	Liberty North Granville Ave	3001 North Granville Avenue Muncie, IN 47303
30	Liberty North Street Muncie	2705 West North Street Muncie, IN 47303
31	Liberty Duneland Coffee Creek	3100 Village Point, Suite 101 Chesterton, IN 46304
32	Liberty Kokomo	3760 South Reed Road Kokomo, IN 46902
33	FMC Lafayette	915 Mezzanine Drive Lafayette, IN 47905
34	Liberty Duneland LaPorte	1007 Lincolnway (in process of relocating to 103 18th Street) LaPorte, IN 46350
35	Liberty Old Alexandria Clinton	7201 Old Alexandria Ferry Road, Suite 6 Clinton, MD 20735

	Clinic Name	Clinic Address
36	Liberty Silver Hill	5652 Silver Hill Road District Heights, MD 20747
37	Liberty Indian Head Oxon Hill	5410 Indian Head Highway Oxon Hill, MD 20745
38	FMC Kent County De Novo	5311 Clyde Park Avenue, SW Wyoming, MI
39	Liberty South East Jackson	200 South East Avenue Jackson, MI 49201
40	FMC Watervliet	8816 Red Arrow Highway Watervliet, MI 49098
41	FMC Dutchess	2585 South Road Poughkeepsie, NY 12601
42	Liberty Latrobe Charlotte	3515 Latrobe Drive Charlotte, NC 28211
43	Liberty Glenwater Charlotte	9030 Glenwater Drive #B Charlotte, NC 28262
44	Liberty Sooner Dialysis Lawton	924 Southwest 38th Street Lawton, OK 73505
45	Liberty Uniontown	201 Mary Higginson Lane, Suite A Uniontown, PA 15401
46	Liberty Sparta Drive McMinnville	1524 Sparta Drive McMinnville, TN 37110
47	Liberty Gallatin	270 East Main Street, Suite 100 Gallatin, TN 37066
48	Liberty Manchester	367 Interstate Drive Manchester, TN 37355
49	FMC Bryan	1612 North Texas Avenue Bryan, TX 77803
50	FMC West Laredo	4151 Bob Bullock Loop, Suite 105 Laredo, TX 78046
51	FMC South Laredo	802 Guadalupe Street Laredo, TX 78040
52	FMC Laredo	5501 Springfield Avenue Laredo, TX 78041

APPENDIX A-2

Appendix A Joint Ventures

AR_000854

APPENDIX A-2 JOINT VENTURES

(Joint Ventures From Which Fresenius Will Divest Its Joint Venture Equity Interests and Clinics Owned by Joint Ventures)

	Joint Venture Name	Clinic Name (Medicare Provider Number)	Clinic Address
1	LDFS LLC	Liberty Flagstaff De Novo	2268 North Walgreens Street Flagstaff, AZ 86004
2	Liberty Dialysis – Pueblo LLC	Liberty Pueblo	850 Eagle Ridge Boulevard Pueblo, CO 81008
3	LDO LLC	Liberty Orange	240 Indian River Road Orange, CT 06477
4	Liberty Dialysis – North Haven LLC	Liberty North Haven	510 Washington Avenue North Haven, CT 06473
5	LDSD LLC	Liberty Seaford	600 Health Services Drive Seaford, DE 19973
6	Liberty Wilmington LLC	Liberty Wilmington	913 Delaware Avenue Wilmington, DE 19806
7	Liberty Dialysis – Hayden LLC	Liberty Hayden	8556 North Wayne Drive Hayden, ID 83835
8	Liberty Dialysis – Duneland LLC	Liberty Duneland Coffee Creek	3100 Village Point, Suite 101 Chesterton, IN 46304
9	Liberty Dialysis – Kokomo, LLC	Liberty Kokomo	3760 South Reed Road Kokomo, IN 46902
10	FMC Clarian Arnett, LLC	FMC Lafayette	915 Mezzanine Drive Lafayette, IN 47905
11	Liberty Dialysis – Duneland LLC	Liberty Duneland LaPorte	1007 Lincolnway (in the process of relocating to 103 18th Street) La Porte, IN 46350
12	RAI Care Centers of Clinton, LLC	Liberty Old Alexandria Clinton	7201 Old Alexandria Ferry Road, Suite 6 Clinton, MD 20735
13	Lawton Med Partners, LLC	Liberty Sooner Dialysis Lawton	924 Southwest 38th Street Lawton, OK 73505
14	RAI Care Centers of Uniontown, LLC	Liberty Uniontown	201 Mary Higginson Lane, Suite A Uniontown, PA 15401
15	RAI Care Centers of Gallatin I, LLC	Liberty Gallatin	270 East Main Street, Suite 100 Gallatin, TN 37066

APPENDIX B

AREA DEFINITIONS TO APPENDIX A CLINICS, THE DALLAS JOINT VENTURE INTERESTS CLINICS, THE MEMPHIS JOINT VENTURE INTERESTS CLINICS, AND THE ALASKA CLINIC ASSETS

AREA DEFINITIONS

- Five digit numbers refer to zip codes.
- Geographic areas bounded by roads include all properties abutting the referenced road (*i.e.*, properties on both sides of the road).
- Zip codes or other areas fully surrounded by areas included in the area definition shall be considered part of the area definition.
- Area definitions are based on maps submitted to the Commission staff by Fresenius.

	Divested Clinics	**Corresponding Area Definition**
1	Liberty Alaska LLC	The area in and/or near Anchorage, AK, consisting of: 99501; 99502; 99503; 99504; 99505; 99506; 99507; 99508; 99515; 99516; 99517; 99518; 99520; 99540; 99567; 99577; 99587; 99654; and the portion of 99645 that lies south and west of Chickaloon, AK.
2	Liberty Flagstaff De Novo	The area in and/or near Flagstaff, AZ, consisting of: 86001, 86004, 86030, 86031, 86033, 86034, 86035, 86039, 86040, 86042, 86043, 86044, 86045, 86046, 86047, 86048, 86053, 86054, 86435, and 86510.
3	FMC Berkeley	The area in and/or near Berkeley, CA, consisting of: 94051; 94501; 94530; 94547; 94564; 94601; 94602; the portion of 94605 that lies north of 66th Avenue; 94606; 94607; 94608; 94609; 94610; 94611; 94612; 94613; 94618; 94619; 94702; 94703; 94704; 94705; 94706; 94707; 94708; 94709; 94710; 94611; 94613; 94618; 94619; 94801; 94803; 94804; 94805; and 94806.

4	Liberty Broadway Chula Vista	The area in and/or near Chula Vista, CA, consisting of: the portion of 91901 that lies south of Japatul Road; 91905; 91906; 91910; 91911; 91913; 91914; 91915; 91917; 91932; 91934; 91935; 91945; 91950; 91962; 91963; 91977; 91978; 92101; 92102; the portion of 92103 that lies south of West Washington Street; 92104; 92105; 92113; 92114; the portion of 92115 that lies south of University Avenue; 92118; 92135; 92136; 92139; 92154; 91962; 91963; 92173; and 92174.
5	Liberty El Camino Real Oceanside	The area in and/or near Oceanside, CA, consisting of: the portions of 91901, 91962, and 92021 that lie north of 8, 91916, 91948, 92003, 92004, 92007, 92008, 92009, 92010, 92011, 92014, 92024, 92025, 92026, 92027, 92028, 92029, 92036, 92037, 92040, 92054, 92055, 92056, 92057, 92058, 92059, 92060, 92061, 92064, 92065, 92066, 92067, 92069, 92070, the portions of 92071, 92111, 92123, and 92124 that lie north of Route 52, 92075, 92078, 92081, 92082, 92083, 92084, 92086, 92121, 92122, 92126, 92127, 92128, 92129, 92130, 92131, 92137, and 92145.
6	Liberty Pueblo	The area in and/or near Pueblo, CO, consisting of: 81001, 81002, 81003, 81004, 81005, 81006, 81007, 81008, 81022, 81023, and 81069.
7	Liberty Orange and Liberty North Haven	The area in and/or near New Haven, CT, consisting of: 06405, 06460, 06461, 06471, 06472, 06473, 06477, the portions of 06410 and 06492 that lie south of Route 68, 06511, 06512, 06513, 06514, 06515, 06516, 06517, 06518, and 06519.
8	Liberty Seaford	The area in and/or near Seaford, DE, consisting of: 19931, 19933, 19939, 19940, 19947, 19950, 19956, 19966, and 19973.
9	Liberty Wilmington	The area in and/or near Wilmington, DE, consisting of: 19701, 19702, 19703, 19706, 19707, 19709, 19711, 19713, 19720, 19733, 19801, 19802, 19803, 19805, 19806, 19807, 19808, 19809, and 19810.

10	Liberty Sarasota	The area in and/or near Sarasota, FL, consisting of: 34201, 34203, 34207, 34231, 34232, 34233, 34234, 34235, 34236, 34237, 34238, 34239, 34240, 34243, the portion of 34202 that lies to the south of State Road 64, the portion of 34208 that lies to the east of 57th Street East, the portion of 34241 that lies to the north of Clark Road/State Road 72.
11	FMC Viera	The area in and/or near Merritt Island, FL, consisting of: 32920, 32922, 32924, 32926, 32927, 32931, 32940, 32952, 32953, 32954, 32955, and the portion of 32937 that lies north of Route 404.
12	FMC Pine Street, BMA of Macon Inc., and FMC South Macon Dialysis	The area in and/or near Macon, GA, consisting of: 31017, 31020, 31032, 31033, 31044, 31052, 31066, 31201, 31203, 31204, 31206, 31210, 31211, 31216, 31217, 31218, and 31220.
13	FMC Milledgeville	The area in and/or near Milledgeville, GA, consisting of: 31024, 31031, 31042, 31054, 31061, the portion of 31082 that lies to the west of North Indian Trail Road and South Indian Trail Road, 31087, and 31090.
14	Liberty Drayton Savannah	The area in and/or near Savannah, GA, consisting of: the portion of Chatham County, GA that lies to the east of I-95, and the portion of 29927 that lies to the south of the line formed by Route 170.
15	FMC Aloha, FMC Kapahulu, FMC Pearlridge, FMC Honolulu, FMC Kapolei, FMC Ko'Olau, FMC Wahiawa, FMC Waipahu De Novo, FMC Windward	The area in and/or near Honolulu, HI, consisting of the island of Oahu, HI.
16	FMC Idaho Panhandle	The area in and/or near Bonner, ID, consisting of: 83801, 83804, 83805, 83809, 83811, 83813, 83821, 83822, 83836, 83845, 83846, 83848, 83853, the portion of 83856 that lies in Idaho, 83864, and 83860.

17	Liberty Hayden	The area in and/or near Coeur d'Alene, ID, consisting of: 83801, 83802, 83804, 83808, 83810, 83812, 83814, 83824, 83830, 83833, 83835, 83837, 83839, 83846, 83850, 83851, 83854, 83858, 83861, 83869, 83870, 83873, and 83876.
18	Liberty Daleville	The area in and/or near Daleville, IN, consisting of: 46001, 46011, 46012, 46013, 46015, 46016, 46017, 46018, 47334, and 47356.
19	Liberty North Granville Avenue and Liberty North Street Muncie	The area in and/or near Muncie, IN, consisting of: 47302, 47303, 47304, 47305, 47306, 47320, 47336, 47338, 47342, 47348, 47356, 47383, and 47396.
20	Liberty Duneland Coffee Creek	The area in and/or near Gary, IN, consisting of: 46304, 46342, 46347, 46360, 46368, 46383, 46384, 46385, 46403, 46405, 46410, and the portions of 46307, 46410, and 46341 that lie east of Highway 65.
21	Liberty Kokomo	The area in and/or near Kokomo, IN, consisting of: 46901, 46902, 46936, and 46979.
22	FMC Lafayette	The area in and/or near Lafayette, IN, consisting of: 46923, 47901, 47904, 47905, 47906, 47907, 47909, 47917, 47918, 47920, 47921, 47923, 47929, 47930, 47942, 47944, 47948, 47951, 47970, 47971, 47975, 47977, 47981, 47991, 47992, 47993, and the portions of 47980, 47960, and 47995 that lie south of Highway 24.
23	Liberty Duneland La Porte	The area in and/or near La Porte, IN, consisting of: 46350, 46552, 46360, 46365, 46371, 46390, and 46391.
24	Liberty Old Alexandria Clinton, Liberty Silver Hill District Heights, Liberty Indian Head Oxon Hill	The area in and/or near Oxon Hill, MD, consisting of: 20019, 20020, 20032, 20623, 20731, 20735, 20743, 20744, 20745, 20746, 20747, 20748, 20749, 20762, and the portion of 20772 that lies south of Highway 4 and east of U.S. Route 301, and the portion of 20774 that lies south of Highway 214 and west of U.S. Route 301.

25	FMC Kent County De Novo	The area in and/or near Grand Rapids, MI, consisting of: 49301, 49302, 49306, 49315, 49316, 49319, 49321, 49323, 49330, 49331, 49335, 49339, 49341, 39343, 49344, 49345, 49348, 49418, 49426, 49428, 49503, 49504, 49505, 49506, 49507, 49508, 49509, 49512, 49519, 49525, 49534, 49544, 49546, and 49548.
26	Liberty South East Jackson	The area in and/or near Jackson, MI, consisting of: 49201, 49202, 49203, 49204, 49224, 49230, 49234, 49237, 49240, 49241, 49245, 49246, 49259, the portion of 49264 south of Wilcox Lane, 49269, 49272, 49277, 49283, and 49284.
27	FMC Watervliet	The area in and/or near Watervliet, MI, consisting of: 49013, 49022, 49038, 49043, 49045, 49047, 49057, 49064, 49085, 49098, 49101, 49102, 49103, 49106, 49107, 49111, 49113, 49117, 49120, 49125, 49126, 49127, 49128, and 49129.
28	Fresenius Medical Director Agreement	The area in and/or near Atlantic City, NJ, consisting of: 08201, 08203, 08205, 08221, 08225, 08226, 08330, 08232, 08234, 08241, 08244, 08401, 08402, 08403, 08406, the portion of 08037 that lies east of Ellwood Road, and the portion of 08215 that lies south of Mullica River.
29	FMC Dutchess	The area in and/or near Poughkeepsie, NY, consisting of: 12501, 12507, 12508, 12514, 12522, 12524, 12527, 12531, 12533, 12538, 12540, 12545, 12546, 12564, 12567, 12569, 12570, 12571, 12572, 12578, 12580, 12581, 12582, 12585, 12590, 12592, 12594, 12601, 12603, and 12604.

30	Fresenius' Good Samaritan Management Contract	The area in and/or near Newburgh, NY, consisting of: 10916, 10917, 10919, 10928, 10930, 10941, 10950, 10992, 10996, 12429, 12493, 12515, 12518, 12520, 12525, 12528, 12542, 12547, 12548, 12549, 12550, 12551, 12553, 12561, 12566, 12575, 12577, 12586, 12589 and the portions of 10918 and 10924 that lie north of Brookside Avenue, the portion of 10926 that lies north of and includes Route 17M, the portion of 10940 that lies north of Route 84, east of County Road 78, south of Ingrassia Road, and east of Route 17M, the portion of 10950 that lies north of and includes Route 17M, and the portion of 10958 that lies north of Route 17M.
31	RAI Latrobe, RAI Glenwater	The area in and/or near Charlotte, NC, consisting of Mecklenburg County, NC.
32	Liberty Lawton	The area in and/or near Lawton, OK, consisting of: 73501, 73503, 73505, 73507, 73527, 73528, 73530, 73531, 73538, 73540, 73541, 73542, 73543, 73546, 73548, 73551, 73552,73553, 73557, 73562, 73566, 73568, 73570, and 73572.
33	RAI Uniontown	The area in and/or near Uniontown, PA, consisting of: 15401, 15416, 15422, 15425, 15431, 15435, 15436, 15437, 15440, 15443, 15445, 15451, 15456, 15458, 15459, 15461, 15468, 15470, 15474, 15478, 15480, 15484, 15486, and 15488.
34	RAI McMinnville	The area in and/or near McMinnville, TN, consisting of: 37110, 37166, 37357, 37190, 38581, and 38585.
35	RAI Pace Road, RAI Poplar Avenue	The area in and/or near Memphis, TN, consisting of: 38103, 38104, 38105, 38106, 38107, 38108, 38109, 38111, 38112, 38113, 38114, 38116, 38122, 38126, 38127, 38128, 38131, and 38132.
36	RAI Gallatin	The area in and/or near Gallatin, TN consisting of: 37022, 37031, 37048, 37066, 37074, 37075, 37186, and the portions of 37072, 37148, and 37188 that lie east of Interstate 65.

37	RAI Manchester	The area in and/or near Tullahoma, TN, consisting of: 37183, 37144, 37160, 37318, 37324, 37330, 37334, 37342, 37348, 37349, 37352, 37355, 37359, 37360, 37388, 37398, the portions of 37306, 37335, and 37345 that lie north of Route 64, and the portion of 37375 that lies north of Sewanee Highway.
38	FMC Bryan	The area in and/or near Bryan, TX, consisting of: 75852, 76629, 77363, 77801, 77802, 77803, 77807, 77808, 77830, 77831, 77836, 77837, 77840, 77845, 77856, 77859, 77861, 77864, 77868, 77872, and 77879.
39	FMC West Laredo, FMC South Laredo, FMC Laredo	The area in and/or near Laredo, TX, consisting of: 78040, 78041, 78043, 78044, 78045, 78046, 78067, 78076, 78344, 78360, 78361, and 78369.
40	Liberty Duncanville, Liberty Lancaster	The area in and/or near Duncanville and Lancaster, TX, consisting of: 75052, 75104, 75115, 75116, 75125, 75134, 75137, 75141, 75146, 75172, 75203, 75211, 75215, 75216, 75224, 75232, 75233, 75236, 75237, 75241, 75249, and the portion of 75154 that lies within Dallas County.
41	Liberty Mesquite	The area in and/or near Mesquite, TX, consisting of: 75043, 75149, 75150, 75159, 75180, 75181, 75182, 75210, 75217, 75223, 75227, 75228, and 75253.
42	Liberty Rockwall	The area in and/or near Rockwall, TX, consisting of: 75032, 75040, 75041, 75043, 75048, 75087, 75088, 75089, 75098, 75132, 75166, 75173, 75228, and the portion of 75189 that lies within Rockwall County.
43	Liberty Waxahachie	The area in and/or near Waxahachie, TX, consisting of: 75119, 75125, 75152, 75154, 75165, 75167, 76041, 76064, 76065, 76084, and 76651.

APPENDIX C

MONITOR AGREEMENT

AR_000864

NON-PUBLIC APPENDIX C-1

COMPENSATION PROVISIONS OF MONITOR AGREEMENT

[Redacted From the Public Record Version, But Incorporated By Reference]

APPENDIX D

EXCLUDED TRADEMARKS & DESIGNS

[INTENTIONALLY LEFT BLANK]

NON-PUBLIC APPENDIX E

DSI-FRESENIUS DIVESTITURE AGREEMENTS

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX F

LIST OF ALTERNATIVE CLINICS TO APPENDIX A CLINICS TO DIVEST

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX F-2

LIST OF ALTERNATIVE JOINT VENTURES TO APPENDIX A-2 JOINT VENTURES

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX F-3

LIST OF ALTERNATIVE CLINICS TO DIVEST IN DALLAS, TEXAS AREA

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX F-4

LIST OF ALTERNATIVE CLINIC TO DIVEST IN ANCHORAGE, ALASKA AREA

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX F-5

LIST OF ALTERNATIVE CLINIC TO DIVEST IN MEMPHIS, TENNESSEE AREA

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX G

DESIGNATED FRESENIUS EMPLOYEES: ADDITIONAL FRESENIUS, RAI, AND LIBERTY EMPLOYEES LIST

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX H

ALASKA CLINIC DIVESTITURE AGREEMENT

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX I

DALLAS CLINICS JOINT VENTURE INTERESTS DIVESTITURE AGREEMENT

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX J

GOOD SAMARITAN MANAGEMENT TERMINATION LETTER, GOOD SAMARITAN MANAGEMENT AGREEMENT, AND FINAL GOOD SAMARITAN TRANSITION SERVICES AGREEMENT

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX K

MEMPHIS CLINICS JOINT VENTURE INTERESTS DIVESTITURE AGREEMENT

[Redacted From the Public Record Version, But Incorporated By Reference]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	
Nielsen Holdings N.V.,	)	
a corporation;	)	**Docket No. C-4439**
and,	)	
Arbitron Inc.,	)	
a corporation.	)	

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Nielsen Holdings N.V. ("Nielsen") of the outstanding voting shares of Respondent Arbitron Inc. ("Arbitron"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement

and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Nielsen is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at 85 Broad Street, New York, New York 10004.

2. Respondent Arbitron is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 9705 Patuxent Woods Drive, Columbia, Maryland 21046-1572.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

A. "Nielsen" means Nielsen Holdings N.V., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Nielsen Holdings N.V., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, the term "Nielsen" shall include Arbitron.

B. "Arbitron" means Arbitron Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Arbitron Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Acquirer" means a Person approved by the Commission to acquire particular assets or rights that Respondents are required, pursuant to this Order, to assign, grant, license, divest, transfer, deliver, or otherwise convey.

D. "Acquisition" means Nielsen's acquisition of Arbitron pursuant to an Agreement and Plan of Merger executed December 17, 2012.

E. "Arbitron Calibration Panel" means the subset of individuals recruited from the Arbitron PPM Panel that provides single source reach levels and overlaps for television, tablets, smartphones, personal computers, and radio (or any other device that performs similar functions), by asking the panelists in addition to their Arbitron PPM Panel responsibilities to download software on their home personal computer, tablets, and

smartphones (or any other device that performs similar functions); "Arbitron Calibration Panel" includes the panel of people as expanded pursuant to Paragraph IV. of this Order.

F. "Arbitron PPM Panel" means the panel of individuals in the U.S. who have been recruited by Arbitron to carry Arbitron's Portable People Meter® ("PPM") device to measure their exposure to encoded audio signals.

G. "Balance of Nation Panel" means a group of individuals recruited to supplement the Arbitron PPM Panel, such that when combined with the Arbitron PPM Panel, national audience projections are possible or enhanced.

H. "Calibration Panel Data" means the data from the Arbitron Calibration Panel or from the expansion of the Arbitron Calibration Panel.

I. "Commission" means Federal Trade Commission.

J. "comScore" means comScore, Inc., a corporation located at 11950 Democracy Drive, Suite 600, Reston, Virginia 20190.

K. "Confidential Information" means information not in the public domain, including, but not limited to, information regarding methodology, encoding share, customer identity, or customer contract details. "Confidential Information" shall not include any information that: (1) is publicly available when provided, disclosed, or otherwise made available; or (2) becomes publicly available after it is provided, disclosed, or otherwise made available by means other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement.

L. "Cross-Platform Services" means any U.S. service that measures viewing of content, for the purpose of determining the size and composition of the audience of such programming and/or advertising across multiple distribution platforms including, but not limited to, television, online, mobile, radio and tablets (or any other device that performs similar functions), but in all events measuring at least television and online, and related insights and analytics.

M. "Direct Cost" means cost not to exceed the cost of labor, material, equipment, travel, and other expenditures to the extent the costs are directly incurred to provide the assistance or services required by this Order and that would not otherwise be incurred by Respondents. "Direct Cost" to the Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

N. "Encoding Equipment" means all equipment relating to the encoding of audio signals for detection by PPMs, including updates thereto.

O. "Encoding Technology" means all intellectual property, rights, know-how, licenses, and agreement related to the encoding of audio signals for detection by PPMs, including updates thereto

P. "ESPN" means the multi-platform media company, ESPN, Inc., a subsidiary of The Walt Disney Company, which focuses on sports-related programming including live and recorded event telecasts, sports talk shows, and other original programming, that

distributes its content on multiple platforms including cable and satellite television, online, mobile, and radio.

Q. "Key Arbitron Employees" means the employees listed on Confidential Exhibit A of this Order.

R. "Link Meter Technology" means (1) all software (source code and object code) intended for use in Project Blueprint that enables comScore to synchronize its media measurement data with the panelists in the Arbitron Calibration Panel; and (2) all other rights and interests arising out of, in connection with, or in relation to such software, including, but not limited to, all rights to causes of action and remedies related thereto.

S. "MRC" means the Media Rating Council, which accredits audience measurement services.

T. "Monitor" means the monitor appointed pursuant to Paragraph VI. of this Order.

U. "Panelist Characteristics" means the following information, provided on a non-personally identifiable basis, for a panelist: (1) age; (2) gender; (3) race/ethnicity; (4) presence of children in the household; (5) size of household; (6) time zone; (7) DMA and metro market code; and (8) five-digit zip code .

V. "PPM Equipment" means all equipment related to the operation of, and collection of data from, PPMs, including updates thereto.

W. "PPM Technology" means all intellectual property rights, know-how, licenses, and agreements related to the operation of, and collection of data from, PPMs, including updates thereto.

X. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.

Y. "Project Blueprint" means the collaboration between Arbitron and comScore for ESPN as contemplated by (1) the Multi-Platform Research Agreement with ESPN between Arbitron, comScore, and ESPN, executed August 8, 2012; and (2) the Collaboration Agreement between Arbitron and comScore, effective August 1, 2012.

Z. "Prospective Acquirer" means the Person that Respondents (or the Divestiture Trustee, if appointed) intend to submit or have submitted to the Commission for the Commission's prior approval pursuant to Paragraph II.A. (or Paragraph VII., if applicable) of this Order.

AA. "Radio Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded radio content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint.

BB. "Remedial Agreement" means the agreement between Respondents and the Acquirer that includes the provisions required by this Order and that has been approved by the Commission, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be offered to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

CC. "Television Data" means all data from the Arbitron PPM Panel that reflect Panelist Characteristics, dictionary of reported data fields, and records of encoded video content detected by the panelists' PPMs as reported consistent with the practices Arbitron used for reporting data for Project Blueprint, and additionally including time shifted viewing data (which shall include video on demand) identified as such, which additional time shifted viewing data shall be provided to the Acquirer at Direct Cost.

II.

IT IS FURTHER ORDERED that:

A. No later than three (3) months after Respondents execute the Agreement Containing Consent Order, Respondents shall divest the Link Meter Technology absolutely and in good faith and at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission (including execution of a Remedial Agreement) and shall, pursuant to a Remedial Agreement, license to that Acquirer, on a non-exclusive basis, all know-how related to the Link Meter Technology;

1. Respondents shall obtain, and the Acquirer shall grant to Respondents, a royalty-free right to use the Link Meter Technology, for purposes of complying with the requirements of this Order;

2. *Provided, however*, that both the Acquirer and Respondents shall have unrestricted rights to use the know-how relating to the Link Meter Technology and each shall covenant not to bring litigation against the other to enjoin or seek recompense for the use of the Link Meter Technology or software designed to perform similar functions.

B. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement, for a period no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above:

1. License to the Acquirer, on a royalty-free basis, for use in developing and providing a calibration panel and/or Balance of Nation Panel for the provision of Cross-Platform Services:

   a. the Encoding Technology; and

   b. the PPM Technology; and

2. Provide, at Direct Cost to the Acquirer, such technical assistance (including know-how relating to the Link Meter Technology), Encoding Equipment, and/or PPM Equipment, as requested by the Acquirer to enable the Acquirer to:

a. provide Cross-Platform Services, including to encode additional content and/or advertising and developing and managing any panel using the PPM Technology for Cross-Platform Services provided by the Acquirer to its customers, and

b. obtain accreditation by the MRC in connection with the provision of Cross-Platform Services.

C. No later than the date Respondents divest the Link Meter Technology to the Acquirer pursuant to Paragraph II.A., above, Respondents shall, pursuant to a Remedial Agreement and consistent with the requirements of Paragraph IV.B.1., for a period of no less than eight (8) years from the date of the divestiture required by Paragraph II.A., above, provide to the Acquirer for purposes of developing and providing Cross-Platform Services to its customers, and grant to the Acquirer a perpetual, royalty-free license (for data delivered during the term of the Remedial Agreement) for the use of:

1. Television Data;

2. Radio Data; and

3. Calibration Panel Data;

Respondents shall provide the Television Data, Radio Data, and Calibration Panel Data (except for five- digit zip code data) to the Acquirer on a respondent-level basis and an aggregated basis by specified customers' stations, networks, websites, and/or other media distribution platforms, as identified by the Acquirer, in such form, at such frequency as reasonably requested by the Acquirer, but in no event less frequent than the frequency Arbitron used for reporting data for Project Blueprint, and according to such metrics as reasonably requested by the Acquirer; *provided, however*, that, with respect to five-digit zip code data, Respondents shall provide the total number of individuals by zip code as reasonably requested by the Acquirer (but at least monthly); and if Respondents make any zip code data, or any segment reporting derived from zip codes, available to its customers of national Cross-Platform Services, then Respondents shall provide five-digit zip code data to the Acquirer sufficient to provide similar information to Acquirer's customers, as reasonably requested by the Acquirer; p*rovided further, however*, that Respondents shall have and retain full and exclusive right, title, and ownership interest in and to any information provided by Respondents to the Acquirer except that the Acquirer shall have the right to use the information to develop and provide Cross-Platform Services to its customers pursuant to the Remedial Agreement; p*rovided further, however*, that, with respect to Radio Data, the Acquirer may not disclose Radio Data to any customer of the Acquirer who is not also a subscriber to Arbitron radio ratings.

D. Respondents shall:

1. Have no authority to, and shall not exercise or attempt to exercise any authority to, market or price the Cross-Platform Services that the Acquirer sells to the Acquirer's customers,

2. Not be entitled to any revenue, or portion thereof, that the Acquirer collects from its customers, or attempt to collect any revenue, or portion thereof, from the Acquirer attributable to revenue that the Acquirer collects from its customers; and

3. Not make any change to the PPM Technology or Encoding Technology that has the effect of eliminating or impairing the ability of the PPM to collect records of encoded video content.

E. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Remedial Agreement, and any breach by Respondents of any term of the Remedial Agreement shall constitute a failure to comply with this Order. If any term of the Remedial Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. No Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondents under such agreement.

F. The purpose of this Paragraph II is to ensure that the Acquirer can offer Cross-Platform Services, with the goal of providing a national syndicated cross-platform audience measurement service, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHERED ORDERED that Respondents shall:

A. No later than ten (10) days after a request from a Prospective Acquirer, provide the Prospective Acquirer with the following information for each Key Arbitron Employee, as and to the extent permitted by law:

1. Name, job title or position, date of hire, and effective service date;

2. A specific description of the employee's responsibilities;

3. The base salary or current wages;

4. The most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus; if any;

5. Employment status (i.e. active or on leave or disability, full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Prospective Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Key Arbitron Employee;

B. No later than ten (10) days after a request from a Prospective Acquirer, provide to the Prospective Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Key Arbitron Employees, and to make offers of employment to any one or more of the Key Arbitron Employees.

C. Not interfere, directly or indirectly, with the hiring or employing by the Prospective Acquirer of any Key Arbitron Employees, not offer any incentive to such employees to decline employment with the Prospective Acquirer, and not otherwise interfere with the recruitment of any Key Arbitron Employees by the Prospective Acquirer;

D. Remove any impediments within the control of Respondents that may deter Key Arbitron Employees from accepting employment with the Prospective Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Prospective Acquirer, and shall not make any counteroffer to a Key Arbitron Employee who receives a written offer of employment from the Prospective Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

E. For Key Arbitron Employees who have accepted offers of employment with the Acquirer, not, for a period of one (1) year following the date such Key Arbitron Employee begins employment with the Acquirer, directly or indirectly, solicit or otherwise attempt to induce such Key Arbitron Employees to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Key Arbitron Employees; or

2. Hire Key Arbitron Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any Key Arbitron Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or

where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

F. For any employees (except those listed on Confidential Exhibit B) who are terminated by Respondents who had responsibilities for or were involved in Project Blueprint or who are engineers knowledgeable about the Encoding Technology, Respondents shall remove any impediments within the control of Respondents that may deter such employee from accepting employment with the Acquirer, including, but not limited to, removal, solely to the extent needed for the Acquirer's provision of Cross-Platform Services, of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to such an employee who receives a written offer of employment from the Acquirer.

IV.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Manage and maintain (and expand as required by Paragraph IV.A.2., below) the Arbitron Calibration Panel consistent with Respondents' own business practices and under the following conditions:

   a. Respondents shall assure that the Arbitron Calibration Panel comprises at least two thousand panelists no later than six (6) weeks after the date of the signing of the Remedial Agreement;

   b. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel*; provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

   c. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the Arbitron Calibration Panel; for the avoidance of doubt, Respondents shall retain all right, title and ownership interest in all underlying data from the PPM Panel that is an input into the data generated by the Arbitron Calibration Panel;

   d. at the Acquirer's option, Respondents shall have the right to use the data generated by the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

   e. *provided, however,* that Respondents shall have no obligation to manage and maintain the Arbitron Calibration Panel if the Acquirer requests in writing (with copies to the Commission staff and the Monitor) that it no longer requires that the Arbitron Calibration Panel be maintained; and

f *provided, further, however* that Respondents shall have no obligation to continue to manage and maintain the Arbitron Calibration Panel if (1) the Acquirer fails to pay the Direct Costs directly attributable to managing and maintaining the Arbitron Calibration Panel as required by the Remedial Agreement; (2) Respondents notify the Acquirer, the Monitor, and Commission staff of Acquirer's failure to pay Direct Costs and give the Acquirer thirty (30) days from receiving that notice to cure the failure; and (3) the Acquirer fails to cure.

2. At the request of the Acquirer, expand the Arbitron Calibration Panel beyond the two (2) thousand panelists required in Paragraph IV.A.1.a. to enable national projections under the following conditions:

   a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the expansion of the Arbitron Calibration Panel; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

   b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron Calibration Panel; and

   c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron Calibration Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff;

B. Respondents shall manage and maintain (and expand as required by Paragraph IV.B.2. below) the Arbitron PPM Panel consistent with Respondents' own practices and under the following conditions:

1. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to the cost of providing the data generated by the Arbitron PPM Panel to the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission; and

2. At the request of the Acquirer, expand the Arbitron PPM Panel to enable national projections under the following conditions:

   a. Respondents shall require the Acquirer to pay the Direct Costs directly attributable to such expansion and to the collection of those data that are provided to and used solely by the Acquirer; *provided, however*, that Respondents may enter into a Remedial Agreement that includes additional payments to which the Acquirer agrees, as approved by the Commission;

   b. the Acquirer shall have full and exclusive right, title, and ownership interest in and to any and all data generated by the expansion of the Arbitron PPM Panel; and

c. at the Acquirer's option, Respondents shall have the right to use the data generated by the expansion of the Arbitron PPM Panel at a cost negotiated and agreed to by the Acquirer and Respondents, as reviewed and approved by the Monitor in consultation with Commission staff.

V.

IT IS FURTHER ORDERED that after the date of the divestiture of the Link Meter Technology, Respondents shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish Confidential Information of the Acquirer, directly or indirectly, to or with any of Respondents' employees, officers, directors, agents or representatives with responsibilities relating to Respondents' audience measurement business, except as necessary to comply with the requirements of this Order.

VI.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that Respondents comply with all obligations and perform all responsibilities required by this Order and the Remedial Agreement.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the requirements of this Order and the Remedial Agreement.

D. If a Monitor is appointed by the Commission, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this Order and in consultation with the Commission or Commission staff.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve until termination of this Order.

4. The Monitor shall report in writing to the Commission every sixty (60) days concerning the Monitor's duties and responsibilities.

5. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Remedial Agreement.

6. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

7. Respondents shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

8. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to, or receiving information from, the Commission.

9. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

10. In the event the Commission determines that the Monitor is no longer willing or able to perform his/her duties under this Order, or has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

12. The Monitor appointed pursuant to this Paragraph VI. may be the same person appointed as the Divestiture Trustee pursuant to Paragraph VII. of this Order.
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VII.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the divestiture and licensing obligations of Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to perform Respondents' obligations in a manner that satisfies the requirements of this Order, including, but not limited to, Paragraphs II. and IV. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures in the media industry. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

1. No later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

2. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

   a. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

   b. the Divestiture Trustee shall have six (6) months after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the six (6) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and IV. of this Order, or believes that such obligations can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, that the Commission may extend the period for only an additional three (3) months.

   c. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VII. for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

   d. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously subject to the provisions of Paragraphs II. and IV., including, but not limited to, the requirement that the Acquirer pay Direct Costs as required by Paragraphs IV.A.1.b, IV.A.2.a., IV.B.1., and IV.B.2.a. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

e. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

f. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Divestiture Trustee.

g. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

h. the Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

i. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

j. the Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

C. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph VII. may be the same person appointed as the Monitor pursuant to Paragraph VI. of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. No later than thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until the Link Meter Technology is divested and the Remedial Agreement entered into pursuant to Paragraph II of this Order is approved by the Commission, Respondents shall submit to the Commission (and a complete copy to the Monitor) a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. For the period covered by this report, the report shall include, but not be limited to, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II of this Order, including a description of all substantive contacts or negotiations and the identity and contact information of all parties contacted. Respondents shall include in the reports copies of all material written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after this Order is issued, annually for the next seven (7) years on the anniversary of that date, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of such Respondent;

B. Any proposed acquisition, merger, or consolidation of such Respondent; or

C. Any other change in such Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents made to either Respondents' principal United States office, registered office of its United States subsidiary, or its headquarters address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative(s) of the Commission and at the expense of the Respondents; and

B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on February 24, 2022.

By the Commission, Commissioner Ohlhausen recused, and Commissioner Wright dissenting.

Donald S. Clark
Secretary

SEAL
ISSUED: February 24, 2014

Confidential Exhibits A and B

[Redacted From the Public Record Version, But Incorporated By Reference]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of: **Red Ventures Holdco, LP,** **a limited partnership, and** **Bankrate, Inc.,** **a corporation.**	**Docket No. C-4627**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Red Ventures Holdco, LP ("Red Ventures") has entered into a transaction with Respondent Bankrate, Inc. ("Bankrate"), that such transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

I. RESPONDENTS

Red Ventures

1. Respondent Red Ventures is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of North Carolina, with its principal place of business located at 1101 Red Ventures Drive, Fort Mill, SC 29707.

2. Two private equity shareholders, General Atlantic, LLC and Silver Lake Partners, LP, own approximately 34% of Respondent Red Ventures. These shareholders each have one board seat and approval rights over two other board members of the seven person board of directors for Red Ventures GP, LLC, which is the management company that controls Respondent Red Ventures. These two shareholders must also approve certain significant capital expenditures by Red Ventures.

3. Respondent Red Ventures is a marketing company providing proprietary internet content and customer leads for providers in a variety of industries. Red Ventures' two private equity shareholders operate the following relevant domains: APlaceforMom.com, SeniorAdvisor.com, Caregivers.com, NursingHomes.com, OurParents.com, and SeniorLiving.net, which generate revenue by providing customer leads for senior living facilities.

4. Respondent Red Ventures and the corporate entities under its control are, and at all times relevant herein have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. §44.

Bankrate

5. Respondent Bankrate is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its principal place of business located at 1675 Broadway, 22nd Floor, New York, NY 10019.

6. Respondent Bankrate is a marketing company providing proprietary internet content and customer leads for providers in a variety of industries. In connection with providing leads for senior living facilities, Bankrate operates the following relevant domains: Caring.com and SeniorHomes.com.

7. Respondent Bankrate and the corporate entities under its control are, and at all times relevant herein have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. §44.

II. THE PROPOSED MERGER

8. Respondent Red Ventures and affiliated companies under its control entered into a merger agreement ("Merger Agreement") with Respondent Bankrate, dated July 2, 2017, pursuant to which Baton Merger Corp., a newly created indirect wholly owned subsidiary of Red Ventures, will merge with and into Bankrate, with Bankrate surviving the merger (the "Merger"). On July 2, 2017, the Merger's total estimated dollar value was $1.4 billion.

9. The Merger is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. §18.

III. THE RELEVANT MARKET

10. A relevant product market in which to analyze the effects of the Merger is third-party paid referral services for senior living facilities. Senior living facilities provide a range of specialized long-term residential living options tailored to the needs of senior consumers. Referral services companies generate and collect customer leads for senior living facilities. Many small referral services generate leads through marketing and networking efforts similar to those

used by real estate agents. Larger referral services are internet-based; they attract consumers to their websites through both paid search advertising and search engine optimization, which includes, among other things, creating compelling free content to help the websites appear higher in search engine result pages. The referral services companies provide leads of qualified consumers to the senior living facilities. The senior living facilities' sales staff then contacts the consumers and seeks to consummate sales. When a consumer moves into a senior living facility, the senior living facility pays the referral services company a referral fee, typically based on a percentage of the first month's rent and care.

11. The relevant geographic market in which to analyze the effects of the Merger is the United States. Although the individual looking to move into a senior living facility has highly localized interests, large third-party paid referral services companies, like those controlled by the Respondents, compete on a nationwide basis to generate, collect, and refer qualified leads to senior living facilities located throughout the United States.

12. If there were a 5-10 percent post-merger price increase, senior living facilities likely would not switch to other lead sources in sufficient numbers to make the post-merger price increase unprofitable.

IV. MARKET STRUCTURE

13. Respondent Red Ventures' two large private equity shareholders jointly own A Place for Mom.com ("APFM"), which is the largest third-party paid referral service for senior living facilities.

14. Respondent Bankrate's Caring.com is generally recognized as the second largest third-party paid referral service for senior living facilities and its website claims to have the largest volume of traffic for individuals seeking information and support for placement of seniors into senior living facilities.

15. Caring.com is APFM's closest competitor. In addition to being the two largest third-party paid referral services for senior living facility operators, the two companies have similar business models. They both are internet-based referral services providers that compete to attract consumers via websites with national reach. They enter into contracts with senior housing operators both locally and nationally. Due to the popularity of its website, Caring.com represents one of APFM's most serious competitive threats. Besides APFM and Caring.com, there are numerous small third-party paid referral services for senior living facility operators, each with a negligible share of the relevant market.

V. BARRIERS TO ENTRY

16. There are substantial barriers to entering the third-party paid referral service for senior living facilities market. Network and scale effects on both the acquisition of potential leads and the supply of qualified leads to senior living facilities are significant. Achieving minimal viable scale means that entry into the relevant market would not be timely, likely, or sufficient in scope to deter or counteract the anticompetitive effects of the Merger.

VI. EFFECTS OF THE MERGER

17. The effects of the Merger, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45 by:

a. increasing the likelihood that Respondent Red Ventures would unilaterally exercise market power in the relevant market; and

b. increasing the likelihood of or facilitating coordinated interaction between APFM and Caring.com in the relevant market.

VII. VIOLATIONS CHARGED

18. The Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

19. The Merger Agreement entered into by Respondents Red Ventures and Bankrate constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this second day of November, 2017, issues its complaint against Respondents.

By the Commission.

Donald S. Clark
Secretary

SEAL:

1710196

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of	)	
Red Ventures Holdco, LP, **a limited partnership,**	)	
and	)	**Docket No. C-**
Bankrate, Inc., **a corporation.**	)	

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Baton Merger Corp. ("Baton"), a wholly-owned subsidiary of Red Ventures Holdco, L.P., ("Red Ventures"), and Bankrate, Inc. ("Bankrate"), collectively "Respondents," and Respondents having been furnished thereafter with a copy of a draft of the Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Hold Separate and Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Red Ventures Holdco, LP, is a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its headquarters and principal place of business located at 1423 Red Ventures Drive, Fort Mill, SC 29707.

2. Respondent Bankrate, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 1675 Broadway, 22nd Floor, New York, NY 10019.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions, and all other definitions used in the Hold Separate Order, shall apply:

A. "Red Ventures" means Red Ventures Holdco, L.P., its directors, officers, partners, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Red Ventures Holdco, L.P., including, but not limited to, Baton Merger Corp., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Red Ventures includes Bankrate, after the Acquisition.

B. "Bankrate" means Bankrate, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including, but not limited to, Caring.com, partnerships, divisions, groups, and affiliates in each case controlled by Bankrate, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Red Ventures and Bankrate, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means the Person approved by the Commission to acquire the Caring.com Assets pursuant to this Decision and Order.

F. "Acquisition" means the proposed merger of Baton Merger Corp., a wholly-owned subsidiary of Respondent Red Ventures, and Respondent Bankrate as described in the Agreement and Plan of Merger by and among Red Ventures Holdco, LP, Baton Merger Corp., and Bankrate, Inc., dated July 2, 2017, and any amendments, exhibits, or schedules attached thereto.

G. "Acquisition Date" means the date on which the Acquisition closes.

H. "APEX" means APEX Super Parent, L.P., a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its headquarters and principal place of business located at Park Avenue Plaza, 55 East 42nd Street, 33rd Floor, New York, NY 10055.

I. "APFM" means A Place For Mom, Inc., a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Washington, with its headquarters and principal place of business located at 701 5th Avenue, Suite 3200, Seattle, WA 98104.

J. "APFM Confidential Business Information" means all Confidential Business Information relating to APFM.

K. "Board" means any board of directors or board of managers of a specified entity.

L. "Business Records" means all originals and all copies of any operating, financial or other information, documents, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, ledgers, papers, instruments, and other materials, whether located, stored, or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: distributor files and records; customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, customer approvals, and other information; credit records and information; correspondence; referral sources; supplier and vendor files and lists; advertising, promotional, and marketing materials, including website content; sales materials; research and development data, files, and reports; technical information; data bases; studies; designs, drawings, specifications and creative materials; production records and reports; service and warranty records; equipment logs; operating guides and manuals; employee and personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind.

M. "Caring.com" means Caring, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its headquarters and principal place of business located at 2600 South El Camino Real, Suite 300, San Mateo, CA 94403.

N. "Caring.com Assets" means all of Respondents' rights, title, and interests in and to all of Caring.com's tangible and intangible assets and property of any kind, wherever located, used for or related to Caring.com or the Caring.com Business, and all improvements or additions thereto, including, but not limited to:

1. The Caring.com Corporate and Technical Facility;

2. All Tangible Personal Property;

3. All Caring.com Contracts;

4. All Intellectual Property relating to Caring.com;

5. All intangible rights and property, including goodwill, going concern value, and telephone and email address and listings;

6. All consents, licenses, certificates, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement relating to Caring.com, and all pending applications therefor or renewals thereof;

7. All Business Records relating to Caring.com; *provided, however,* that where documents or other materials included in the Business Records to be divested contain information: (a) that relates both to the Caring.com Assets to be divested and Respondents' other products or businesses, and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Caring.com Assets to be divested; or (b) for which Respondents have a legal obligation to retain the original copies, Respondents shall be required to provide only copies or relevant excerpts of the documents and materials containing this information, then Respondents may keep such records and provide copies with appropriate redactions to the Acquirer. In instances where such copies are provided to the Acquirer, Respondents shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes.

H. "Caring.com Business" means the business of Caring.com related to the provision of paid referral services for senior living facilities, and all other operations and businesses related to Caring.com or the Caring.com Assets, including, but not limited to, any online website providing, among other things: (1) original editorial content related to senior care; (2) any comprehensive online senior living community directory(ies) for the United States; (3)

any local directory(ies) covering other senior caregiving services; and (4) access to support and advice from Caring.com Family Advisors.

I. "Caring.com Confidential Business Information" means all Confidential Business Information relating to Caring.com, the Caring.com Assets, and the Caring.com Business.

J. "Caring.com Contracts" means all agreements and contracts with customers (including, but not limited to, Senior Care Paid Referral Services Contracts), suppliers, vendors, representatives, agents, licensees and licensors; and all leases, mortgages, notes, bonds, and other binding commitments, whether written or oral, and all rights thereunder and related thereto related to the Caring.com Business.

K. "Caring.com Corporate and Technical Facility" means the facility located at 2600 South El Camino Real, Suite 300, San Mateo, CA 94403, including, but not limited to, all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held by Respondents, and all Tangible Personal Property therein, and parts, inventory, and all other assets relating to the Caring.com Business.

L. "Caring.com Family Advisor" means any Caring.com Employee who provides individualized support and information to potential clients and their families regarding potential entry into a senior care facility or other senior caregiving services.

M. "Caring.com Employee(s)" means any Person employed by Caring.com on a full-time, part-time, or contract basis as of, and at any time after July 2, 2017: (1) at the Caring.com Corporate and Technical Facility; (2) as a Caring.com Family Advisor, information technology specialist, or sales and/or marketing support staff; or (3) otherwise identified by agreement between Respondents and an Acquirer and made a part of a Remedial Agreement.

N. "Caring.com Key Employee(s)" means those Caring.com Employees who are identified in Non-Public Confidential Appendix B attached to this Order.

O. "Confidential Business Information" means any information that is not in the public domain. The term "Confidential Business Information":

1. Includes, but is not limited to, all operating, financial or other documents, information, data, computer files (including files stored on a computer's hard drive or other storage media), electronic files, books, records, papers, instruments, and all other materials, whether located, stored, or maintained in paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media, including, without limitation: bid proposals and all related documents, data, and materials, including initial bid terms, final bid terms, documents that support cost and rate structures underlying the bids; term sheets, responses to requests for proposals or other solicitation for

bids; customer files and records; customer contracts; customer lists; customer service and support materials; customer approvals and related information; price lists; credit records and information; correspondence; referral sources; vendor and supplier agreements; vendor and supplier files and lists; advertising, promotional and marketing materials, including website content; sales materials; marketing methods, research and developments data, files, and reports; technical information; data bases; studies; drawings, specifications and creative materials; cost information; expansion and other plans and projects; proprietary design and engineering standards; operating guides and manuals; employee personnel records; education materials; financial and accounting records; and other documents, information, and files of any kind; and

2. Excludes the following:

   a. Information that is protected by attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition law; or

   b. Information that Respondents demonstrate to the satisfaction of the Commission, in the Commission's sole discretion:

      i. was or becomes generally available to the public other than as a result of disclosure by Respondents;

      ii. is necessary to be included by Respondents' mandatory regulatory filings; *provided, however,* that Respondents shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

      iii. was available, or becomes available, to the public other than as a result of disclosure by Respondents;

      iv. is information the disclosure of which is consented to by the Acquirer;

      v. is necessary to be exchanged in the course of consummating the Acquisition or the transaction under any Remedial Agreement;

      vi. is disclosed in complying with this Order;

vii. is information the disclosure of which is necessary to allow Respondents to comply with the requirements and obligations of the laws of the United States and other countries, and decisions of Government Entities; or

viii. is disclosed obtaining legal advice.

P. "Consents" means all consents, approvals, permissions, waivers, ratifications, or other authorizations that are necessary to effect the complete transfer and divestiture of the Caring.com Assets to an Acquirer and for the Acquirer to operate any aspect of the Caring.com Business.

Q. "Copyrights" means all rights to all original works of authorship of any kind owned or created by or for or related to Caring.com, the Caring.com Assets, or the Caring.com Business, and any registrations and applications for registrations thereof, and all copyrightable works, registered and unregistered copyrights in both published works and unpublished works, and all applications, registrations, and renewals in connection therewith, including, but not limited to, all such rights with respect to promotional materials and educational materials; market research data, market intelligence reports, and statistical programs (if any) used for marketing and sales research; customer information, promotional, and marketing materials; sales forecasting models; records, including customer lists, sales forces call activity reports, vendor lists, sales data, reimbursement data, and speaker lists.

R. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.

S. "Director" means an individual who is elected, or appointed by, or who is an agent or representative of, a specified Person to serve on a Board of a specified entity.

T. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee) closes on the divestiture of the Caring.com Assets as required by Paragraph II. (or Paragraph VI.) of this Order.

U. "Domain Names" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

V. "Employee Information" means, for each Caring.com Employee, a profile prepared by Respondents summarizing the employment history of each employee including, but not limited to, the following information:

1. Name, job title or position, date of hire and effective service date;

2. A specific description of the employee's responsibilities;

3. The base salary or current wages;

4. The most recent bonus paid, aggregate annual compensation for Caring.com Business's last fiscal year and current target or guaranteed bonus, if any;

5. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly-situated employees; and

7. Copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employee.

W. "Firewalled Entity(ies)" means APEX, Silver Lake and General Atlantic individually and collectively, and includes the Firewalled Individuals.

X. "Firewalled Individuals" means the following:

1. All Persons appointed by, approved by, or who otherwise represent Silver Lake as Director on any Board of Respondents; and

2. All Persons appointed by, approved by, or who otherwise represent General Atlantic as Director on any Board of Respondents.

Y. "General Atlantic" means General Atlantic LLC, a limited liability corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its headquarters and principal place of business located at 55 East 52nd Street, Park Avenue Plaza, 33rd Floor, New York, NY 10055.

Z. "Geographic Territory" means the United States.

AA. "Government Entities" means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

BB. "Hold Separate Order" means the Order to Hold Separate and Maintain Assets incorporated into and made a part of the Consent Agreement.

CC. "Hold Separate Period" means the time period beginning as of the date on which Respondents sign the Consent Agreement in this matter, and shall terminate pursuant to the provisions of Paragraph IX. of the Hold Separate Order.

DD. "Intellectual Property" means, and includes without limitation, all:

1. Patents;

2. Copyrights;

3. Trademarks, trade dress, logos, slogans, service marks, Websites and Domain Names, together with all translations, adaptions, derivations, and combinations thereof, and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith;

4. Marketing Materials;

5. Computer software (including source code, executable code, data, databases, and related documentation);

6. Plans (including proposed and tentative plans, whether or not adopted or commercialized), research and development, specifications, drawings, and other assets (including the right to use Patents, know-how, and other intellectual property relating to such plans);

7. Trade secrets, technology, know-how, and confidential or proprietary information (including ideas, research and developments, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development, and other information), whether patented, patentable, or otherwise;

8. Licenses including, but not limited to, third party software, if transferrable, and sublicenses to software modified by Caring.com; and

9. Any other intellectual property used prior to the Divestiture Date in connection with Caring.com or the Caring.com Business; and

10. All rights to obtain and file for Patents, Copyrights, Trademarks, and registrations thereof and to bring suit against a third party for the past, present, or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing.

EE. "Marketing Materials" means all materials used in the marketing or sale of services or products by Caring.com or the Caring.com Business as of the Divestiture Date, including, without limitation, all advertising and display materials, promotional and marketing materials, training materials, educational materials, speaker lists, product data, mailing lists, sales materials, marketing information (*e.g.,* competitor information, research data, market intelligence reports, statistical programs used for marketing and sales research), customer information, sales forecasting models, Website content, and other materials

related to the marketing or sale of services or products by Caring.com or the Caring.com Business.

FF. "Monitor" means any monitor appointed pursuant to Paragraph V. of this Order or Paragraph V of the Hold Separate Order.

GG. "Monitor Agreement" means the Monitor Agreement between Respondents and R. Shermer & Company. The Monitor Agreement is attached as Appendix A to this Order.

HH. "Patents" means pending patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

II. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity other than Respondents.

JJ. "Remedial Agreement(s)" means any agreement between Respondents and the Acquirer (or between a Divestiture Trustee and the Acquirer) that have been approved by the Commission to accomplish the requirements of this Order, including any divestiture or assets purchase agreement(s) related to the Caring.com Assets, any Transition Services Agreement(s), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order.

KK. "Senior Care Paid Referral Service Contracts" means contracts with senior care facilities or other senior caregiving service providers for paid referrals to potential clients seeking entry into a senior care facility or senior caregiving services.

LL. "Silver Lake" means Silver Lake Partners LP, a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its headquarters and principal place of business located at 2775 Sand Hill Road, Suite 100, Menlo Park, CA 94025.

MM. "Tangible Personal Property" means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased by the Caring.com Business, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

NN. "Trademarks" means all proprietary names or designations, registered and unregistered trademarks, service marks, trade names, brand names, commercial names, "doing business as" (d/b/a) names, logos, and slogans, together with all translations, adaptions, derivations, and combinations thereof, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof), all common law rights, and all goodwill symbolized thereby and associated therewith.

OO. "Transition Services" means any transitional services required by the Acquirer for the operation of the Caring.com Business including, but not limited to administrative assistance (including, but not limited to, accounting, and information transitioning services), technical assistance, and supply agreements.

PP. "Transition Services Agreement(s)" means any agreement entered into between Respondents and an Acquirer (or the Divestiture Trustee and an Acquirer) for the provision of Transition Services.

QQ. "Website and Domain Names" means the content of the Website(s) located at the Domain Names, the Domain Names, and all Copyrights in such Website(s), to the extent owned by Respondents.

II.

IT IS FURTHER ORDERED that:

A. No later than six (6) months after the Acquisition Date, Respondents shall divest the Caring.com Assets, absolutely and in good faith and at no minimum price, to the Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

B. At the Acquirer's option, and subject to the prior approval of the Commission, Respondents shall provide, at no greater than Direct Cost, Transition Services from knowledgeable employees of Respondents to assist the Acquirer in the transfer of the Caring.com Assets from Respondents to the Acquirer in a timely and orderly manner pursuant to a Transition Services Agreement. The Transition Services Agreement:

1. Shall be for a period of one (1) year following the Divestiture Date, with an opportunity to extend for up to one (1) year at the option of the Acquirer;

2. May be terminated at any time by the Acquirer without cost or penalty to the Acquirer upon commercially reasonable notice to Respondents; and

3. Must include provisions that:

    a. comply with the requirements and prohibitions of Paragraph IV. of this Order to ensure that Caring.com Confidential Business Information remains confidential; and

b. require Respondents, with the concurrence of the Acquirer, to certify in writing to the Commission as to the completion of all Transition Services provided by the Respondents to the Acquirer pursuant to any Transition Services Agreement approved by the Commission.

C. Prior to the Divestiture Date:

1. Respondents shall secure at their sole expense:

a. Consents from all Persons that relate to or are necessary to divest the Caring.com Assets to the Acquirer and for the Acquirer to operate any tangible or intangible assets of the Caring.com Business in a manner that will achieve the purposes of this Order; and

b. Consents from all Persons necessary for the assignment or transfer to the Acquirer of all the Caring.com Contracts;

provided, however, Respondents shall not be required to secure the consent of any Governmental Agency relating to any permit, license, or right that Respondents have no legal right to divest or transfer to the Acquirer; and

provided further, however, the failure of Respondents or the Acquirer to obtain any Consents that relate to or are necessary to divest the Caring.com Assets shall not extend the date by which Respondents must divest the Caring.com Assets.

2. Respondents shall use best efforts to assist the Acquirer to obtain the transfer from Respondents or issuance to the Acquirer of any permit, license, asset, or right that Respondents have no legal right to divest or transfer to the Acquirer.

D. Within ten (10) days of the Divestiture Date, Respondents shall submit to the Acquirer, at Respondents' expense, all Business Records of the Caring.com Assets, in good faith, and in a manner that ensures their completeness and accuracy and that fully preserves their usefulness; *provided, however*, pending complete delivery of all such Business Records of the Caring.com Assets to the Acquirer, Respondents shall provide the Acquirer, and the Monitor with access to all such Business Records of the Caring.com Assets and employees who possess or able to locate such information for the purposes of identifying the books, records, and files directly related to the Caring.com Assets and facilitating the delivery in a manner consistent with this Order.

E. Until Respondents (or the Divestiture Trustee) complete the divestiture and other obligations to transfer the Caring.com Assets as required by this Order, Respondents shall take all actions as are necessary to:

1. Maintain the full economic viability and marketability of the Caring.com Assets and the Caring.com Business;

2. Minimize any risk of loss of competitive potential for the Caring.com Assets;

3. Prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Caring.com Business; and

4. Not sell, transfer, encumber, or otherwise impair the Caring.com Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of Caring.com, the Caring.com Assets, or the Caring.com Business.

F. The purpose of this Paragraph II. is to ensure the continued use of the Caring.com Assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents, minimize the loss of competitive potential for the Caring.com Business, minimize the risk of disclosure or unauthorized use of Caring.com Confidential Business Information; to prevent the destruction, removal, wasting, deterioration, or impairment of the Caring.com Business, except for ordinary wear and tear; and to remedy the potential lessening of competition resulting from the Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondents shall cooperate with and assist the proposed Acquirer of the Caring.com Assets to evaluate independently and retain the Caring.com Employees, such cooperation to include at least the following:

1. Not later than forty-five (45) days before the Divestiture Date, Respondents shall, to the extent permitted by applicable law: (i) provide the proposed Acquirer a list of all Caring.com Employees, identifying which Persons are Caring.com Key Employees; and (ii) provide Employee Information for each Person on the list;

2. Not later than thirty (30) days before the Divestiture Date, Respondents shall provide the proposed Acquirer with:

   a. an opportunity to meet, personally and outside the presence or hearing of any employee or agent of Respondents, with any Caring.com Employee;

   b. an opportunity to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws; and

   c. to make offers of employment to any Caring.com Employee;

3. Respondents shall: (i) not interfere, directly or indirectly, with the hiring or employing by a proposed Acquirer of any Caring.com Employee; (ii) not offer any incentive to any Caring.com Employee to decline employment with a proposed Acquirer; (iii) not make any counteroffer to any Caring.com Employee who receives a written offer of employment from a proposed Acquirer; and (iv) remove any impediments within the control of Respondents that may deter any Caring.com Employee from accepting employment with a proposed Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of such employee to be employed by a proposed Acquirer;

   provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee.

B. Respondents shall provide reasonable financial incentives:

1. to the Caring.com Employees including the continuation of all employee benefits offered by Respondents (*i.e.,* regularly schedule or merit raises and bonuses, and regularly scheduled vesting of all pension benefits) during the Hold Separate Period, to encourage such employees to continue in his/her position with the Caring.com Business until the Divestiture Date; and

2. to the Caring.com Key Employees as needed to facilitate the employment of such employees by the proposed Acquirer.

C. For a period of two (2) years after the Divestiture Date, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Caring.com Employee employed by the Acquirer or any Person employed by the Acquirer whose job responsibilities predominantly relate to the Caring.com Business, to terminate his or her employment relationship with the Acquirer;

provided, however, Respondents may: (1) advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, so long as these actions are not targeted specifically at any Caring.com Employee; and (2) hire employees of the Caring.com Business who apply for employment with Respondents, so long as such individuals were not solicited by Respondents in violation of this paragraph;

provided further, however, that this Paragraph shall not prohibit Respondents from making offers of employment to or employing any employee of the Caring.com Business if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the individual's employment has been terminated by the Acquirer.

IV.

IT IS FURTHER ORDERED that:

A. Beginning on the date the Hold Separate Order is issued until six (6) months after the Divestiture Date, Respondents shall not:

1. Possess or control any APFM Confidential Business Information;

2. Request, solicit, seek, receive, obtain, or otherwise have access to, directly or indirectly, any APFM Confidential Business Information from any Person(s), including the Firewalled Entities; or

3. Provide any services to or have any business dealings with the Firewalled Entities as related to APFM.

B. Respondents shall not, except as expressly permitted by or as necessary to comply with the Hold Separate Order or this Order:

1. Provide, disclose, share, convey, discuss, exchange, circulate, or otherwise grant access to, directly or indirectly, any Caring.com Confidential Business Information, including information related to the divestiture of the Caring.com Assets, to or with any Person(s), including the Firewalled Individuals; or

2. Use, directly or indirectly, the Caring.com Confidential Business Information for any purpose.

C. As of the date Respondents sign the Consent Agreement, Respondents shall: (1) take all actions as are necessary and appropriate to prevent access to, or the disclosure or use of, Caring.com Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such Confidential Business Information pursuant to the terms of this Order; and (2) with the advice and assistance of the Monitor, develop and implement procedures and requirements with respect to such Confidential Business Information to ensure that:

1. Caring.com or the Caring.com Business does not provide, disclose, or otherwise make available any Caring.com Confidential Business Information to the Firewalled Entities, and are in compliance with the requirements of this Order;

2. Employees of Respondents' retained businesses, including the Firewalled Individuals, do not request, solicit, seek, receive, obtain, use or otherwise have access to, directly or indirectly, any Caring.com Confidential Business Information from the Caring.com Business;

provided, however, employees of Respondents' retained businesses are not in violation of this Paragraph if: (1) they provide or are involved in the provision of Transition Services under the (i) Hold Separate Order or this Order, or (ii) any Remedial Agreement; or (2) are complying with financial reporting requirements or environmental, health, and safety policies and standards, ensuring the integrity of the financial and operational controls on the Caring.com Assets or the Caring.com Business, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against Caring.com or the Caring.com Business, or as required by law;

3. The Firewalled Individuals are:

   a. In compliance with the requirements of this Order;

   b. Prohibited from, directly or indirectly, influencing or attempting to influence or participate in any vote of Respondents' Board pertaining to Caring.com or the Caring.com Business; and

   c. Prohibited from participating in any discussions or communications with Respondents and the Firewalled Entities about Caring.com or the Caring.com Business.

D. As part of the procedures and requirements described in Paragraph IV.C. of this Order, Respondents shall:

1. Within ten (10) days of the date Respondents sign the Consent Agreement, require all Respondents' employees who have access to Caring.com Confidential Business Information, including the Firewalled Individuals, to sign an appropriate non-disclosure agreement agreeing to comply with the prohibitions and confidentiality requirements of this Order; *provided, however*, for Respondents' employees with access to Caring.com Confidential Business Information who have clerical positions but no operational or commercial responsibilities, Respondents may send an appropriate notification regarding the prohibitions and confidentiality requirements of this Order by email with return receipt requested or other similar transmission, and shall keep a file of such return receipts for one (1) year;

2. Require and enforce compliance with appropriate remedial action in the event of non-compliant access, use, or disclosure of Caring.com Confidential Business Information in violation of this Order; immediately report any event to the Monitor, if one has been appointed, and to the Commission or its staff; and include detailed information about any event and any remedial action taken by Respondents in Respondents' compliance reports to the Commission; and

3. Institute all necessary information technology procedures, authorizations, protocols, and any other controls necessary to comply with the Order's requirements.

V.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Hold Separate Order and the Remedial Agreements. The Commission hereby appoints Richard A. Shermer as the Monitor and approves the Monitor Agreement between R. Shermer & Company and Respondents.

B. Not later than one (1) day after the appointment of the Monitor, Respondents shall, pursuant to the Monitor Agreement and to this Order, confer on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order in a manner consistent with the purposes of this Order.

C. The Monitor shall serve until the later of (1) twelve (12) months after the Divestiture Date or (2) the termination of all Respondents' obligations under all Remedial Agreements; *provided, however*, the Commission may extend or modify this period as may be necessary to accomplish the purposes of this Order and the Hold Separate Order.

D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture, hold separate and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission, including, but not limited to:

(a) Assuring that Respondents expeditiously comply with all of their obligations and performs all of their responsibilities as required by this Order, the Hold Separate Order, and the Remedial Agreements;

(b) Monitoring any Transition Services Agreements; and

(c) Assuring that Confidential Business Information is not received or used by Respondents or the Acquirer, except as allowed in this Order and in the Hold Separate Order;

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission;

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order, the Hold Separate Order, and the Remedial Agreements;

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with its obligations under this Order, the Hold Separate Order, and the Remedial Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order, the Hold Separate Order, and the Remedial Agreements;

5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission;

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor. For purposes of this Paragraph V.D.6, the term "Monitor" shall include all persons retained by the Monitor pursuant to Paragraph V.D.5 of this Order;

7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by the Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under this Order, the Hold Separate Order, and the Remedial Agreements;

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph, every sixty (60) days thereafter, and otherwise requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, the Hold Separate Order, and the Remedial Agreements;

9. Respondents may require the Monitor and each of the Monitor's consultants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor.

G. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor all the rights and powers necessary to permit the substitute Monitor to monitor Respondents' compliance with the terms of this Order, the Hold Separate Order, and the Remedial Agreements in a manner consistent with the purposes of this Order.

H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order, the Hold Separate Order, and the Remedial Agreements.

I. A Monitor appointed pursuant to this Order may be, but need not be, the same Person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Caring.com Assets and otherwise fully complied with the obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Caring.com Assets in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute an agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to

be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to enter into Transition Services agreements;

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the divestiture period only two (2) times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all

monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture;

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided*, *however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission; and

10. The Commission may require, among other things, the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VII.

IT IS FURTHER ORDERED that:

A. The Remedial Agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of the Respondents under such agreement.

B. The Remedial Agreements shall be incorporated by reference into this Order and made a part hereof.

C. Respondents shall comply with all provisions of the Remedial Agreements, and any breach by Respondents of any term of such agreement shall constitute a violation of this Order. If any term of the Remedial Agreements varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order. Any failure by the Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

D. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Respondents shall submit to the Commission and, if appointed, the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order:

1. Within thirty (30) days after the date this Order becomes final;

2. Every thirty (30) days thereafter until Respondents have fully divested, licensed, transferred and/or granted the Caring.com Business to an Acquirer;

3. Every three (3) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Remedial Agreements to render Transition Services to the Acquirer; and

4. One (1) year after this Order is issued, annually for the next nine (9) years on the anniversary of that date, setting forth in detail the manner and form in which they have complied and are complying with this Order.

C. At such other times as the Commission may request, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this Order and any Remedial Agreement.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondents;

B. Any proposed acquisition, merger, or consolidation of Respondents; or

C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents related to compliance with the Consent Agreement and/or this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present.

XI.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date the Order is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

PUBLIC APPENDIX A

Redacted Monitor Agreement

NON-PUBLIC APPENDIX B

Caring.com Key Employees

[Redacted From the Public Record Version, But Incorporated By Reference]

1710156

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of

CDK Global, Inc.
a corporation,

CDK Global, LLC
a limited liability company,

Auto/Mate, Inc.
a corporation,

Robert Eustace
an individual,

Elsa Eustace
an individual,

G. Larry Colson, Jr.
an individual,

Michael Esposito,
an individual,

And

Glen Eustace
a representative.

Docket No. 9382

REDACTED PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents CDK Global, Inc. and CDK Global, LLC (collectively "CDK") and Auto/Mate, Inc. ("Auto/Mate"), Robert Eustace, Elsa Eustace, G. Larry Colson, Jr., Michael Esposito, and Glen Eustace have executed an acquisition agreement in

violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. Respondents are providers of dealer management systems ("DMS") for franchise (new car) dealerships. The DMS is mission-critical business software used by dealerships to manage nearly every aspect of their business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing. Franchise DMS providers must also obtain car manufacturer ("OEM") certifications so that the DMS can share information between the franchise dealerships and OEMs, including information about new car sales, warranty services, parts, financial performance, and labor time.

2. CDK and Reynolds & Reynolds ("Reynolds") are the two largest franchise DMS providers in the United States. They are also the highest priced, and have similar business models, which include long-term contracts and significant initial and monthly fees for third-party applications (app) vendors to integrate with their respective DMS.

3. Auto/Mate is an innovative, disruptive challenger to the two market leaders. It offers franchise dealerships a distinct value proposition, including strong functionality, low pricing, an agnostic platform for third-party applications, extensive OEM certifications, short contracts, free software upgrades and training, and a reputation for high-quality customer service. In recent years, Auto/Mate has grown as a competitive threat in the franchise DMS market, including by specifically targeting CDK customers. Auto/Mate has consistently expanded its customer base and revenues through both aggressive pricing and adapting its differentiated product to match the preferences of many franchise dealers, placing pressure on CDK's pricing and margins. It has also developed features attractive to larger franchise dealerships and as a result, became an increasing threat to take more customers from CDK. CDK identified Auto/Mate as a current and emerging threat and responded aggressively by discounting and offering more flexible and better terms to customers.

4. In the fall of 2016 when Auto/Mate placed itself up for sale, CDK concluded that it could eliminate a strong current competitor, which was threatening to become an even more disruptive rival, by simply purchasing the company. However, CDK's plan to rid itself of a significant and growing competitive threat hit a roadblock: during the bidding process, CDK suspected that other well-financed, credible bidders recognized Auto/Mate's competitive strengths and were seriously interested in buying the company. CDK recognized that if Auto/Mate fell into the hands of a well-financed buyer willing to invest additional resources, Auto/Mate would become an even more aggressive and effective competitor. CDK was so concerned about this possibility that it [redacted]

5. After concluding that it could not allow Auto/Mate to fall into the hands of a larger, well-financed backer, CDK [redacted] CDK ultimately offered a price that was far in excess of its original standalone valuation of Auto/Mate [redacted] Indeed, the most credible explanation for CDK's [redacted]

6. CDK's post-merger plans for Auto/Mate provide substantial additional support for the conclusion that this Acquisition will reduce competition. Post-merger, CDK plans to substantially downgrade [redacted] features and service, raise [redacted] prices, and prevent CDK's larger customers from migrating [redacted].

7. Today, competition from Auto/Mate yields a myriad of substantial benefits to franchise dealers. Auto/Mate's presence in this market means lower prices, greater innovation, more flexible contract terms, and better service. If consummated, the Acquisition would eliminate the considerable and growing competition between CDK and Auto/Mate. It would also eliminate competition between Auto/Mate and other DMS providers, and thereby cause significant and pervasive harm to franchise dealers.

8. The Acquisition would entrench CDK's [redacted] share of the relevant market and would significantly increase market concentration. Post-Acquisition, CDK would control approximately 47% of the franchise DMS market. Reynolds would possess approximately [redacted] of the relevant market. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-merger market-concentration level above 2500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Acquisition market concentration would be more than 2500, and the Acquisition would increase HHIs in an already concentrated market by well over 200 points. Thus, the Acquisition is presumptively unlawful.

9. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. *De novo* entrants face considerable barriers including substantial and lengthy up-front investments in product development and OEM certification, with a high risk of failure. Similarly, existing DMS providers face substantial challenges in order to reposition to replace Auto/Mate's competitive significance, including but not limited to, a poor or non-existent reputation among customers, software with limited functionality, limited or non-existent OEM certifications, poor service levels, constrained capacity, and high prices. In brief, the remaining firms in this market are not likely to replace the unique, substantial, and growing competitive significance of Auto/Mate in a timely way, either collectively or individually.

10. Respondents cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Acquisition.

II. JURISDICTION

11. Respondents are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

12. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

13. CDK is the largest provider of franchise DMS in the United States. CDK is a publicly traded company, headquartered in Hoffman Estates, Illinois. CDK had 2017 global revenues of over $2 billion. In the United States, CDK has DMS customers with more than [redacted] franchise dealership locations (or "rooftops," the industry's preferred term).

14. Auto/Mate is one of the fastest-growing providers of franchise DMS in the United States. Auto/Mate is a privately held company based in Albany, New York, with 180 employees in the United States. [redacted] Auto/Mate had 2017 revenues of approximately [redacted]. In the United States, Auto/Mate has DMS customers with more than [redacted] franchise dealership rooftops. Since 2012, Auto/Mate has grown rapidly, significantly increasing its customer base year-over-year. Auto/Mate is now the fifth largest franchise DMS provider in the United States with approximately [redacted] market share.

IV. THE ACQUISITION

15. Pursuant to a Stock Purchase Agreement, dated April 28, 2017, CDK proposes to acquire 100% of the shares of Auto/Mate for approximately [redacted] in cash.

V. MARKET PARTICIPANTS AND INDUSTRY DYNAMICS

16. The United States franchise DMS market is highly concentrated with CDK and Reynolds controlling approximately 70% of the market. Dealertrack, Auto/Mate, and Autosoft round out the top five franchise DMS providers in the United States. Each of the remaining franchise DMS providers accounts for a much smaller share of the market.

17. CDK and Reynolds have similar business models — both offer a broad set of features and OEM certifications, but both also charge relatively high prices, and both regularly require their customers to sign long-term contracts. In addition to these issues, both companies tend to charge relatively high fees for integrating third party applications, and CDK has a reputation for relatively poor customer service. Despite such business practices that frustrate

some of their customers, the two market leaders have maintained dominant positions in this market.

18. Customers frustrated with CDK's and Reynolds's business practices have faced significant challenges in switching DMS suppliers and, historically, a lack of good alternatives to the two market leaders. In order to change DMS suppliers, franchise dealers need to spend a significant number of hours training their staff, while dealing with losses in productivity that can lead to lower sales during the transition period. Because the DMS touches essentially every aspect of a dealer's business, there is considerable risk associated with switching to a DMS that does not perform adequately. This makes customers understandably wary of DMS suppliers without an established track record of success.

19. Auto/Mate is a low price, innovative company that has posted consistent, double-digit growth in recent years. A significant portion of Auto/Mate's wins in recent years have come at CDK's expense. Auto/Mate's value proposition includes but is not limited to, low prices, an ample and growing set of features, month-to-month contracts, the choice of on-site or cloud server deployment, a full roster of major OEM certifications, a low-cost agnostic platform for third-party applications, a strong reputation, and excellent customer service.

20. Today, no other DMS offers Auto/Mate's combination of low prices, high functionality, and strong customer service. These attributes position Auto/Mate well to effectively challenge the market leadership of CDK and Reynolds. According to its internal business documents, Auto/Mate plans to grow its market share both by continuing to aggressively court and win small franchise dealership customers as well as by continuing to expand on its recent successes in winning larger franchise dealership customers. In 2016, Auto/Mate stated it could grow [redacted]

21. Compared to Auto/Mate, each remaining DMS provider, including Dealertrack and Autosoft, lacks important features or value, including but not limited to, low pricing, important software functionalities, important OEM certifications, month-to-month contracts, or a strong reputation. Many of these DMS providers have failed to show significant growth or have stagnated or contracted in the last several years. Many of the remaining DMS providers have significant limitations on their capacity to add and support new customers.

VI. RELEVANT MARKET

22. The relevant market is the sale of DMS for franchise dealers in the United States ("Relevant Market" or "U.S. Franchise DMS Market"). A hypothetical monopolist of the sale of all franchise DMS in the United States would find it profit-maximizing to impose at least a small but significant and non-transitory increase in price ("SSNIP").

A. Relevant Product Market

23. The relevant product market in which to assess the effects of the proposed Acquisition is DMS for franchise dealers.

24. The DMS is a mission-critical business software that serves as the backbone of the dealer's information technology systems. Within a dealership, the DMS is used to manage nearly every aspect of the business, including accounting, payroll, parts and vehicle inventory, service repair scheduling, and vehicle financing. Much of the technology needed to run a dealership, including internet connectivity, telephones, website management, inventory, service scheduling, finance and insurance, and accounting is run or connected through the DMS. The DMS is also necessary for sharing information between the dealerships and OEMs like Ford, Audi, or Honda. This enables the dealer and OEMs to share real-time information on sales, inventory, parts, service, and warranties.

25. There are no reasonably interchangeable substitutes for franchise DMS, and franchise dealerships could not realistically switch to other products in the face of a SSNIP for DMS for franchise dealers.

26. DMS for franchise dealers has distinct qualities that other DMS products, including independent (used car) DMS does not have. A DMS for franchise dealers must have OEM certifications for the dealer to communicate with OEMs to share new car sales and parts information, and perform warranty services. Independent DMS providers and general business software do not have OEM certifications.

27. In addition to OEM certification, franchise dealers generally require software features tailored to franchise car dealership business operations, which are lacking in other DMS. In particular, franchise dealers demand complex automobile repair and parts software modules that independent DMS providers do not offer. In addition, independent DMS providers often lack other software modules important to the franchise dealer, including accounting and payroll modules.

28. Franchise dealers do not use independent DMS providers as a competitive restraint in negotiations with franchise DMS providers. General business software programs are also not a constraint on franchise DMS providers, and franchise dealers do not use general business software as a competitive restraint in negotiations with franchise DMS providers.

29. Thus, DMS for franchise dealers is the relevant product market in which to analyze the Acquisition's likely effects.

B. Relevant Geographic Market

30. The relevant geographic market is the United States. Auto/Mate does not compete outside of the United States. OEM certifications are frequently limited to specific countries and many OEMs require a United States-specific certification. Because franchise DMS customers demand OEM certifications that work within their country, and those certifications are frequently nation-specific, the relevant geographic market is the United States.

VII. MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

31. The U.S. Franchise DMS Market is highly concentrated, with CDK and Reynolds controlling roughly 70% of the market. CDK has approximately [redacted] market share and Auto/Mate has approximately [redacted] market share. Post-Acquisition, the Relevant Market would be even more highly concentrated; CDK would control nearly half the market.

32. The Merger Guidelines and courts often measure concentration using HHIs. HHIs are calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power and is presumptively illegal when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

33. Post-Acquisition, the Relevant Market would be substantially more highly concentrated than it is today. Post-Acquisition, CDK would control approximately 47% of this Relevant Market. Reynolds, the next largest competitor, would possess approximately [redacted] of the Relevant Market. The Acquisition would result in a post-Acquisition HHI of over 2,500, and would increase concentration by well over 200 points. Therefore, the Acquisition establishes a presumption of competitive harm.

34. In this matter, the HHIs based on current market shares materially understate Auto/Mate's competitive significance in the Relevant Market because they do not take into consideration Auto/Mate's likely growth trajectory. Prior to the merger announcement, Auto/Mate posted significant growth year-over-year, adding new functionalities to its DMS and gaining large dealership customers. Moreover, Auto/Mate's reputation was growing in the industry and it was poised for continuing and significant growth.

35. The Acquisition is, therefore, presumptively unlawful under relevant case law and the Merger Guidelines.

VIII. ANTICOMPETITIVE EFFECTS: THE ACQUISITION WOULD ELIMINATE VITAL COMPETITION BETWEEN AUTO/MATE AND OTHER DMS PROVIDERS

36. The Acquisition is likely to substantially lessen competition in the Relevant Market. Auto/Mate competes aggressively against CDK today and would compete even more aggressively against CDK in the future but for the Acquisition. The merger would extinguish

this competition, as well as competition between Auto/Mate and other DMS providers. The result would be higher prices, inferior service, and reduced quality and innovation.

A. Auto/Mate Competes Aggressively Against CDK Today

37. To successfully challenge the large incumbent DMS providers, Auto/Mate deploys aggressive sales and marketing efforts. In attempts to win CDK customers, Auto/Mate has repeatedly emphasized CDK's price increases for both its core DMS and third-party integration, CDK's restrictive contracts, and CDK's business practices in marketing blasts it sent directly to CDK customers:

- "Pressure to increase margins has already caused prices to increase on third-party integration fees. This pressure will also cause increased prices on products for dealers directly if they have not seen it already."

- "CDK is letting go of a substantial amount of account managers in addition to other employees" and "[t]his will surely result in decreased communications between CDK and its dealers."

- "We believe that CDK dealers using an older web platform are being forced to migrate to a newer version and are required to pay for the cost of implementation."

- "[I]f you are currently using an in-house server, you may be alarmed to find out that you will be forced to migrate to a cloud-based solution by January 1st, 2018."

- "We are aware that these changes could drastically impact your bottom line. If you're tired of being locked down in an unsatisfactory contract and forced to pay for unnecessary updates, please feel free to contact me personally."

38. Auto/Mate also focuses on the overall price difference between Auto/Mate and CDK and Reynolds, using its website to assure prospective customers that "dealers often find their Auto/Mate monthly support bills to be 65-75 percent less than what they're paying with Reynolds and Reynolds or CDK." Auto/Mate is successful in its attempts to target CDK and Reynolds customers. Auto/Mate touted that "[o]ver 82% of our customers are converted from CDK Global and Reynolds & Reynolds DMS systems."

39. Auto/Mate also continually improves its product in response to customer demand for feature innovations. [redacted] Auto/Mate almost always provides these enhancements to its entire customer base, and in most cases, does so free of charge.

40. Auto/Mate's aggressive competition drew considerable attention at CDK. In 2016, CDK recognized that Auto/Mate was winning an increasing share of opportunities and that CDK was "losing more clients to Automate (sic) in the [redacted] than we've ever lost before," that Auto/Mate had "shrunken the gap in functionality to our core DMS," that Auto/Mate was "moving up toward Tier 1," and that Auto/Mate was now successfully acquiring large dealership customers. Internally, CDK discussed that Auto/Mate was getting "more and more aggressive with pricing" and that Auto/Mate was "making too much headway" relative to other franchise DMS competitors.

41. To respond to competition from Auto/Mate, CDK regularly offers [redacted] concessions. Reynolds also provides [redacted] and other benefits in response to competition from Auto/Mate.

42. In 2016, CDK implemented a plan specifically designed to reduce the risk that some of its customers would switch to Auto/Mate. [redacted] all of which were beneficial to customers.

43. Competition between CDK and Auto/Mate has substantially lowered prices for customers. The following are examples of this direct price competition:

- In a competition between CDK, Auto/Mate and Dealertrack, a franchise dealer's consultant produced a cost comparison showing that Auto/Mate's total price over 60 months was [redacted] less than Dealertrack and [redacted] less than CDK's DMS. In explaining his decision to leave CDK, the franchise dealer cited the price difference as "significant" and added that the decision to leave "wasn't a very hard call."

- A franchise dealer told CDK it was switching to Auto/Mate because "The price difference between R&R / CDK and a smaller DMS like Auto/Mate is a savings of [redacted] over 60 months. That is substantial and the main reason our owners wish to go this route."

- In competition with Auto/Mate, CDK was forced to provide a roughly [redacted] discount on monthly charges (an equivalent of approximately [redacted] over 60 months).

44. CDK also regularly responds to competition from Auto/Mate on non-price terms, including but not limited to, [redacted] For example, CDK typically offers a 60-month term contract, whereas Auto/Mate's contracts are month-to-month. Before the Acquisition's announcement, in response to Auto/Mate competition, [redacted] In another example, seeing Auto/Mate as the "real risk" to win one of its existing customers who expressed frustration with CDK's service, [redacted]

B. Auto/Mate Is Positioned to Compete Even More Aggressively in the Future Against CDK, Especially for Larger Dealership Customers

45. This Acquisition would lead to a real and significant loss of current competition. However, Auto/Mate's effect on the market is more significant than its current market share suggests, in part because of its compelling value proposition and history of continuous software innovations. These issues strongly indicate that, prior to the Acquisition, Auto/Mate was poised to become an even more aggressive and effective competitor in the Relevant Market.

46. For the past five years, Auto/Mate has been experiencing significant year-over-year rooftop growth. To drive this growth, Auto/Mate recently introduced several important functionality upgrades, including centralized accounting, which is a feature that dealerships with multiple rooftops value, and often strongly prefer. By adding centralized accounting to an already solid feature set at aggressive prices, Auto/Mate has attracted the attention of multi-rooftop dealers with very sophisticated DMS needs. Auto/Mate's introduction of centralized accounting was a [redacted] and amplified its competitive threat to CDK.

47. Prior to the Acquisition's announcement, Auto/Mate was on a clear growth path and believed it was well positioned to win larger DMS franchise customers. In 2016, Auto/Mate's Chairman made its growth plans clear: "We expect that as we continue to take larger groups from CDK/R&R, that we will eventually wake the sleeping giants. Right now, we're an annoyance, and they truly think that we are not a serious competitor at dealerships of a certain size. However, they are not really aware of some of the recent changes we have made to the software, and in the coming months we will begin installing a pilot store at a very large dealer group[] that, assuming we are successful, ought to shake up the industry, at least those who are paying attention."

48. As predicted, Auto/Mate had its best year yet in 2016, the last full year prior to the Acquisition's announcement, when it won several larger dealerships and successfully started [redacted] Auto/Mate believed its momentum would lead to further success: "Our success with these Groups is already generating interest from other large groups…. The large groups we installed in 2015 and 2016 are singing our praises."

49. In 2016, Auto/Mate won [redacted] customers with [redacted] rooftops from CDK in competitive situations. Auto/Mate also had significant success against Reynolds in 2016, winning [redacted] customers with [redacted] rooftops in competitive situations. Auto/Mate also won [redacted] customers with [redacted] rooftops from other DMS providers in competitive situations.

50. Auto/Mate knew its aggressive competition and strong reputation were working: "It seems that our reputation as tops in customer service, our successes at multi-store group installations, our more recent larger customer wins and some help from our competitors jacking up 3rd party integration fees has combined to create one of those 'perfect storm' moments, and we're perfectly positioned to take advantage of it."

51. At the end of 2016, Mike Esposito, the President and CEO of Auto/Mate highlighted to his team "We have worked very hard to get to the 'top of the hill'…we are almost on the other side. Our efforts are paying off! People don't ask anymore 'Who are you guys?' They now know who Auto/Mate is!" Mr. Esposito expected 2017 to "be the best year we have ever had."

52. As Auto/Mate won more and more customers, CDK executives knew they needed to respond to this competition, acknowledging that [redacted] and that CDK needed a [redacted] CDK determined that [redacted]

C. The Acquisition Will Eliminate the Consumer Benefits of Head-to-Head Competition Between Auto/Mate and other DMS providers

53. The Acquisition would eliminate the intense head-to-head price and quality competition between CDK and Auto/Mate occurring today. Consequently, CDK would not need to compete as aggressively on price to win franchise dealer customers, and would have the incentive and ability to raise prices and lower service quality. The Acquisition would also eliminate the competition between Auto/Mate and other DMS providers, reducing the need for those providers to compete as aggressively on price, service, and innovation.

54. After the Acquisition, CDK and other DMS providers would face less competition to retain and gain new customers and would have less incentive to offer shorter contracts, faster software enhancements, more third-party and less expensive app integration, additional training, and better customer service. CDK was aware that it would face less competition after acquiring Auto/Mate, internally touting: "We are so serious about acquiring new customers that we bought the DMS [Auto/Mate] that has been kicking our butts."

55. Indeed, CDK was willing to pay top dollar to keep Auto/Mate out of the hands of an acquirer that would increase Auto/Mate's already impressive growth trajectory. CDK predicted that, in the hands of a motivated and well-capitalized buyer, Auto/Mate would [redacted] To prevent this, CDK [redacted] over the next highest bidder to acquire Auto/Mate, and [redacted] CDK's original valuation of Auto/Mate. The gap between CDK's winning bid and its initial valuation substantially represents the defensive value to CDK of removing Auto/Mate as a competitor and preventing a well-financed alternative buyer from accelerating Auto/Mate's growth further.

56. Post-Acquisition, CDK plans to severely handicap the [redacted] DMS platform and remove it as a competitive alternative to CDK's other DMS products for large swaths of customers. [redacted] These are two Auto/Mate features its customers highly value. [redacted]

[redacted] Prior to the Acquisition announcement, Auto/Mate was successfully adding customers with three or more rooftops, often at the expense of CDK. [redacted] customers therefore would face degraded functionality and higher prices following the Acquisition, and [redacted] strong competitive attributes would be significantly dampened or withdrawn from the market. To the extent that Auto/Mate customers seek another franchise DMS provider, that provider would not be a close substitute to the unique value proposition they chose with Auto/Mate. Moreover, such alternatives may not be available given the significant installation and support capacity limitations of many other DMS providers.

IX. LACK OF COUNTERVAILING FACTORS

A. Barriers to Entry and Expansion

57. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Acquisition.

58. New entry or repositioning by existing producers would not be timely, likely, or sufficient to counteract the anticompetitive effects of the Acquisition. *De novo* entrants into this market would face considerable barriers in replicating the competition that will be eliminated by the Acquisition. Effective entry into this market would require substantial, costly up-front investments in product development and OEM certification, and the risk of failure would be high given the substantial product development and reputational barriers to commercial success in this market. Collectively, these challenges would take many years to overcome. Auto/Mate's current success has taken many years of slow, careful growth to achieve, and new entrants would face a similarly protracted, high-risk path to success.

59. Similarly, existing DMS providers are unlikely to replace the competition that will be lost as a result of the Acquisition, because all of them lack important offerings Auto/Mate provides and that they are unlikely to develop in a timely manner if Auto/Mate is absorbed by CDK. While each firm's shortcomings are distinct, each faces real and significant challenges in becoming the next Auto/Mate. These challenges include, but are not limited to, a poor or non-existent reputation among customers, software with limited functionality, limited or non-existent OEM certifications, poor service levels, and constrained capacity. Moreover, other DMS providers are significantly higher priced than Auto/Mate and would not sufficiently replace Auto/Mate's aggressive pricing. The remaining firms in this market are not likely to replace the unique, substantial, and growing competitive significance of Auto/Mate in a timely way, either collectively or individually.

B. Efficiencies

60. Respondents have not identified and cannot demonstrate cognizable efficiencies that would be sufficient to rebut the strong presumption and evidence that Acquisition likely would substantially lessen completion in the relevant market.

X. VIOLATION

Count I – Illegal Agreement

61. The allegations of Paragraphs 1 through 60 above are incorporated by reference as though fully set forth herein.

62. The Acquisition Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II—Illegal Acquisition

63. The allegations of Paragraphs 1 through 60 above are incorporated by reference as though fully set forth herein.

64. The Acquisition, if consummated, may substantially lessen competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-first day of August, 2018, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as CDK and Auto/Mate were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between CDK and Auto/Mate that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, CDK and Auto/Mate provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Auto/Mate as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this nineteenth day of March, 2018.

By the Commission.

Donald S. Clark
Secretary

SEAL:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Maureen K. Ohlhausen
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter

IN THE MATTER OF	)
GRIFOLS, S.A., **a corporation;**	) **Decision and Order**) **Docket No. C-4654**
and	) **[Public Record Version]**
GRIFOLS SHARED SERVICES NORTH AMERICA, INC., **a corporation.**	)

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Grifols Shared Services North America, Inc., a wholly owned subsidiary of Respondent Grifols S.A. (collectively "Grifols" or "Respondents") of all of the outstanding voting securities of Biotest US Corporation ("Biotest US"). The Biotest Divestiture Trust is the ultimate parent entity of Biotest US. At the time of the announcement of the proposed acquisition, Biotest Pharmaceutical Corporation, a subsidiary of Biotest US, owned a portion of the outstanding voting securities of ADMA Biologics, Inc. ("ADMA"). Prior to Respondents' proposed acquisition of Biotest US, Biotest US transferred or will have transferred all of the aforementioned voting securities of ADMA to either The Biotest Divestiture Trust or to ADMA. Accordingly, ADMA's voting securities will not be acquired or held by Respondents. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint reflecting the foregoing transactions, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Grifols, S.A., is a corporation organized, existing, and doing business under and by virtue of the laws of the Kingdom of Spain with its executive offices and principal place of business located at Avinguda de la Generalitat, 152-158, Parc de Negocis Can Sant Joan, Barcelona, Spain 08174. Its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, is as follows: General Counsel, c/o Grifols Shared Services North America, Inc., 2410 Lillyvale Avenue, Los Angeles, California 90032.

2. Respondent Grifols Shared Services North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its executive offices and principal place of business located at 2410 Lillyvale Avenue, Los Angeles, California 90032.

3. Biotest US, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 901 Yamato Road, Suite 101, Boca Raton, Florida 33431.

4. The Biotest Divestiture Trust, is a statutory trust organized under the laws of Maryland and pursuant to the terms of a Declaration of Trust, dated January 17, 2018, and an Amended and Restated Declaration of Trust, dated July 8, 2018, by and among Biotest AG (an Aktiengesellschaft organized under the laws of the Federal

Republic of Germany), as grantor, and Eric Rosenbach, a U.S. citizen. The mailing address of The Biotest Divestiture Trust is c/o Eric Rosenbach, Trustee, 402 Norfolk St., Cambridge, Massachusetts 02139. The Trust Agreement for the Biotest Divestiture Trust is contained in Non-Public Appendix I of the Order.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in the Order, the following definitions shall apply:

A. "Respondents" means, individually and collectively: Grifols, S.A. and Grifols Shared Services North America, Inc.; their directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Grifols, S.A. or Grifols Shared Services North America, Inc. (including, without limitation, Biomat USA), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Respondents will include Biotest US.

B. "Biotest US" means Biotest US Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates, in each case controlled by Biotest US Corporation (including, without limitation, Biotest Pharmaceuticals Corporation), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer(s)" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

E. "Acquisition" means Respondents' acquisition of Biotest US pursuant to the Acquisition Agreement.

F. "Acquisition Agreement" means the *Stock Purchase Agreement* by and between Grifols Shared Services North America, Inc., Biotest US Corporation, Biotest AG, and, solely for the purposes of Section 7.13 of the *Stock Purchase Agreement*, as guarantor, Grifols, S.A. dated December 22, 2017, and the *Amendment* [amendment insert] dated [insert]that were submitted by the Respondents to the Commission in this matter. The Acquisition Agreement is contained in Non-Public Appendix I.

G. "Acquisition Date" means the date on which Respondents acquire fifty percent (50%) or more of the outstanding voting securities of Biotest US.

H. "ADMA" means ADMA Biologics, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 465 State Route 17, Ramsey, New Jersey 07446.

I. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the operation of the Business of a Plasma Donor Center. The term "Agency" includes, without limitation, the United States Food and Drug Administration ("FDA").

J. "Applicant Plasma" means human plasma collected from any of the Plasma Donor Center Divestiture Facilities that has not been fully tested and cleared within the Respondents' donor management system (*i.e.*, Blood Establishment Computer System) for subsequent use or distribution.

K. "Blood Establishment Computer System" means the computer hardware, computer software, peripheral devices, networks, and documentation (*e.g.*, users manuals and standard operating procedures) as required by the FDA pursuant to 21 CFR 211.68, 606.100(b), and 606.160 that apply to blood establishment validation systems, and any other components of such a system as required by the FDA in order to (i) ensure the proper diagnosis of disease or other conditions in donors of human blood or blood components, or (ii) to prevent disease by preventing the release of unsuitable blood and blood components.

L. "Business" means the activities related to the collection and processing of human blood and blood components (*e.g.*, plasma) conducted at Plasma Donor Centers.

M. "Closing Date" means, as to each Plasma Donor Center Divestiture Facility, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Plasma Donor Center Divestiture Facility to an Acquirer pursuant to this Order.

N. "Collection Materials" means materials used under the standard operation procedures for blood collection, handling, and processing at each of the Plasma Donor Center Divestiture Facilities (*e.g.*, plasma collection tubes).

O. "Current Operating Condition" means that, as of the date of delivery to the Acquirer, the machine meets or exceeds all current operational, functional, and productive capabilities required to perform plasmapheresis.

P. "Disposable Medical Supplies" means general medical products regularly used in the conduct of the Business of a Plasma Donor Center that are intended for one-time or temporary use (*e.g.*, gloves, needles, bandages, paper products, syringes, and wipes).

Q. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph V of this Order.

R. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

S. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, or government commission; or any judicial or regulatory authority of any government.

T. "Fixtures and Equipment" means all furniture, fixtures, furnishings, machinery, equipment, supplies and other tangible personal property used or held for use in the operation of the Business of each of the Plasma Donor Center Divestiture Facilities respectively, or if leased, the Respondents' leasehold interest therein.

U. "Kedplasma" means (i) Kedplasma LLC, wholly-owned subsidiary of Kedrion S.p.a. and a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at Parker Plaza, 400 Kelby Street, Fort Lee, New Jersey 07024; or (ii) Kedrion S.p.a, a corporation organized, existing, and doing business under and by virtue of the laws of the Italian Republic with its registered office located at Località Ai Conti – 55051 Barga (Lucca) - frazione Castelvecchio Pascoli, Italy and any other subsidiary of Kedrion S.p.a.

V. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

W. "Monitor" means any monitor appointed pursuant to Paragraph IV of this Order or Paragraph III of the related Order to Maintain Assets.

X. "Orders" means this Decision and Order and the related Order to Maintain Assets.

Y. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

Z. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

AA. "Ownership Interest" means any voting or non-voting stock, share capital, equity, notes convertible into any voting or non-voting stock, or other interest in an entity.

BB. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.

CC. "Plasma Donor Center(s)" means a facility used for the collection of whole blood or plasma from human donors that operates in accordance with FDA rules related to the evaluation of the eligibility of potential donors and to the storing, processing, tracking, testing, and shipping of human blood or blood components for further manufacturing and use in blood or plasma-based therapies.

DD. "Plasma Donor Center Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the operation of the Business of a Plasma Donor Center.

EE. "Plasma Donor Center Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business of the Plasma Donor Center Divestiture Facilities. The term "Plasma Donor Center Confidential Business Information" *excludes*, and Respondents are not required to submit the following information to an Acquirer:

1. information relating to a Respondent's general business strategies or practices that does not discuss with particularity the Business of a particular Plasma Donor Center Divestiture Facility;
2. information specifically excluded from the Plasma Donor Center Divestiture Assets conveyed to the Acquirer;
3. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Plasma Donor Center Divestiture Facilities acquired by that Acquirer or that is exclusively related to Plasma Donor Centers retained by the Respondents; and
4. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

FF. "Plasma Donor Center Contracts" means all contracts or agreements:

1. pursuant to which a Third Party provides any specialized services necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent including, but not limited to, consultation arrangements; and/or

2. pursuant to which a Third Party provides any equipment necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent; and

3. pursuant to which a Third Party provides any software necessary to the operation of the Business of the specified Plasma Donor Center Divestiture Facility to a Respondent.

provided, however, that where any such contract or agreement also relates to a Plasma Donor Center(s) that is being retained by the Respondents, a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the specified Plasma Donor Center Divestiture Facility, but concurrently may retain similar rights for the Plasma Donor Centers retained by the Respondents.

GG. "Plasma Donor Center Divestiture Agreement(s)" means the following:

1. *Plasma Center Purchase Agreement* by and between Kedplasma LLC and Biomat USA, Inc., dated June 18, 2018;

2. *Transition Services Agreement* by and between Kedplasma LLC and Biomat USA, Inc., dated June 18, 2018; and

3. all amendments, exhibits, attachments, agreements, and schedules attached to and submitted to the Commission with the foregoing listed agreement(s).

The Plasma Donor Center Divestiture Agreements are contained in Non-Public Appendix II.A. The Plasma Donor Center Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective are Remedial Agreements.

HH. "Plasma Donor Center Divestiture Assets" means all rights, title, and interest in and to the Business of Respondents related to each of the Plasma Donor Center Divestiture Facilities, to the extent legally transferable and as such assets and rights are in existence as of the date the Respondents sign the Consent Agreement in this matter, and to be maintained by the Respondents in accordance with the Order to Maintain Assets until the Closing Date, including, without limitation, the following:

1. all rights to all of the leasehold interests in the real property at which the Plasma Donor Center Divestiture Facility is located and the building and improvements thereon;

2. all rights to all of the Plasma Donor Center Contracts;

3. all Fixtures and Equipment;

4. all Plasma Donor Center Approvals;

5. at the Acquirer's option, all Applicant Plasma in inventory as of Closing Date;

6. at the Acquirer's option, either (i) all plasmapheresis machines used or held for use in the operation of the Business at each respective Plasma Donor Center Divestiture Facility (which machines shall be delivered to the Acquirer in Current Operating Condition), or (ii) a license for an interim period to use all plasmapheresis machines used or held for use in the operation of the Business at each respective Plasma Donor Center Divestiture Facility (which machines shall be provided to the Acquirer in Current Operating Condition) for a time sufficient to allow the Acquirer to transition to the Acquirer's own plasmapheresis machines;
7. at least two (2) weeks supply (in the ordinary course of business) of Collection Materials at each Plasma Donor Center Divestiture Facility;
8. at least two (2) weeks supply (in the ordinary course of business) of Disposable Medical Supplies at each Plasma Donor Center Divestiture Facility;
9. at least two (2) weeks supply (in the ordinary course of business) of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;
10. all donor records and registries related to the blood or blood component (*e.g.,* plasma) donations made at the particular Plasma Donor Center Divestiture Facility, including any records made by personnel at that Plasma Donor Center Divestiture Facility relating to the collection of plasma from a donor;
11. all computers and computer equipment, printers, software and databases, routers, servers, switches and timeclocks and documentation related to any of the foregoing used or held for use in the operation of the Business of each Plasma Donor Center Divestiture Facility (all cabling within each center shall remain in place), which shall also include access to any computer databases or donor information connected or related to each Plasma Donor Center Divestiture Facility at the corporate level held outside the respective Plasma Donor Center Divestiture Facility;
12. at the Acquirer's option, a license for an interim period to the Blood Establishment Computer System that was in use in connection with the operation of each Plasma Donor Center Divestiture Facility prior to the Acquisition for a time sufficient to allow the Acquirer to transition to the Acquirer's own Blood Establishment Computer System for that facility;
13. all Website(s) related exclusively to the specified Plasma Donor Center Divestiture Facility;
14. the content related exclusively to the specified Plasma Donor Center Divestiture Facility that is displayed on any Website that is not dedicated exclusively to the specified Plasma Donor Center Divestiture Facility;
15. at the option of the Acquirer, all Plasma Donor Center Contracts related to the specified Plasma Donor Center Divestiture Facility; and
16. all of a Respondent's books, records, and files directly related to the foregoing;

provided, however, that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Plasma Donor Center Divestiture Facility and a Plasma Donor Center retained by the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the specified Plasma Donor Center Divestiture Facility; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest itself of information that, in content, also relates to Plasma Donor Centers retained by the Respondents.

II. "Plasma Donor Center Divestiture Facility(ies)" means the Plasma Donor Centers located at the following addresses, individually and collectively:

1. 3160 Wrightsboro Road, Augusta, Georgia 30909;
2. 2002 N Street, Lincoln, Nebraska 68510; and
3. 444 Martin Luther King Jr. Boulevard, Youngstown, Ohio 44502.

JJ. "Plasma Donor Center Employee Information" means the following, for each employee of a Plasma Donor Center Divestiture Facility, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each employee of a Plasma Donor Center Divestiture Facility (including former employees who were employed by a Respondent within ninety (90) days of the execution date of any Remedial Agreement); and
2. with respect to each such employee, the following information:
    a. direct contact information for the employee, including telephone number;
    b. the date of hire and effective service date;
    c. job title or position held;
    d. a specific description of the employee's responsibilities related to the relevant Plasma Donor Center Divestiture Facility; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;
    e. the base salary or current wages;
    f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

g. employment status (*i.e.*, active or on leave or disability; full-time or part-time);

h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

KK. "Relevant Geographic Markets" means the following:

1. City of Lincoln, Nebraska;

2. City of Augusta, Georgia; and

3. City of Youngstown, Ohio.

LL. "Remedial Agreement(s)" means the following:

1. any agreement between a Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement to supply specified products (or components thereof) or services, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a Plasma Donor Center Divestiture Facility(ies) or other Order requirement to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including, without limitation, any agreement by that Respondent to supply specified products (or components thereof) or services, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between a Respondent and a Third Party to effect the assignment of assets or rights of that Respondent related to a Plasma Donor Center Divestiture Facility(ies) or other Order requirement to the benefit of an Acquirer that has been

approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

MM. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

NN. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; *provided, however*, "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Plasma Donor Center Divestiture Facilities.

II.

IT IS FURTHER ORDERED that:

A. Not later than thirty (30) days after the Order Date, Respondents shall divest the Plasma Donor Center Divestiture Assets, absolutely and in good faith, to Kedplasma pursuant to, and in accordance with, the Plasma Donor Center Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Kedplasma or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Plasma Donor Center Divestiture Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Plasma Donor Center Divestiture Assets to Kedplasma prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that Kedplasma is not an acceptable purchaser of any of the Plasma Donor Center Divestiture Assets, then Respondents shall immediately rescind the transaction with Kedplasma, in whole or in part, as directed by the Commission, and shall divest the Plasma Donor Center Divestiture Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Plasma Donor Center Divestiture Assets to Kedplasma prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the

Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Plasma Donor Center Divestiture Assets to Kedplasma (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Prior to the Closing Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Plasma Donor Center Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Plasma Donor Center Divestiture Assets to an Acquirer, and to permit the Acquirer to continue the Business of the Plasma Donor Center Divestiture Facility;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

D. Respondents shall:

1. submit to the Acquirer, at Respondents' expense, all Plasma Donor Center Confidential Business Information;
2. deliver all Plasma Donor Center Confidential Business Information:
    a. in good faith;
    b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
    c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Plasma Donor Center Confidential Business Information to the Acquirer, provide that Acquirer and the Monitor (if any has been appointed) with access to all such Plasma Donor Center Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain such Plasma Donor Center Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Plasma Donor Center Confidential Business Information other than as necessary to comply with the following:
    a. the requirements of this Order;
    b. Respondents' obligations to the Acquirer under the terms of any related Remedial Agreement; or

c. applicable Law;

5. not disclose or convey any Plasma Donor Center Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable Law;

6. not provide, disclose or otherwise make available, directly or indirectly, any Plasma Donor Center Confidential Business Information to the employees associated with the Plasma Donor Centers that are being retained by the Respondents; and

7. institute procedures and requirements to ensure that the above-described employees:

   a. do not provide, disclose or otherwise make available, directly or indirectly, any Plasma Donor Center Confidential Business Information in contravention of this Order to Maintain Assets; and

   b. do not solicit, access or use any Plasma Donor Center Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. Respondents shall:

1. not later than ten (10) days after a request from the Acquirer, provide the Acquirer with the Plasma Donor Center Employee Information;

2. for a period of twelve (12) months after the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the employees that work in the locations of each of the Plasma Donor Center Divestiture;

3. until the Closing Date, provide all of the above-described employees with reasonable financial incentives to continue in their positions consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Business related to each of the Plasma Donor Center Divestiture Facility. Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Closing Date(s).

F. Until Respondents complete the divestiture of the Plasma Donor Center Divestiture Assets to the Acquirer:

1. Respondents shall take actions as are necessary to:

   a. maintain the full economic viability and marketability of the Business associated with each Plasma Donor Center Divestiture Facility;

   b. minimize any risk of loss of competitive potential for that Business;

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the Plasma Donor Center Divestiture Assets;

d. ensure the assets related to each Plasma Donor Center Divestiture Facility are provided to the Acquirer without disruption, delay, or impairment of any regulatory approval processes related to the Business associated with each Plasma Donor Center Divestiture Facility; and

2. Respondents shall not sell, transfer, encumber, or otherwise impair the Plasma Donor Center Divestiture Assets (other than in the manner prescribed in this Order).

G. For a period of ten (10) years beginning on the Order Date, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing prior written notification to the Commission:

1. acquire any ownership or leasehold interest in any facility that has operated as a Plasma Donor Center within (6) months prior to the date of such proposed acquisition within any of the Relevant Geographic Markets; or

2. acquire any Ownership Interest in any entity that owns any interest in or operates a Plasma Donor Center, or owned any interest in or operated any Plasma Donor Center within six (6) months prior to such proposed acquisition in any of the Relevant Geographic Markets;

provided however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition of or leasing of a facility that has not operated as a Plasma Donor Center within six (6) months prior to Respondents' offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the advanced written notification provisions of this Paragraph shall not apply to any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

H. The purpose of the divestiture of the Plasma Donor Center Divestiture Assets and the related obligations imposed on the Respondents by this Order is:

1. to ensure the continued use of such assets for the purposes of the Business associated with each Plasma Donor Center Divestiture Facility;
2. to create a viable and effective competitor that is independent of Respondents in the Business of each Plasma Donor Center Divestiture Facility; and
3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. In connection with, or as a result of Respondents' acquisition of the voting securities of Biotest US or pursuant to the Acquisition Agreement, Respondents shall not, directly or indirectly, acquire or hold:

1. any Ownership Interest in ADMA;
2. any rights to nominate or obtain representation on the Board of Directors of ADMA;
3. any rights to exercise dominion or control over ADMA; or
4. any rights to direct, supervise, or manage the business of ADMA (including any rights to participate in the formulation, determination, or direction of any business decisions of ADMA).

B. For a period of ten (10) years beginning on the Order Date, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advanced written notification to the Commission:

1. acquire any Ownership Interest in ADMA;
2. acquire any rights to nominate or obtain representation on the Board of Directors of ADMA; or
3. acquire any assets or rights owned or controlled by ADMA exclusively used in the research, development, manufacture, distribution, marketing, or sale of hepatitis B immune globulin (*e.g.*, Nabi-HB®), including, without limitation, any FDA applications or approvals (*e.g.*, biological license) related to hepatitis B immune globulin.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required

for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the advanced written notification provisions of this Paragraph shall not apply to any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

C. The purpose of the requirements of Paragraph III is to ensure that the Respondents will not hold the voting securities of ADMA and will not seek to exert, or exert influence over the business operations of ADMA.

IV.

IT IS FURTHER ORDERED that:

A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements.

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor each Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed, each Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

3. The Monitor shall serve until Respondents complete each of the divestitures required by this Order and complete any transitional services required to be provided to an Acquirer under this Order or related Remedial Agreement(s), *provided, however,* that the Monitor's service shall not extend more than two (2) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

E. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days after

the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by a Respondent of its obligations under the Order.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.

L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

M. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Plasma Donation Center Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

VI.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. to assure such Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

B. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

provided, however, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however*, that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VII.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Within five (5) days of each Closing Date, Respondents shall submit to Commission staff a letter certifying the date on which that particular divestiture occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have completed the divestitures required by this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondents intend to comply, are complying, and have complied with these requirements of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, and (ii) transitional services being provided by Respondents to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

D. One (1) year after the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

E. Respondents shall verify each compliance report with a notarized signature or sworn statement of the Chief Executive Officer or other officer or employee specifically authorized to perform this function, or self-verified in the manner set forth in 28 U.S.C. § 1746. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

IX.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Grifols, S.A. or Grifols Shared Services North America, Inc.;

B. any proposed acquisition, merger, or consolidation of Grifols, S.A. or Grifols Shared Services North America, Inc.; or

C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on the date ten (10) years after the Order Date.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENT
[Cover Page]

[Redacted From the Public Record Version, But Incorporated By Reference]

NON-PUBLIC APPENDIX II.A
AGREEMENTS RELATED TO THE
PLASMA DONOR CENTER DIVESTITURE ASSETS
[Cover Page]

[Redacted From the Public Record Version, But Incorporated By Reference]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
	)	
Corpus Christi Polymers LLC,	)	
a limited liability company,	)	**DECISION AND ORDER**
	)	**DOCKET NO. C-4672**
Alfa, S.A.B. de C.V.,	)	**[Public Record Version]**
a corporation,	)	
	)	
Indorama Ventures Plc,	)	
a corporation,	)	
	)	
Aloke Lohia and Suchitra Lohia,	)	
natural persons,	)	
	)	
and	)	
	)	
Far Eastern New Century Corporation,	)	
a corporation.	)	
	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition of M&G Resins USA LLC's unfinished polyethylene terephthalate resin production facility in Corpus Christi, Texas and related assets, by Alfa S.A.B. de C.V. ("DAK") and Indorama Ventures Plc ("Indorama"), controlled by Aloke and Suchitra Lohia ("Lohias"), through Corpus Christi Polymers LLC ("CCP"), a planned production joint venture. The Commission continued the investigation after the parties revised the proposed acquisition to include Far Eastern New Century Corporation ("FENC") as a third equal-part joint venture

partner. The Commission's Bureau of Competition prepared and furnished to CCP, DAK, Lohias, Indorama, and FENC (collectively "Respondents") the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Order" or "Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent Alfa S.A.B. de C.V. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Mexico with its executive offices and principal place of business located at Ave. Gómez Morin Sur No. 1111, Col. Carrizalejo, San Pedro Garza Garcia, N.L., Mexico C.P. 66250. Alfa S.A.B. de C.V.'s United States address for service of process in this matter is DAK Americas LLC, 7621 Little Ave., Charlotte, NC 28226 (attention: Veronica Ramirez, Esq.).

2. Respondent Far Eastern New Century Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Taiwan with its executive offices and principal place of business located at 36F, Taipei Metro Tower 207, Tun Hwa South Road, Sec. 2, Taipei, Taiwan. FENC's United States address for service of process in this matter is APG Polytech USA Holdings, Inc., 27610 Huntington Road, Apple Grove, West Virginia 25502.

3. Respondents Aloke Lohia, Executive Director, Vice Chairman of the Board, and Group Chief Executive Officer of Indorama, and Suchitra Lohia, Executive Director, and Chairperson of the Corporate Social Responsibility Committee of Indorama are natural persons and the ultimate parent entities of Indorama with

their executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand.

4. Respondent Indorama Ventures Plc is a corporation organized, existing, and doing business under, and by virtue of, the laws of the Thailand with its executive offices and principal place of business located at 37th Floor, Ocean Tower 2, Soi Sukhumvit 19, Wattana, Bangkok, Thailand. Indorama's United States address for service of process in this matter is Indorama Ventures Corpus Christi Holdings LLC, 251 Little Falls Drive, Wilmington, DE 19808.

5. Respondent Corpus Christi Polymers LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 7001 Joe Fulton International Trade Corridor, Corpus Christi, TX 78409.

6. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

THE PURPOSE OF THIS ORDER is to ensure that CCP is operated as a toll manufacturing PET and PTA production plant, independently of each Respondent Member, and to remedy the lessening of competition alleged in the Commission's Complaint.

I. Definitions

IT IS HEREBY ORDERED that, as used in this Order, the following definitions apply:

A. "DAK" means Alfa S.A.B. de C.V, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by DAK, including but not limited to DAK Americas LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "FENC" means Far Eastern New Century Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by FENC, including but not limited to APG Polytech USA Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Indorama" means Indorama Ventures Plc and Aloke and Suchitra Lohia, their directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Indorama, including but not limited to Indorama Ventures Corpus Christi Holdings LLC,

and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "CCP" means Corpus Christi Polymers LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by CCP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Base PET Production" means the actual production quantity of PET produced at the Corpus Christi Plant, as defined in the CCP Joint Venture Agreement, *provided, however*, Base PET Production does not include any production quantity from any expansion of PET capacity pursuant to the CCP Joint Venture Agreement.

F. "Base PTA Production" means the actual production quantity of PTA produced at the Corpus Christi Plant, as defined in the CCP Joint Venture Agreement, *provided, however*, Base PTA Production does not include any production quantity from any expansion of PTA capacity pursuant to the CCP Joint Venture Agreement.

G. "CCP Joint Venture Agreement" means the Second Amended and Restated Limited Liability Agreement of Corpus Christi Polymers LLC, dated November 29, 2018, and all ancillary agreements, exhibits and schedules thereto, including but not limited to the Form of Tolling Contract between Corpus Christi Polymers LLC and DAK Americas, LLC, APG Polytech USA Holdings, and Indorama Ventures Corpus Christi Holdings LLC, which are attached as Confidential Appendix A.

H. "CCP Joint Venture Business" means the business conducted by CCP related to the toll manufacture and sale of PET and PTA at the Corpus Christi Plant.

I. "CCP Joint Venture Agreement Date" means the date Respondent Members sign the CCP Joint Venture Agreement.

J. "Corpus Christi Assets" means the Corpus Christi Plant, and certain additional assets as defined in the Asset Purchase Agreement between M&G Resins USA LLC and CCP, dated March 28, 2018 and attached as Exhibit 1 to the court's Order Approving the Sale of Certain Assets, ECF No. 1300, in *In re M&G USA Corp.*, Case No. 17-12307 (Bankr. D. Del. Mar. 29, 2018).

K. "Corpus Christi Plant" means the PET and PTA facility, located at Joe Fulton International Trade Corridor, Corpus Christi, TX 78409.

L. "Confidential Information" means all information relating to the operation of the CCP Joint Venture Business that is not in the public domain, including but not limited to customer lists, customer locations, price lists, plans, contracts, utilization rate, production volumes, production grades, capacity expansions, cost information, marketing methods, and competitively sensitive data or information.

M. "Construction Phase" means the construction of the Corpus Christi Plant, including the construction of assets related to both PET and PTA, as defined and referred to in the CCP Joint Venture Agreement.

N. "Commission" means the Federal Trade Commission.

O. "FENC Appointed Manager" means the fifth manager appointed by FENC in accordance with the CCP Joint Venture Agreement.

P. "Independent Manager" means any person nominated by a Respondent Member and selected by FENC (or nominated by one or more of the Independent Managers in the case of the Fourth Independent Manager) to manage, oversee, or operate CCP in accordance with the CCP Joint Venture Agreement including, but not limited to, the First Independent Manager, the Second Independent Manager, the Third Independent Manager, and the Fourth Independent Manager, as those terms are referred to and defined in the CCP Joint Venture Agreement.

Q. "Initial Independent Manager" means any person selected by Member Managers to work with Member Managers to manage, oversee, or operate CCP during the Construction Phase, as defined and delineated in the CCP Joint Venture Agreement.

R. "PET" means polyethylene terephthalate.

S. "PTA" means purified terephthalic acid.

T. "PET or PTA Production Asset" means any manufacturing facility that produces, or within the last 10 years has produced, virgin PET or PTA.

U. "Respondent Member(s)" means DAK, FENC, and Indorama, individually and collectively.

V. "Respondents" means CCP and Respondent Members.

W. "Member Managers" means any person appointed by any Respondent Member to manage, oversee, or operate CCP during the Construction Phase.

X. "Restricted Employee" means any employee of CCP, any former employee of CCP, and any CCP Secondee.

Y. "Secondee" means any individual that is seconded by a Respondent Member to CCP or that is otherwise made available to CCP (through an employee lease, consulting, or other similar arrangement) by a Respondent Member.

Z. "Separation Date" means (1) the date of termination of any employee or former employee of CCP, and (2) with respect to any Secondee, the date that such person has both ended its relationship with CCP and has ceased providing any services to CCP.

II. Acquisition and Operation

IT IS FURTHER ORDERED that:

A. On and after the CCP Joint Venture Agreement Date, and subject to Paragraph II.C., each Respondent Member shall not acquire, own, or hold more than one-third equity interest in the Corpus Christi Assets owned by CCP.

B. Each Respondent Member shall not acquire, own, or hold tolling rights to more than one-third of the Base PET Production or the Base PTA Production.

Provided, however, if notified by CCP pursuant to the CCP Joint Venture Agreement that a Respondent Member does not claim the entirety of its one-third tolling rights, the other two Respondent Members have a right to the unused capacity, and, if no Respondent Member claims the unused capacity, CCP shall market the available capacity to third parties, in accordance with and as delineated in the CCP Joint Venture Agreement.

C. Each Respondent Member shall not, without the prior approval of the Commission, increase or decrease, directly or indirectly, its one-third equity interest in CCP, as long as CCP is the owner and operator of the Corpus Christi Plant.

III. Confidential Information and Selection of Member Managers

IT IS FURTHER ORDERED that:

A. A Respondent Member shall not receive, or attempt to receive, directly or indirectly, Confidential Information from any person, including but not limited to any Independent Manager, Initial Independent Manager, Member Manager, or other Respondent Member, and shall not use or share any Confidential Information. Any employee of a Respondent Member who receives Confidential Information shall sign a non-disclosure or equivalent agreement providing written acknowledgement of his/her/their responsibilities regarding the restrictions on the use and dissemination of Confidential Information, and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that employees that report to him or her will comply with its terms;

Provided, however, Respondent Members may receive summary aged and aggregated information and other information necessary for certain reporting obligations and for certain material decisions affecting CCP, or for the Respondent Members and CCP to implement and perform the Form of Tolling Contract between such Respondent Member and CCP, as delineated and permitted in the CCP Joint Venture Agreement. The receipt of such information shall be overseen by the Monitor, and subject to firewalls designed in consultation with the Monitor protecting any Confidential Information from being shared by CCP or the Respondent Members with persons who manufacture and sell PTA and PET for the Respondent Members.

B. A Respondent Member shall not influence, or attempt to influence, directly or indirectly, any Initial Independent Manager, Independent Manager, or FENC Appointed Manager regarding the operation of CCP, including, but not limited to, decisions concerning production grades, production quantities, tolling fees, capacity expansions, the marketing of unused capacity to third parties, the licensing or sale of any intellectual property, or employee or manager hiring or retention.

Provided, however, Respondent Members may provide notice or input to Managers as expressly permitted in the CCP Joint Venture Agreement and may make the decisions requiring the approval of Respondent Members as permitted and delineated in the CCP Joint Venture Agreement.

Provided, further, however, nothing in this provision prohibits Respondent FENC from influencing or communicating with any FENC Appointed Manager.

C. A Respondent Member shall not hire, or enter into negotiations or discussions regarding hiring, an Independent Manager for a period of 12 months after expiration or termination of his or her term as an Independent Manager.

D. Respondent Members shall retain, and identify and describe in a log, all communications with any other Respondent Member relating to the operation and management of CCP (not including communications discussing the construction of the Corpus Christi Plant), or the production and sale of PET and PTA from CCP.

IV. CCP Joint Venture Agreement

IT IS FURTHER ORDERED that:

A. The CCP Joint Venture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the CCP Joint Venture Agreement shall constitute a violation of this Order; *provided, however*, that the CCP Joint Venture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the CCP Joint Venture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify, replace, or extend the terms of the CCP Joint Venture Agreement, or reach any other agreement that would have such an effect, after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

V. Employees

IT IS FURTHER ORDERED that for a period of 20 years from the date this Order becomes final:

A. Each Respondent Member, so long as it retains ownership interest in CCP and for a period of 12 months from the date that such Respondent Member ceases to be a member of the CCP, shall not:

1. solicit, recruit, or induce any CCP employee to become affiliated with, directly or indirectly, any Respondent Member;

2. assist in the hiring of any such CCP employee by any other Respondent Member; or

3. encourage any CCP employee to terminate his or her employment with CCP.

Provided, however, a Respondent Member may place general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at CCP's employees; and may also utilize an independent employment agency or search firm whose efforts are not specifically directed at employees of CCP; *Provided further, however*, a Respondent Member may hire CCP employees who apply for employment with a Respondent Member, as long as such employees were not solicited by the Respondent Member in violation of this Paragraph.

B. If a Respondent Member hires or engages any Restricted Employee, the Respondent Member shall ensure that the Restricted Employee does not have any sales, marketing, pricing, or production decision-making authority for PET or PTA sales in North America, and is not otherwise involved in any such decisions, prior to the first anniversary of such Restricted Employee's Separation Date from the CCP.

VI. Monitor

IT IS FURTHER ORDERED that:

A. Jeffrey W. Brennan shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

B. No later than one day after the CCP Joint Venture Agreement Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.

C. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.

2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to

compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;

3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor from providing any information to the Commission.

D. The Monitor shall report in writing to the Commission (i) every 60 days until the expiration of the Construction Phase, (ii) every 90 days after the expiration of the Construction Phase for a period of 3 years, (iii) annually thereafter until the expiration of this Order, and (iv) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

F. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his final report pursuant to Paragraph VI.D. of this Order, or at such other time as directed by the Commission.

G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and

2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph VI.

H. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VII. Prior Notice

IT IS FURTHER ORDERED that for a period of 20 years from the date this Order becomes final:

A. Respondents shall not, without providing advance written notification to the Commission in the manner described in this paragraph, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any PET or PTA Production Asset located in North America.

With respect to the Notification:

1. The prior notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, and the Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction.

2. Respondent shall include a detailed description of the proposed acquisition, including but not limited to:

a. a description of the asset(s) being acquired;

b. identifying from whom the assets are purchased;

c. a description of the type of ownership interest being acquired; and

d. identifying whether the asset is a PET or PTA production asset.

3. Respondent shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material to the parties to the transaction (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until 30 days after all parties to the transaction submit such additional information or documentary material.

4. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VIII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall submit the complete CCP Joint Venture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the date the Commission issues this Order, and any other agreements 30 days from being finalized and signed by Respondents.

B. Each Respondent Member and CCP shall submit verified written reports ("compliance reports") in accordance with the following:

1. An interim compliance report 30 days after the Order is issued, every 60 days thereafter until the expiration of the Construction Phase, and every 90 days after the expiration of the Construction Phase for a period of 3 years;

2. Annual compliance reports one year after the date this Order is issued, and annually for the next 19 years on the anniversary of that date; and

3. Additional compliance reports as the Commission or its staff may request.

Provided, however, for purposes of this Paragraph VIII, Respondent Indorama and Respondent Lohias may submit combined compliance reports.

C. Each compliance report shall set forth in detail the manner and form in which each Respondent intends to comply, is complying, and has complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether each Respondent is in compliance with

the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Each Respondent shall include in its reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures each Respondent has implemented or plans to implement to ensure that they have complied or will comply with each paragraph of the Order, including the following information:

1. Each month in which Respondent Members took other than one-third of the Corpus Christi Plant's Base PET Production or Base PTA Production output, including how much PET and PTA each Respondent Member used, and any steps CCP took to offer unused capacity to third parties;

2. Each instance in which a Respondent Member requested that the Corpus Christi Plant change a particular grade of PET, the resolution of that request, and CCP's efforts to accommodate those requests;

3. Each instance in which a Respondent Member requested to expand PET, PTA, or feedstock capacity at the Corpus Christi Plant, the resolution of that request, and CCP's efforts to accommodate those requests;

4. Each instance in which any person requested to license or acquire intellectual property owned by CCP, and CCP's response;

5. A detailed description of any Confidential Information received by any Respondent Member; and

6. The log required by Paragraph III.D.

D. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Each Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, each Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

IX. Change in Respondent

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least 30 days prior to:

A. Its proposed dissolution;

B. Its proposed acquisition, merger or consolidation; or

C. Any other change in the Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

X. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

XI. Term

IT IS FURTHER ORDERED that this Order shall terminate on February 20, 2039.

By the Commission.

April J. Tabor
Acting Secretary

SEAL
ISSUED: February 20, 2019

Confidential/Non-Public Appendix A
CCP Joint Venture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix B
Monitor Agreement

Confidential/ Non-Public Appendix C
Monitor Compensation

[Redacted From the Public Record Version, But Incorporated By Reference]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
QUAKER CHEMICAL CORPORATION, **a corporation;**	)	
GLOBAL HOUGHTON LTD., **a corporation;**	)	
GULF HOUGHTON LUBRICANTS LTD., **a corporation;**	)	**DECISION AND ORDER** **Docket No. C-4681**
and	)	
AMAS HOLDING SPF, **a private asset management company.**	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of (i) the proposed acquisition by Quaker Chemical Corporation of the voting securities of Global Houghton Ltd., and (ii) the proposed acquisition of newly issued shares of Quaker Chemical Corporation stock by AMAS Holding Spf, the ultimate parent entity of Global Houghton Ltd. and Gulf Houghton Lubricants Ltd. (each a "Respondent," and collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and an Order to Maintain Assets; and

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Quaker Chemical Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its executive offices and principal place of business located at One Quaker Park, 901 E. Hector Street, Conshohocken, Pennsylvania 19428-2380.

2. Respondent Global Houghton Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

3. Respondent Gulf Houghton Lubricants Ltd. is a corporation organized, existing, and doing business under and by virtue of the laws of the Cayman Islands with its executive offices and principal place of business located at Whitehall House, 238 North Church St., P.O. Box 1043, George Town Grand Cayman, Cayman Islands, KY1-1102, and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

3. Respondent AMAS Holding Spf is a *société de gestion de patrimoine familial*, organized, existing, and doing business under and by virtue of the laws of the Grand Duchy of Luxembourg, with its executive offices and principal place of business located at 412F, Route d'Esch, L, 2086, Luxembourg City, Luxembourg,

and its United States address for service of process of the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Michael Baxter, Morgan, Lewis & Bockius LLP, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921.

4. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS HEREBY ORDERED that, as used in the Orders, the following definitions shall apply:

A. "Quaker" means: Quaker Chemical Corporation; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Quaker Chemical Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Quaker shall include Houghton.

B. "Houghton" means: Global Houghton Ltd.; its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Global Houghton Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Gulf Houghton" means: Gulf Houghton Lubricants Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by Gulf Houghton Lubricants Ltd., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "AMAS" means: AMAS Holding Spf, its directors, officers, members authorized to act on behalf of AMAS Holding Spf or manage AMAS Holding Spf, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, partnerships, groups, and affiliates, controlled by AMAS Holding Spf, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

E. "Commission" means the Federal Trade Commission.

F. "Respondents" means Quaker, Houghton, Gulf Houghton, and AMAS, individually and collectively.

G. "Acquirer(s)" means the following:

1. Total; or

2. any other Person approved by the Commission to acquire the Divestiture Product Assets pursuant to this Order.

H. "Acquisition" means Quaker's acquisition of Houghton pursuant to the Acquisition Agreement.

I. "Acquisition Agreement" means the *Share Purchase Agreement* dated as of April 4, 2017, by and among Global Houghton Ltd., Quaker Chemical Corporation, Gulf Houghton Lubricants Ltd., The Other Sellers Party Hereto, and Gulf Houghton Lubricants Ltd., as Seller's Representative. The Acquisition Agreement is contained in Non-Public Appendix I.

J. "Acquisition Date" means the earlier of the following: (i) the date on which Quaker acquires any Ownership Interest in Houghton; or (ii) the date on which AMAS or Gulf Houghton acquires any Ownership Interest in Quaker.

K. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Divestiture Product.

L. "AHRO Product Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to AHROs, to the extent the transfer is permitted by Law, including the Categorized Assets related to the AHROs which also include the following:

1. NOA Patent;

2. the following Trademarks or tradenames: Tandemol®; NOA; NOA ARC; Rodshield; and NOALUBRIC.

M. "AHRO(s)" or "Aluminum Hot Rolling Oils" means all Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the aluminum in the Hot Rolling Process of the aluminum. "Aluminum Hot Rolling Oils" include all such Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the aluminum in the Hot Rolling Process of the aluminum at any width or gauge sheet and for any further processing (*e.g.*, printing or coating) or any end-use.

N. "Business" means the research, Development, manufacture, commercialization, distribution, marketing, importation, exportation, advertisement, and sale of a product.

O. "Business Information" means all originals and all copies of any operating, financial, or other information, books, records, documents, data computer files (including files stored on a computer hard drive or other storage media), electronic files, ledgers, papers, instruments, and other materials, wherever located and however stored (*i.e.*, whether stored or maintained in traditional paper format or by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media).

P. "Categorized Assets" means all rights, title, and interest in and to all assets related to the Business of the specified Divestiture Product(s), including the research, Development, manufacture, distribution, marketing, and sale of such Divestiture Product(s), including:

1. all Product Intellectual Property;
2. all Product Approvals;
3. at the Acquirer's option, Manufacturing Equipment;
4. all Manufacturing Technology;
5. all Marketing Materials;
6. all Quality and Safety Reports;
7. all Research and Development Reports;
8. all Website(s);
9. the content related exclusively to a Divestiture Product that is displayed on any Website that is not dedicated exclusively to the Divestiture Product;
10. at the option of the Acquirer, all Product Contracts;
11. for each Divestiture Product:
    a. a list of all Customers for each Divestiture Product and a listing of the net sales (in either units or dollars) of that Divestiture Product to such Customers during the one (1) year period immediately prior to the Divestiture Date, stated on either an annual, quarterly, or monthly basis, including (i) the name of the Customer's employee(s) for each Customer that is or has been responsible for the purchase of the product on behalf of the Customer and that employees business contact information and (ii) the name of Customer's employees at each mill that is or has been the primary contact person at the mill related to the use of the product;
    b. a list for each formulation of each Divestiture Product containing the following: (i) the net price per formulation of the Divestiture Date, *i.e.*, the final price per unit charged by the Respondents net of all customer-level discounts, rebates, or promotions; (ii) the net price per unit charged by the Respondents at the end of each quarter during the one (1) year immediately prior to the Divestiture Date; and (iii) any supply outages by unit during the one (1) year period immediately prior to the Divestiture Date; and
    c. backorders as of the Divestiture Date;
12. for each Divestiture Product, a list of all suppliers of inputs to the Divestiture Product;
13. a description of any disruptions during the three (3) year period immediately prior to the Divestiture Date in the supply of any inputs to any Divestiture Product, for each such disruption: (i) a description of the input(s); (ii) name of the supplier(s);

(iii) the length of time of the disruption; and (iv) the corrective actions taken to remediate the disruption;

14. to the extent available, a list of each Divestiture Product that has had any finished product determined to be out-of-specification during the three (3) year period immediately preceding the Divestiture Date, and, for each such Divestiture Product: (i) a description of the deficiencies; and (ii) the corrective actions taken to remediate the deficiencies in the Divestiture Product;

15. at the option of the Acquirer, all inventory in existence as of the Divestiture Date including raw materials, packaging materials, work-in-process, and finished goods related to the Divestiture Products;

16. the quantity and delivery terms in all unfilled Customer purchase orders for each Divestiture Product as of the Divestiture Date, to be provided to the Acquirer not later than five (5) days after the Divestiture Date;

17. at the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for each Divestiture Product as of the Divestiture Date; and

18. all of the Respondents' Business Information directly related to the foregoing;

provided, however, that "Divestiture Product Assets" shall not include: (i) documents relating to a Respondent's general business strategies or practices relating to the conduct of its Business outside of the Divestiture Products, where such documents do not discuss with particularity a Divestiture Product; and (ii) information that is exclusively related to the Retained Products;

provided further, however, that in cases in which documents or other materials included in the Divestiture Product Assets contain information: (i) that relates both to a Divestiture Product and to Retained Products or Businesses of a Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Divestiture Product; or (ii) for which any Respondent has a legal obligation to retain the original copies, that Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondents shall provide the Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the Respondents provide the Acquirer with the above-described information without requiring a Respondent completely to divest information that, in content, also relates to Retained Product(s).

Q. "Cold Rolling" means the Rolling of metal at a temperature below its recrystallization temperature.

R. "Compatible Hydraulic Fluids-Aluminum" mean all hydraulic fluids that are composed of the same raw materials as the AHRO fluids manufactured, Developed, in

Development, marketed, or sold that are used in the equipment used to roll Aluminum in the Hot Rolling Process.

S. "Compatible Hydraulic Fluids-Aluminum Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to each of the Compatible Hydraulic Fluids-Aluminum, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Compatible Hydraulic Fluids-Aluminum.

T. "Confidential Business Information" means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the conduct of the Business related to a Divestiture Product(s). The term "Confidential Business Information" *excludes* the following:

1. information relating to a Respondent's general business strategies or practices that does not discuss with particularity the Divestiture Products;

2. information that is contained in documents, records, or books of a Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products or that is exclusively related to Retained Product(s); and

3. information that is protected by the attorney work product, attorney-client, joint defense, or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

U. "Contract Manufacture" means the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer (including for the purposes of testing or qualification and/or commercial sales); or

2. to provide, or to cause to be provided, any part of the manufacturing process or shipping/transportation process including the blending, dispensing into containers, and shipping/transporting of a Contract Manufacture Product on behalf of an Acquirer.

V. "Contract Manufacture Product(s)" means the Divestiture Products, individually and collectively, and any ingredient, material, or component used in the manufacture of the foregoing products including the packaging/containers.

W. "Copyrights" means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory.

X. "Customer(s)" means any Person that is a direct purchaser or end-user of any Divestiture Product in the Geographic Territory.

Y. "Development" means all research and development activities, including the following: design (including customized design for a particular Customer(s)); formulation (customized formulation(s) for particular Customers or mills); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; lubrication and dispersion

properties testing; performance testing; safety testing; and qualification testing for the purpose of obtaining or achieving any and all Product Approvals. "Develop" means to engage in Development.

Z. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees' labor shall not exceed the average hourly wage rate for such employee.

AA. "Divestiture Agreement(s)" means the following:

1. *Asset Purchase Agreement* by and among Quaker Chemical Corporation, Global Houghton Ltd., and Total Marketing Services, dated as of March 25, 2019;
2. *Transition Service Agreement* by and between Total Marketing Services and Quaker Chemical Corporation to be executed on or before the Divestiture Date;
3. *Patent Assignment Agreement* by and between Houghton Technical Corp. and Total Marketing Services to be executed on or before the Divestiture Date;
4. *Trademark Assignment Agreements* by and between Houghton Technical Corp. and Total Marketing Services to be executed on or before the Divestiture Date;
5. *Partial Assignment and Assumption Agreement* by and among Houghton Technical Corp., Total Marketing Services, and Henkel US Operations Corporation;
6. all amendments, exhibits, attachments, and schedules attached to and submitted to the Commission with the foregoing listed agreements, other than the *License Agreement*; and
7. any other agreement between a Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

The Divestiture Agreements that have been submitted to the Commission by the Respondents prior to the Order Date are contained in Non-Public Appendix II.

BB. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) closes on the sale of the Divestiture Product Assets to an Acquirer.

CC. "Divestiture Product(s)" means all of the following products manufactured, Developed, in Development, marketed, sold, owned, or controlled by Houghton:

1. Aluminum Hot Rolling Oils;
2. Compatible Hydraulic Fluids-Aluminum;
3. Pickle Oils;
4. Steel Cold Rolling Oils; and
5. Steel Cleaners.

DD. "Divestiture Product Asset(s)" means the following, individually and collectively:

1. Aluminum Hot Rolling Oil Assets;
2. Compatible Hydraulic Fluids-Aluminum Assets;
3. Pickle Oil Assets;
4. Steel Cold Rolling Oil Assets; and
5. Steel Cleaner Assets.

EE. "Divestiture Product Core Employees" means:

1. the Sales and Marketing Employees related to each Divestiture Product;
2. the Research and Development Employees related to each Divestiture Product;
3. the Manufacturing Employees related to each Divestiture Product; and
4. the Essential Employees.

FF. "Divestiture Product Business(es)" means the Business related to the Divestiture Product(s).

GG. "Divestiture Product License" means a perpetual, non-exclusive, fully paid-up, and royalty-free license(s) under a Divestiture Agreement with rights to sublicense to all Manufacturing Technology related to general manufacturing know-how that was owned, licensed, held, or controlled by a Respondent:

1. to research and Develop each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) for marketing, distribution, or sale within the Geographic Territory;
2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) within the Geographic Territory;
3. to import or export each Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) to or from the Geographic Territory to the extent related to the marketing, distribution, or sale of the Divestiture Products in the Geographic Territory; and
4. to have the Divestiture Product(s) and any ingredient, material, or component used in the manufacture of the Divestiture Product(s) made anywhere in the world for distribution or sale within, or import into the Geographic Territory;

provided, however, that for any Manufacturing Technology that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent and rights to any modifications made by the Respondents.

HH. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to Paragraph X of this Decision and Order.

II. "Domain Name" means the domain name(s) (uniform resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration; *provided, however*, "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Trademarks required to be divested.

JJ. "Essential Employees" means any Person listed in Non-Public Appendix III attached to this Order.

KK. "Geographic Territory" means the following:

1. United States of America;
2. Canada; and
3. United Mexican States.

LL. "Government Entity" means any Federal, state, local, or non-U.S. government; any court, legislature, government agency, government department, or government commission; or any judicial or regulatory authority of any government.

MM. "Hot Rolling Process" means the Rolling of metal at a temperature above its recrystallization temperature.

NN. "Law(s)" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

OO. "Manufacturing Employees" means all employees of a Respondent that have directly participated within the two (2) year period immediately prior to the Divestiture Date in any of the following related to a Divestiture Product:

1. defining the commercial manufacturing process;
2. confirming that the manufacturing process is capable of reproducible commercial manufacturing;
3. formulating the manufacturing process performance qualification protocol;
4. controlling the manufacturing process to assure performance product quality;
5. assuring that during routine manufacturing the process remains in a state of control;
6. collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality products;
7. managing the operation of the manufacturing process;
8. defining packaging and materials handling procedures; or
9. managing the technological transfer of the manufacturing process from a facility to a different facility, of the Manufacturing Technology of a Divestiture Product;

unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance.

PP. "Manufacturing Equipment" means all fixtures, equipment (including technical equipment and computers), and machinery that is being used or has been used at any time since the Respondents entered into the Acquisition Agreement, in the research, Development, or manufacture of a Divestiture Product and that is suitable for use in the research, Development, or manufacture of a Divestiture Product as of the Divestiture Date.

QQ. "Manufacturing Technology" means all technology, Trade Secrets, know-how, designs, formulas, ideas, concepts, and proprietary information (whether patented, patentable, or otherwise) used by Respondents to manufacture each Divestiture Product, including:

1. all product specifications, product formulation, and formulation protocols, including the exact formulation, combination, design, array and identity and specifications of all components or ingredients (*e.g.*, synthetic ester oils) that achieve a particular set of application and end-use characteristics in a final Divestiture Product;
2. manufacturing processes, analytical methods, flow diagrams, instructions, and other related manuals and drawings;
3. standard operating procedures;
4. quality assurance and control procedures, and quality manuals;
5. quality system documentation;
6. Customer quality surveys;
7. Customer quality certifications;
8. control history;
9. corrective actions stemming from Customer complaints;
10. non-conformance audits on products or processes used to manufacture products;
11. research and Development records;
12. annual product reviews;
13. supplier lists;
14. labeling and product manuals;
15. manuals and technical information provided to employees, Customers, distributors, suppliers, agents, licensees, including manufacturing, equipment and engineering manuals and drawings;
16. repair and performance records related to the Manufacturing Equipment being acquired by the Acquirer for the two (2) year period immediately preceding the Divestiture Date;

17. records related to the protective workplace safety standards related to the Manufacturing Equipment being acquired by the Acquirer for the two (2) year period immediately preceding the Divestiture Date;

18. audits of manufacturing methods for the Divestiture Products conducted by any Agency, end-use Customer, or any Standards and Certification Organization; and

19. all other information related to the manufacturing process.

RR. "Marketing Materials" means all marketing materials used specifically in the marketing or sale of each Divestiture Product in the Geographic Territory as of the Divestiture Date, including all quality system documentation used for Customer presentations, advertising materials, training materials, product data, mailing lists, sales materials (*e.g*., sales reports, sales funnel or process information, and sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, and statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter, or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials to be provided to distributors and/or end-use Customer (*e.g*. specification sheets, application/use instructions, and technical specifications), Website content and advertising and display materials, artwork for the production of packaging components, television masters, and other similar materials related to each Divestiture Product.

SS. "Monitor" means any monitor appointed pursuant to Paragraph IX of this Decision and Order or Paragraph III of the Order to Maintain Assets.

TT. "NOA Patent" means U.S. Patent No. 6,818,609, including all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

UU. "Oil Product(s)" means any product that has a lubricant base of any of the following: petroleum and petroleum derivatives (including mineral oils), natural oils, animal fats and other derivatives, vegetable oils, or synthetic ester oils.

VV. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

WW. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

XX. "Orders" means this Decision and Order and the related Order to Maintain Assets.

YY. "Ownership Interest" means any voting securities, non-voting securities, share capital, non-corporate equity interest, notes convertible into any voting or non-voting securities, contractual power to designate a director of an entity, equity, or other interest in an entity or its assets.

ZZ. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

AAA. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups, or affiliates thereof.

BBB. "Pickle Oil(s)" means all Oil Products manufactured, Developed, in Development, marketed, or sold to protect the surface of sheet steel during or after the steel has undergone the pickling process (*i.e.*, the surface treatment process that usually uses an acidic solution to remove impurities, such as stains, inorganic contaminants, rust or scale from sheet steel).

CCC. "Pickle Oil Product Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to Pickle Oils, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Pickle Oils which includes the following Trademarks and tradenames: Rolkleen®.

DDD. "Product Approval(s)" means all approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Divestiture required by:

1. any Customer; and/or
2. any Agency, Standards and Certification Organization, engineering firm, chemical firm, or procurement firm, as applicable.

EEE. "Product Contracts" means all contracts or agreements between a Respondent and a Third Party:

1. that make specific reference to a Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, that Divestiture Product from a Respondent;
2. pursuant to which a Respondent had or has as of the Divestiture Date the ability to independently purchase the raw materials, inputs, ingredients, or component(s), or had planned to purchase the raw materials, inputs, ingredients, or component(s) from any Third Party, for use in connection with the manufacture of a Divestiture Product;
3. pursuant to which a Third Party manufactures or plans to manufacture a Divestiture Product in order to provide it to a Respondent;

4. pursuant to which a Third Party manufactures or plans to manufacture an input, ingredient or component of a Divestiture Product in order to provide it to a Respondent;

5. pursuant to which a Third Party markets, sells, or distributes a Divestiture Product;

6. pursuant to which a Third Party provides or plans to provide any part of the manufacturing process, including the mixing or packaging of a Divestiture Product;

7. pursuant to which a Third Party provides the Manufacturing Technology related to a Divestiture Product to a Respondent;

8. pursuant to which a Third Party is licensed by a Respondent to use the Manufacturing Technology related to the Divestiture Product;

9. constituting confidentiality agreements related to a Divestiture Product;

10. involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Divestiture Product;

11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Divestiture Product to a Respondent, including consultation arrangements; and/or

12. pursuant to which any Third Party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Divestiture Product;

13. pursuant to which a Respondent licenses Software related to the Business of the Divestiture Products;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), a Respondent shall, at the Acquirer's option, assign or otherwise make available to the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

FFF. "Product Employee Information" means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by a Respondent within ninety (90) days prior to the execution date of any Divestiture Agreement); and

2. with respect to each such employee, the following information:

    a. direct contact information for the employee, including telephone number;

    b. the date of hire and effective service date;

    c. job title or position held;

d. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, a Respondent may provide the employee's most recent performance appraisal;

e. the base salary or current wages;

f. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;

g. employment status (*i.e.*, active or on leave or disability; full-time or part-time);

h. all other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

GGG. "Product Intellectual Property" means all of the following intellectual property that is used in the Business of any Divestiture Product that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date:

1. Patents;
2. Copyrights;
3. Software;
4. Trademarks;
5. Trade Dress;
6. Trade Secrets, know-how, techniques, data, inventions, practices, methods, formulations, and other confidential or proprietary technical, business, research, Development information; and
7. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof, and to bring suit against a Third Party for the past, present, or future infringement, misappropriation, dilution, misuse, or other violation of any of the foregoing;

provided, however, that "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Quaker", "Houghton", or "Gulf Houghton" or the related corporate logos thereof, as well as the mark "Houghto Roll"; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which Quaker, Houghton, or Gulf Houghton can be identified or defined.

HHH. "Proposed Acquirer" means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become an acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed pursuant to this Order.

III. "Quality and Safety Reports" means:

1. descriptions of material events and matters concerning safety related to a Divestiture Product;
2. reports to the Environmental Protection Agency related to a Divestiture Product;
3. summary of product complaints from end-use customers related to a Divestiture Product;
4. product recall reports filed with any Agency or any Standards and Certification Organization related to a Divestiture Product, and all reports, studies, and other documents related to such recalls;
5. investigation reports and other documents related to any out-of-specification results found in a Divestiture Product;
6. reports related to a Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues;
7. reports of vendors of the inputs used to produce a Divestiture Product that relate to the specifications and testing of the production of a Divestiture Product;
8. analytical methods development records related to a Divestiture Product; and
9. manufacturing records related to a Divestiture Product.

JJJ. "Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research or Development of a Divestiture Product (unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) including engineers, technical specialists, or chemists involved in new product development, chemical composition or formulation, design of Software that is used in the Development, manufacture, or use of the Divestiture Product, and Product Approvals within the three (3) year period immediately prior to the Divestiture Date.

KKK. "Research and Development Reports" means all research and Development records relating to the Divestiture Products including:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know-how related to the Divestiture Products;
2. all correspondence with any Agency or Standards and Certification Organizations relating to applications for Product Approvals;
3. all correspondence with Customers relating to Product Approvals;

4. all underlying information, data filings, reports, correspondence or other materials used to obtain or apply for any of the Product Approvals, including, all data submitted to and all correspondence with Customers or any other Person;

5. annual and periodic reports related to the Product Approvals;

6. product labeling or documents provided to Customers; and

7. product usage, product application (*i.e.*, how the product is applied to metal), product installation/dispersal instructions, and technical specifications.

LLL. "Retained Product(s)" means any product(s) other than a Divestiture Product.

MMM. "Rolling" means the process of passing metal stock through one or more pair of mill rollers in order to reduce the thickness of the metal sheet or slab and to make the thickness uniform, or to form a new structure.

NNN. "Sales and Marketing Employees" means all employees of a Respondent who have participated in the sales, marketing, or on-site mill technical support of a Divestiture Product to customers within the two (2) year period immediately prior to the Divestiture Date.

OOO. "Software" means computer programs related to the Business of Respondents, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases, and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that "Software" does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than user preference settings).

PPP. "Standards and Certification Organization(s)" means any non-governmental Person that provides audits and certifications of management systems and/or manufacturing processes or product assessments and certifications related to the Divestiture Products (*e.g.*, ASTM International).

QQQ. "Steel Cleaner(s)" means all products that are cleaners manufactured, Developed, in Development, marketed, or sold to remove rolling lubricant residues from steel.

RRR. "Steel Cleaner Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to Steel Cleaners, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Steel Cleaners which also include the following:

1. The following Trademarks or tradenames: Rolkleen®; Mill Clean®; Strip-Kleen®; Cerfa-Kleen®; and,

2. all rights related to Steel Cleaners granted to Houghton and/or Gulf Houghton pursuant to the Steel Cleaner Henkel License.

SSS. "Steel Cleaner Henkel License" means the *License Agreement* by and between Henkel Corporation and Houghton Technical Corp dated as of March 31, 2014. This license is attached as Annex A to the *Partial Assignment and Assumption Agreement* by and among Houghton Technical Corp., Total Marketing Services, and Henkel US Operations Corporation. The *Partial Assignment and Assumption Agreement* is attached as Exhibit G to the *Asset Purchase Agreement* by and among Quaker Chemical Corporation, Global Houghton Ltd., and Total Marketing Services, dated as of March 25, 2019 in Non-Public Appendix I attached to this Order.

TTT. "Steel Cold Rolling Oil(s)" means all Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the steel in the Cold Rolling Process of the steel. "Steel Cold Rolling Oils" include all such Oil Products manufactured, Developed, in Development, marketed, or sold that are used to reduce friction and to prevent metal-to-metal contact between the surfaces of the mill rollers and the steel in the Cold Rolling Process of the steel at any width or gauge sheet and for any further processing (*e.g.*, tinplating or coating with another substance, *e.g.*, zinc, aluminum, or paint) and for any end-use (*e.g*., can bodies, can ends, and other closures for food and beverages, household appliances, such as washers and dryers, automobile or truck parts, or building and construction products).

UUU. "Steel Cold Rolling Oil Assets" means all rights, title, and interest in and to all assets related to the Business of Houghton related to each of the Steel Cold Rolling Oils, to the extent the transfer is permitted by Law, including the Categorized Assets related to the Steel Cold Rolling Oils which also include the following Trademarks or tradenames: Fenella®; Tempershield®; Rollshield®; Rollub®; and Steelshield.

VVV. "Supply Cost" means the actual cost of materials, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation where those costs are incurred by the Respondents.

WWW. "Technical Support" means all capabilities to provide customer-specific technical expertise, modification of products, customizing of products, testing of products, product performance advice, equipment assessment, on-site product assistance, monitoring of inventory levels and product orders/deliveries, and general product issue-solving and trouble-shooting.

XXX. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*:

1. designating employees of a Respondent knowledgeable about the Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer,

and the Monitor (if one has been appointed), for the purpose of effecting such delivery *unless* such Persons are hired by the Acquirer;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;

3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Manufacturing Technology (including all related intellectual property) to the Acquirer; and

4. to the extent the Persons with the relevant knowledge remain employees of a Respondent (*e.g.*, are not hired by the Acquirer), providing, in a timely manner, assistance and advice to enable the Acquirer to:

    a. manufacture the specified Divestiture Product and any ingredients, *e.g.*, synthetic ester oils, or components of the Divestiture Product that have been or are being made by a Respondent in the quality and quantities achieved by that Respondent;

    b. obtain any Product Approvals necessary for the Acquirer to manufacture, distribute, market, and sell each Divestiture Product in commercial quantities and to meet the requirements of all Product Approvals for such Divestiture Product; and

    c. receive, integrate, and use all such Manufacturing Technology and all such intellectual property related to each Divestiture Product.

YYY. "Third Party(ies)" means any non-governmental Person other than the following: a Respondent; or an Acquirer of particular assets or rights pursuant to this Order.

ZZZ. "Total" means Total S.A., a corporation (*société anonyme*) with its principal executive offices located at 2, place Jean Millier, La Défense 6, 92400 Courbevoie, France, and any Person controlled by or under common control of Total S.A., including Total Marketing Services S.A.

AAAA. "Trade Dress" means the current trade dress of a Divestiture Product, including packaging and the lettering of the product trade name or brand name.

BBBB. "Trade Secret(s)" means information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who can obtain economic value from its disclosure or use (*e.g.*, competitors); and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

CCCC. "Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration

therefor (and all renewals, modifications, and extensions thereof), and all common law rights, and the goodwill symbolized thereby and associated therewith, for a product.

DDDD. "Transition Services" means the provision of Technical Support by the Respondents.

EEEE. "United States of America" means the United States of America, and its territories, districts, commonwealths and possessions.

FFFF. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all Copyrights in such Website(s), to the extent owned by a Respondent; *provided, however*, "Website" shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Divestiture Product Assets and grant the Divestiture Product License, absolutely and in good faith, to Total pursuant to, and in accordance with, the Divestiture Agreements.

B. If Respondents divest the Divestiture Product Assets to Total prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondents that:

1. Total is not an acceptable purchaser of any of the Divestiture Product Assets, then Respondents shall immediately rescind the transaction with Total, in whole or in part, as directed by the Commission, and shall divest the Divestiture Product Assets within one hundred eighty (180) days after the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

2. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Product Assets to Total (including entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review all contracts or agreements that are Product Contracts for the purposes of the Acquirer's determination whether to assume such contracts or agreements.

D. Prior to the Divestiture Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Divestiture Product Assets to the Acquirer, and to permit the Acquirer to continue the Business of the Divestiture Products;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

E. Respondents shall provide, or cause to be provided, to the Acquirer in a manner consistent with the Technology Transfer Standards the following:

1. all Manufacturing Technology (including all related intellectual property); and
2. all rights to all Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to a Respondent.

Respondents shall obtain any consents from Third Parties required to comply with this provision. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to use or to acquire from the Third Party the Manufacturing Technology (including all related intellectual property). Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology. Not later than ten (10) days after the Divestiture Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Manufacturing Technology to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer.

F. After the Divestiture Date, Respondents shall not, in the Geographic Territory:

1. use any of the Trademarks related to Divestiture Products or any mark confusingly similar to the Trademarks as a trademark, tradename, or service mark *except* (i) as may be necessary to sell stocks of Divestiture Products in existence as of the Acquisition Date that are not being acquired by the Acquirer or to comply with the Contract Manufacture requirements of this Order, or (ii) as permitted under any license entered into by Respondents pursuant to Paragraph II.N;
2. attempt to register the Trademarks;
3. attempt to register any mark confusingly similar to the Trademarks;
4. challenge or interfere with an Acquirer's use and registration of the Trademarks; or
5. challenge or interfere with an Acquirer's efforts to enforce its trademark registrations for and trademark rights in the relevant Trademarks against Third Parties.

G. After the Divestiture Date, Respondents shall not, in the Geographic Territory, market or sell to, or manufacture for, any Person other than the Acquirer any Aluminum Hot Rolling Oils, Steel Cold Rolling Oils, Compatible Hydraulic Fluids-Aluminum, Pickle

Oils, or Steel Cleaners that are the same formulation or substantially the same formulation as the Divestiture Products *except* that for a transition period beginning immediately after the Divestiture Date, Respondents may manufacture such products within the Geographic Territory solely for delivery to, and use at, customer locations outside the Geographic Territory and only in circumstances wherein Houghton manufactured such products within the Geographic Territory and supplied such products to these customer locations outside the Geographic Territory as of the Divestiture Date. Such transition period:

1. is conditioned on (i) Respondents providing a notification to the Acquirer and the Monitor on a quarterly basis that includes, for each delivery of the product to the customer, the customer's name, volume(s) of the product(s), and delivery location, and (ii) Respondents notifying these customers in writing that the products supplied under these circumstances may not be used within, or imported into, the Geographic Territory;
2. shall terminate on the earlier of (i) two years after the Divestiture Date, or (ii) the date the Respondents complete their requirements to Contract Manufacture pursuant to this Order; and
3. may only be extended with the prior approval of the Commission *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

H. This Order does not restrict the Respondents' use of the formulations of the Divestiture Products to make, have made, use, sell, offer for sale, any product outside of the Geographic Territory, but only if such product is made and delivered outside the Geographic Territory and is only for use by the purchasers of such product outside the Geographic Territory and not for import into the Geographic Territory.

I. Respondents shall treat all formulations of the Divestiture Products as Trade Secret information owned by the Acquirer and shall institute all such procedures as are necessary and appropriate to protect this Trade Secret information.

J. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s), if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) for the purposes of marketing, sale, or offer for sale within the Geographic Territory of such Divestiture Product(s); or (ii) the import, export from one country within the Geographic Territory to another country within the Geographic Territory, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) into, from, or within the Geographic Territory.

K. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Acquirer, its licensees, or its Customers under any Patent that was pending or issued on or before the Acquisition Date if such suit would directly limit or impair the Acquirer's freedom to manufacture any Divestiture Product anywhere in the world, or to distribute, market, sell, or offer for sale any Divestiture Product within the Geographic Territory.

L. For any patent infringement suit filed prior to the Divestiture Date in which a Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that a Respondent has prepared or is preparing to defend against as of the Divestiture Date, and where such a suit would have the potential directly to limit or interfere with the Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the world of the Divestiture Product(s) acquired for the purposes of marketing, sale, or offer for sale within the Geographic Territory of such Divestiture Product(s); or (ii) the import, export, use, supply, distribution, sale, or offer for sale of the Divestiture Product(s) into, from, or within the Geographic Territory, that Respondent shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;

2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation related to that Divestiture Product; and

3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to that Divestiture Product.

M. Subject to the prior approval of the Commission, Respondents may enter into a license from the Acquirer to make, have made, use, sell, offer for sale, any product that practices any claim of the NOA Patent, but such license shall:

1. be limited to:

   a. products to be offered for sale or sold by the Respondents within or outside the Geographic Territory that are within the following fields-of-use: (i) copper rod, copper wire, or other copper metalworking; (ii) brass rod, brass wire, or other brass metalworking; and (iii) aluminum rod or aluminum wire; or

   b. products to be offered for sale or sold by the Respondents outside the Geographic Territory for delivery outside the Geographic Territory and not for import into, or use within, the Geographic Territory;

2. be non-exclusive;

3. require that any sublicense by the Respondents be subject to the prior approval of the Acquirer;

4. not be modified or amended without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

N. Subject to the prior approval of the Commission, and solely for the purposes of products that are either (i) to be offered for sale or sold by the Respondents outside the Geographic Territory or (ii) to be offered for sale or sold by the Respondents within the Geographic Territory that are not a Divestiture Product and do not compete with a Divestiture Product, the Respondents may enter into a license from the Acquirer for a period of up to two (2) years after the Order Date to use certain Trademarks or tradenames divested to the Acquirer pursuant to this Order. Such agreement may not be modified or amended without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. Any Divestiture Agreement shall be deemed incorporated into this Order.

B. Any failure by a Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in each Divestiture Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.

D. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement, or in any agreement related to any of the Divestiture Products, a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.

E. No Respondent shall modify or amend any of the terms of any Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Divestiture Agreement(s), any modification or amendment of any Divestiture Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

IV. Contract Manufacturing by Respondents

IT IS FURTHER ORDERED that Respondents shall:

A. Contract Manufacture and deliver, or cause to be manufactured and delivered, to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products requested by the Acquirer at no greater than Supply Cost, for a period of time sufficient to allow the Acquirer (or the Manufacturing Designee of the Acquirer) to: (i) obtain all of the relevant Product Approvals necessary to manufacture the Contract Manufacture Product(s), (ii) manufacture such products in commercial quantities independently of Respondents, and (iii) secure sources of supply of the specialized ingredients and necessary components from Persons other than Respondents;

B. Make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied by Respondents pursuant to a Divestiture Agreement meet the relevant Product Approvals;

C. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Divestiture Agreement by that Respondent to meet the relevant Product Approvals. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

provided, however, that the supplying Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the supplying Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order;

provided further, however, that this obligation shall not require such Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the supplying Respondent to the Acquirer in an agreement to Contract Manufacture;

D. Give priority to supplying a Contract Manufacture Product to the Acquirer over manufacturing and supplying of products for Respondents' own use or sale;

E. Agree to hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner *unless* (i) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (ii) Respondents are able to cure the supply failure not later than thirty (30) days after the receipt of notice from the Acquirer of a supply failure;

F. During the term of any agreement to Contract Manufacture, upon written request of the Acquirer or the Monitor, make available to the Acquirer and the Monitor all records that

relate directly to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Divestiture Date;

G. For each Contract Manufacturer Product for which Respondents purchase the ingredient(s) or components(s) from a Third Party, provide the Acquirer with the actual price paid by Respondents for each ingredient(s) or component(s), respectively, used to manufacture that Contract Manufacture Product;

H. For each Contract Manufacturer Product for which the Respondents are the source of the ingredient(s) or component(s), charge the Acquirer a price no greater than the Respondents' actual cost for such ingredient(s) or component(s) and shall exclude any intracompany transfer profit in calculating the total price for the final finished Contract Manufacture Product to the Acquirer;

I. During the term of any agreement to Contract Manufacture, take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);

J. Provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Contract Manufacture;

K. Not be entitled to terminate any agreement to Contract Manufacture due to an Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

L. Notify the Commission at least sixty (60) days prior to terminating any agreement with an Acquirer to Contract Manufacture for any reason, and shall submit at the same time a copy of such notice to the Monitor; and

M. During the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products in the same quality achieved by, or on behalf of, a Respondent and in commercial quantities, and in a manner consistent with the Product Approvals, independently of Respondents and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

N. The foregoing requirements for Respondents to Contract Manufacture shall remain in effect with respect to each Contract Manufacture Product until the earliest of:

1. the date the Acquirer notifies Commission staff in writing that it (or the Manufacturing Designee(s) of the Acquirer) has been qualified by all Customers to manufacture such Contract Manufacture Product for sale in the Geographic

Territory and is able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with the quality achieved by the Respondents, independently of Respondents; or

2. the date the Commission otherwise directs that these requirements to Contract Manufacture are no longer in effect.

V. Transition Services

IT IS FURTHER ORDERED that Respondents shall:

A. Upon written request of the Acquirer, provide Transition Services to the Acquirer in a timely manner and under reasonable terms and conditions at no greater than Direct Cost for a period of time sufficient to allow the Acquirer to obtain all of the relevant Product Approvals necessary to manufacture and sell commercial quantities of the finished Divestiture Products independently of Respondents;

B. Designate employees of Respondents knowledgeable about the Technical Support to advise and provide such services to the Acquirer;

C. During the term of any agreement with the Acquirer to provide Transition Services and pursuant to such agreement and this Order:

1. take all actions as are reasonably necessary to ensure that the provision of Transition Services to the Acquirer are uninterrupted;

2. not limit damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of such agreement;

3. not be entitled to terminate such agreement due to the Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of its creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency Law;

4. permit the Acquirer to terminate such agreement at any time upon commercially reasonable notice and without cost or penalty; and

5. upon the Acquirer's request, file with the Commission a written request to extend the time period for any such agreement.

VI. Employees

IT IS FURTHER ORDERED that Respondents shall:

A. For a period of two (2) years after the Divestiture Date, provide the Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core

Employees. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)";

B. Not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to the relevant Respondent to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide the Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by that Respondent to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

provided, however, that the provision of such information may be conditioned upon the Acquirer's or Proposed Acquirer's written confirmation that it will (i) treat the information as confidential and, more specifically, (ii) use the information solely in connection with considering whether to provide, or providing to Divestiture Product Core Employees the opportunity to enter into employment contracts during the Divestiture Product Core Employee Access Period, and (iii) restrict access to the information to such of the Acquirer's or Proposed Acquirer's employees who need such access in connection with the specified and permitted use;

C. During the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Divestiture Product Core Employees and remove any impediments within the control of a Respondent that may deter these employees from accepting employment with the Acquirer, including any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with a Respondent that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, a Respondent shall not make any counteroffer to any Divestiture Product Core Employee who has received a written offer of employment from the Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit a Respondent from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with a Respondent prior to the date of the written offer of employment from the Acquirer to that employee;

D. Until the Divestiture Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, manufacture, market and/or sell the Divestiture Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divestiture Product Businesses and to ensure successful execution of the pre-Acquisition plans for the Divestiture Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by a Respondent until the Divestiture Date(s) for the divestiture of the Divestiture Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that this Paragraph does not require, nor shall be construed to require, a Respondent to terminate the employment of any employee or to prevent a Respondent from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition;

E. For a period of one (1) year after the Divestiture Date, not: (i) directly or indirectly solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Divestiture Product ("Divestiture Product Employee") to terminate his or her employment relationship with the Acquirer; or (ii) hire any Divestiture Product Employee;

provided, however, this Order does not prohibit a Respondent from hiring any former Divestiture Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with that Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained within this Order;

provided further, *however*, this Order allows a Respondent to do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts a Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from that Respondent.

F. From the Divestiture Date until the date that is two (2) years after the Divestiture Date, Respondents shall not:

1. market or sell any Retained Products that compete with any Divestiture Product using the services of any Essential Employee;

2. permit any Essential Employee to participate, directly or indirectly, in the direction, planning, management, or advisement of the Respondents' Business related to the Retained Products that compete with any Divestiture Product; or

3. permit any Essential Employee to provide, disclose, or otherwise make available, directly or indirectly, any current or historical marketing or sales plans, negotiation histories with customers, product Development, or other Confidential Business Information related to any Divestiture Product to any employee of the Respondents that has any responsibilities related to the marketing, management, or sales of any Retained Product that compete with a Divestiture Products.

G. Respondents shall not enforce, or seek to enforce, any restrictions on the work that any Divestiture Product Core Employee is permitted to do as an employee of the Acquirer.

H. Respondents shall provide each Essential Employee who (i) accepts an offer of employment with the Acquirer either on or before the Divestiture Date or within six (6) months after the Divestiture Date, and (ii) who remains with the Acquirer for a period of (1) year, a financial incentive equal to amount specified in Non-Public Appendix III. The Respondents shall pay such financial incentives one (1) year after the commencement of the employee's employment by the Acquirer. On or before the

Divestiture Date, Respondents shall notify each Essential Employee of the provisions of this Paragraph. Respondents shall give the above-described notification to each Essential Employee by e-mail with return receipt requested and keep a file of those receipts for two (2) years after the Divestiture Date. Each Respondent shall provide a copy of the notification to the Acquirer.

VII. Asset Maintenance

IT IS FURTHER ORDERED that:

A. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Manufacturing Technology related to each Divestiture Product to the Acquirer Respondents shall take actions as are necessary to:

1. maintain the full economic viability and marketability of the Business associated with that Divestiture Product;
2. minimize any risk of loss of competitive potential for that Divestiture Product Business;
3. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product Business;
4. ensure the assets related to each Divestiture Product Business are provided to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval processes related to that Divestiture Product Business;
5. ensure the completeness of the transfer and delivery of the Manufacturing Technology; and

B. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in this Order), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Product Businesses.

VIII. Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. transfer and deliver to the Acquirer, at Respondents' expense, all Confidential Business Information:
    a. in good faith;
    b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

2. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Business of each Divestiture Product that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

3. not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:

   a. the requirements of the Orders;

   b. Respondents' obligations to the Acquirer under the terms of any related Divestiture Agreement; or

   c. applicable Law;

4. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person *except*:

   a. the Acquirer;

   b. other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information;

   c. the Commission; or

   d. the Monitor; and

   except to the extent necessary to comply with applicable Law;

5. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees directly involved in providing Contract Manufacturing or Transition Services to the Acquirer or who are engaged in the transfer and delivery of the Manufacturing Technology to the Acquirer and only for the purposes of providing such products, assistance, and information to the Acquirer;

6. institute procedures and requirements to ensure that the employees providing Contract Manufacturing or Transition Services or who are engaged in the transfer and delivery of the Manufacturing Technology:

   a. do not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and

   b. do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. take all action necessary and appropriate to prevent access to, and the disclosure or use of the Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

    a. establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols and system and network controls and restrictions;

    b. to the extent practicable, maintaining Confidential Business Information separate from other data or information of the Respondents; and

    c. ensuring by other reasonable and appropriate means that the Confidential Business Information is not share with Respondents' personnel engaged in the provision of the same or substantially the same type as the Divestiture Product Businesses;

8. upon the request of the Acquirer, destroy any copies of Confidential Business Information (other than electronic copies of Confidential Business Information created as a result of automatic back-up procedures) within thirty (30) days of such request *except* as otherwise agreed to between the Respondent(s) and the Acquirer or to the extent necessary to comply with applicable Law.

B. Respondents shall require, as a condition of continued employment post-divestiture of the Divestiture Product Assets, that each employee that has had responsibilities related to the Development, marketing, or sales of the Divestiture Products within the one (1) year period prior to the Divestiture Date and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that perform the same or similar functions as the Divestiture Products, in each case who have or may have had access to Confidential Business Information (including the specific formulations of the Divestiture Products), and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of the Respondents (other than as necessary to comply with the requirements of this Order).

C. Not later than thirty (30) days after the Divestiture Date, each Respondent shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by that Respondent's personnel to all of its employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Each Respondent shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Divestiture Date. Each Respondent shall provide a copy of the notification to the Acquirer. Each Respondent shall maintain complete records of all such notifications at that Respondent's registered office within the United States of America and shall provide

an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Each Respondent shall provide the Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer (other than electronic copies created as a result of automatic back-up procedures) or access original documents provided to an Acquirer, *except* under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. to assure such Respondent's compliance with any Divestiture Agreement, this Order, any Law (including any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

2. to defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or the assets and Businesses associated with those Divestiture Products;

provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph pursuant to an appropriate confidentiality order, agreement, or arrangement;

provided further, *however*, that pursuant to this Paragraph, a Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

IX. Monitor

IT IS FURTHER ORDERED that:

A. James B. Mynaugh shall serve as the Monitor to observe and report on Respondents' compliance with all of Respondents' obligations as required by the Orders and the Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all the rights, powers, and authorities necessary to monitor each Respondent's compliance with the Orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor each Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission or its staff.
2. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent Third Party and not as an employee or agent of the Respondents or of the Commission; and
3. The Monitor shall serve until Respondents complete the following in a manner as required by this Order:
    a. the transfer and delivery of all of the Divestiture Product Assets to the Acquirer;
    b. the transfer and delivery of all the Manufacturing Technology to the Acquirer;
    c. the transfer and delivery of all Confidential Business Information to the Acquirer;
    d. the provision of all Transition Services to the Acquirer; and
    e. the Acquirer or its Manufacturing Designee is able to manufacture the Divestiture Products in the same quality as the Respondents and in commercial volumes, independently of the Respondents.

    provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission extends this period.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders, including its obligations related to the relevant assets.

E. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

F. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the

performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports or communications submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after Order Date and every ninety (90) days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders.

I. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission.

J. The Commission, among other things, may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent Quaker, which consent shall not be unreasonably withheld. If Respondent Quaker has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) day after notice by the staff of the Commission to Respondent Quaker of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor;

2. not later than ten (10) days after the appointment of the Monitor, Respondent Quaker shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights, powers, and authorities necessary to permit the Monitor to monitor Respondents' compliance with the Orders in a manner consistent with the purposes of the Orders.

L. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

M. The Monitor may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

X. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to a Respondent of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

   provided, however, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by a Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order;

   provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission;

   provided further, however, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other

representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional

orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Within five (5) days of the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition Date occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

B. Within five (5) days of the Divestiture Date, Respondents shall submit to the Commission a letter certifying the date on which the divestiture occurred, including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.

C. Within thirty (30) days after the Order Date, and every ninety (90) days thereafter until Respondents have completed all of the following:

1. the transfer and delivery of all Divestiture Product Assets to the Acquirer;
2. transfer and delivery of all of the Manufacturing Technology to an Acquirer;
3. the provision of Transition Services; and
4. the provision of Contract Manufacture of the Divestiture Products, all in a manner that fully satisfies the requirements of this Order;

Respondents shall submit to the Commission and, at the same time, to the Monitor, a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the requirements of the Orders ("Compliance Reports").

D. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether the Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of their efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, actions, or recommendations related to:
    a. the transfer and delivery of all Divestiture Product Assets to the Acquirer;
    b. transfer and delivery of all of the Manufacturing Technology to the Acquirer;

c. the provision of Transition Services to the Acquirer; and

d. the provision of Contract Manufacture of the Divestiture Products to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

E. One (1) year after the Order Date, annually for the nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

F. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

XII. Change in Respondents

IT IS FURTHER ORDERED Respondents shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of: Quaker Chemical Corporation; Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf;

B. any proposed acquisition, merger, or consolidation of: Quaker Chemical Corporation, Global Houghton Ltd.; Gulf Houghton Lubricants Ltd.; or AMAS Holding Spf; or

C. any other change in a Respondent including assignment and the creation, sale, or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XIII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all

documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of that Respondent; and

B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of the divestiture of the Divestiture Product Assets and the related obligations imposed on the Respondents by this Order is:

A. to ensure the continued use of such assets for the purposes of the Business of Divestiture Products within the Geographic Territory;

B. to create a viable and effective competitor that is independent of Respondents in the Business of the Divestiture Products within the Geographic Territory; and

C. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate on September 9, 2029.

By the Commission.

April J. Tabor
Acting Secretary

SEAL

ISSUED: September 9, 2019

NON-PUBLIC APPENDIX I
ACQUISITION AGREEMENT
[Cover Page]

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NON-PUBLIC APPENDIX II
AGREEMENTS RELATED TO THE DIVESTITURE

[Cover Page]

NON-PUBLIC APPENDIX III
ESSENTIAL EMPLOYEES

[Cover Page]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **Illumina, Incorporated** **a corporation,** **And** **Pacific Biosciences of California, Incorporated (PacBio)** **a corporation.**	**Docket No. 9387** **PUBLIC**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondents Illumina, Inc. ("Illumina") and Pacific Biosciences of California, Inc. ("Pacific Biosciences" or "PacBio"), have executed an agreement for the acquisition of PacBio by Illumina (the "Acquisition"), which, if consummated, would violate Section 2 of the Sherman Act, 15 U.S.C. § 2, Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Illumina is a monopolist. It is the self-proclaimed leader in DNA sequencing and dominates DNA sequencing markets in the United States and worldwide. Its name is often considered synonymous with "next-generation sequencing" ("NGS"), the technology that allows researchers and clinicians quickly, accurately, and efficiently to identify the order of the component blocks—called nucleotides—in a DNA sample. In the United States, Illumina has complete dominance over the market for these products, with a share of over 90%. Historically, Illumina has faced little competition for its NGS instruments and consumables (collectively, "systems").

2. PacBio is one of the few firms that has managed to gain a foothold in the NGS market. PacBio sells a DNA sequencing system that offers substantial benefits over Illumina's systems, including longer individual sequence read lengths, but is a lower throughput and more expensive alternative.

3. Due to the benefits provided by PacBio's technology, some Illumina customers have shifted certain sequencing projects (or parts of projects) from Illumina to PacBio despite the differences in cost and throughput.

4. Respondents' internal documents show that PacBio and Illumina consistently and routinely refer to each other as competitors. These include many internal strategy documents, technical assessments, and sales support documents prepared over a period of years.

5. In the past two years, PacBio has made significant technological advancements, including the release of its "Sequel II" instrument in 2019. These advancements have brought down the cost of sequencing using PacBio systems and increased the accuracy and throughput of PacBio's instruments. Collectively, these improvements have made PacBio a closer alternative to Illumina than ever before.

6. In advance of the Sequel II's release, PacBio positioned its improved technology as an ever closer competitor to Illumina. By 2018, PacBio executives instructed its marketing department to [redacted] In October 2018, one PacBio marketing executive explained, [redacted]

7. Illumina has monitored PacBio as [redacted] and [redacted] from its inception. But as it learned details about PacBio's recent product improvements and the PacBio system's trajectory, Illumina recognized PacBio as [redacted].

8. Illumina now proposes to acquire PacBio and extinguish it as a competitive threat. Per an agreement executed November 1, 2018, Illumina will pay $1.2 billion for PacBio, a 71% premium over PacBio's share price at the time.

9. This Acquisition will eliminate competition between the two companies now and in the future. Accordingly, it will substantially lessen competition and further insulate Illumina's monopoly from PacBio's increasing competitive threat.

II.

BACKGROUND

A. Jurisdiction

10. Respondents are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Respondents

12. Respondent Illumina is a publicly traded Delaware corporation, headquartered in San Diego, California. Illumina develops, manufactures, and markets life sciences tools. Illumina's main product offerings are instruments used for DNA sequencing and associated consumable chemistry kits. Illumina offers seven DNA sequencing systems at a range of different price points and throughput levels. Its primary customers are leading genomic research centers, academic institutions, government laboratories, and hospitals, as well as companies in the pharmaceutical, biotechnology, agrigenomic, commercial diagnostics, and consumable genomics industries. Illumina was founded in 1998 and has 7,300 employees worldwide, with commercial offices located in Europe, Asia, Australia, and the Americas. In 2018, Illumina's worldwide revenue was $3.33 billion, approximately 55% of which was from U.S. sales.

13. Respondent PacBio is a publicly traded Delaware corporation, headquartered in Menlo Park, California. PacBio sells DNA sequencing instruments and consumable chemistry kits. It targets these products toward scientists striving to resolve complex and novel issues in genetics. PacBio's customer base is broadly similar to that of Illumina and includes research institutions, commercial laboratories, genome centers, pharmaceutical companies, and agricultural companies. PacBio was founded in 2004 and has about 400 full-time employees, almost all of whom are located in the United States. In 2018, PacBio's worldwide revenue was $78.6 million, approximately 45% of which was North American sales.

C. The Proposed Acquisition

14. Illumina agreed to acquire PacBio on November 1, 2018, for approximately $1.2 billion. The price per share represents a 71% premium to PacBio's share price as of market close on October 31, 2018. This agreement (the "Agreement") was set to expire on December 31, 2019. On September 25, 2019, Illumina and PacBio executed an amendment to this agreement to allow Illumina the unilateral right to extend the end date to March 31, 2020.

D. Background on Sequencing Technologies

15. DNA sequencing is the process of determining the order of nucleotides in DNA molecules from a biological sample. Scientists use DNA sequencing to ascertain the sequence of individual genes, larger genetic regions, full chromosomes, or the entire genome of any organism. DNA sequencing is foundational to research spanning the fields of molecular biology, evolutionary biology, genomics, medicine, pharmacology, ecology, and epidemiology. Other uses for DNA sequencing include clinical medical diagnostics, forensics, biometrics, and consumer genetics. Additionally, scientists can use DNA sequencing systems to sequence RNA, which has unique scientific utility for research and clinical use.

16. From the 1970s until the mid-2000s, the Sanger method was the predominant method of sequencing. It was, however, time consuming, costly, and labor intensive.

17. In the mid-2000s, new technologies—dubbed next-generation sequencing ("NGS")—began to appear. NGS systems offered much lower cost and higher throughput, with the ability to generate a large number of sequences at once. This technology rapidly eclipsed Sanger as the primary tool for genetic sequencing.

18. Illumina's technology is known as "short-read" sequencing. Short-read technology has been the predominant NGS technology for the last decade.

19. NGS sequencing also includes "long-read" sequencers. Long-read sequencing became commercially available in 2011. PacBio has been the leading system of this type since this technology emerged.

20. Short-read and long-read sequencing systems—and Illumina and PacBio in particular—currently differ on several metrics that drive the ways in which customers use them. Illumina's short-read systems currently have an advantage over PacBio's long-read systems on cost, number of sequence reads, and throughput. PacBio's system far surpasses Illumina's in terms of the length of DNA that it can cover in each individual sequence read. Both systems are capable of delivering highly accurate sequence reads.

21. The characteristics of PacBio's systems have been converging with those offered by Illumina. As PacBio has improved the individual sequence read length, cost, and throughput of its products over the years, it has become a closer substitute for Illumina's short-read technology for some customers in some projects. PacBio expects to continue to improve the cost and throughput of its system in the future. Historically, Illumina's short-read sequencing has been cheaper than long read on a cost per genome basis. However, because of the inherent benefits of long-read sequencing over short-read sequencing for certain applications, use cases, and projects, customers have been willing to pay a price premium to use PacBio for some sequencing projects. And, as PacBio's cost per genome decreases, customers expect to sequence more samples on PacBio and fewer samples on Illumina.

22. Sequencing is used for a number of different applications, use cases, projects, and sample sets within projects. Today, certain applications are best served by short-read systems, other applications are adequately served only by long-read systems, and some applications may be served by either short-read or long-read technology depending upon the objectives, budget, and time for a particular use case or project. As the cost of PacBio's long-read sequencing has decreased and its accuracy and throughput have increased, sequencing volume has shifted from short read to long read, as long read is able to fit the needs of more use cases and projects within several applications. Market participants expect this trend to continue for a broader set of projects and use cases.

III.

THE NGS PRODUCT MARKET

23. A relevant product market in which to assess the competitive impact of the proposed Acquisition is no broader than all next-generation sequencing systems (the "NGS Market").

24. The NGS Market comprises highly differentiated systems, including those of Illumina, PacBio, and a few other small participants.

25. In internal documents, both Illumina and PacBio routinely recognize the existence of an NGS market, consistently refer to each other as competitors in that market, and refer to competition across NGS systems. These documents include investor presentations, SEC filings, strategic planning documents, sales plans, and technical assessments.

26. Other market participants also recognize the existence of an NGS market, and other sequencing companies consider themselves to be competing in the NGS Market. Industry analysts also assess and monitor the NGS Market.

27. PacBio's long-read systems have characteristics and uses similar to those of Illumina's short-read systems for certain projects and use cases. As PacBio continues to improve the cost, accuracy, and throughput of its long-read systems, their characteristics and uses will become even more similar to those of Illumina's short-read systems.

28. In some instances, customers have switched sequencing volume from Illumina to PacBio as a result of past improvements in the cost, accuracy, and throughput of PacBio's systems. PacBio expects to continue improving its system's cost, accuracy, and throughput in the future, and customers expect to switch additional volume from Illumina to PacBio as a result of those improvements.

29. Sanger sequencing systems, the only other technology capable of sequencing DNA, are properly excluded from the NGS Market. It costs much less to sequence DNA with NGS than Sanger sequencing, and the legacy Sanger approach is so much slower that it is impractical for almost all purposes for which scientists employ NGS.

30. Non-sequencing products, such as microarrays, are properly excluded from the NGS Market. Microarrays do not sequence DNA. They merely identify known single nucleotide variants in a genome. These products lack the throughput and technical capabilities of NGS products, qualities that customers require for their sequencing work.

IV.

THE RELEVANT GEOGRAPHIC MARKET

31. The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition.

32. U.S. NGS customers cannot practically turn to suppliers that do not have a U.S. presence to purchase an NGS system. NGS customers require local service and support networks. Reflecting the reality of regional competitive differences, Illumina [redacted]

33. Intellectual property is a significant barrier to entry in the NGS Market. The strength of incumbent NGS companies' patent portfolios differs depending on the region. Using intellectual property, incumbent U.S. NGS suppliers (namely, Illumina) exclude other firms from selling NGS products in the United States, including some companies that supply NGS products elsewhere in the world. Accordingly, intellectual property creates a unique set of entry conditions in the United States.

V.

MARKET STRUCTURE

34. Illumina is the dominant manufacturer of NGS systems in the United States, where it enjoys a market share of more than 90%. PacBio is one of three other companies manufacturing and selling NGS systems in the United States. All of the companies that could, theoretically, enter the U.S. NGS Market at some point in the future [redacted].

A. Illumina

35. Illumina describes itself as the "global leader in DNA sequencing" and has enjoyed an enduring dominance in the sale of sequencers. Market participants describe Illumina as "synonymous with sequencing" because its technology generates more than 90% of the world's sequencing data. Illumina has sustained its dominance for years.

36. Illumina has possessed since at least 2009, and continues to possess today, monopoly power in the markets in which it sells its DNA sequencing systems, including in the NGS Market.

37. Substantial direct evidence demonstrates Illumina's durable monopoly power. For many projects and use cases, customers have few, if any, commercially reasonable alternatives to Illumina.

38. Customers recognize that they have few commercially reasonable alternatives and lack bargaining leverage to obtain lower prices or better contract terms from Illumina. When Illumina has implemented price increases, those increases have been profitable and have not driven sales toward other DNA sequencing systems.

39. Illumina's own documents provide evidence of its monopoly power. An internal 2016 document answers the question [redacted]. It also states that [redacted] but explains that [redacted].

40. Illumina is so dominant that it sees limited sales left to compete for. Illumina's Vice President of Regional Sales and Marketing for the Americas explained in an email [redacted]

41. Illumina's monopoly power may also be established through indirect evidence. Illumina possesses an extremely high share of the NGS Market. It has had a share of over 80% since at least 2013, and over 90% since 2015.

42. Substantial barriers to entry prevent other firms from competing with Illumina in the sale of DNA sequencing systems. DNA sequencing is complex, and any new entrant would need to overcome significant scientific, commercial, and intellectual property barriers to develop and commercialize a new NGS system successfully. Since 2013, only one new firm, Oxford Nanopore, has entered and remained in the U.S. NGS Market, and three years later it holds only a [redacted]% market share.

B. PacBio

43. PacBio systems use an innovative "Single-Molecule, Real-Time" ("SMRT") sequencing approach. With its ability to generate accurate long reads, PacBio can provide more comprehensive and higher quality information than short-read sequencing systems like Illumina's. While PacBio's system offers advantages over short read, it currently has substantially lower throughput and higher costs than Illumina.

44. PacBio has continually improved its system with the goal of converting ever more sequencing volume from short-read systems to its long-read technology. Some Illumina customers have switched samples, projects, or entire applications from Illumina to PacBio already.

45. PacBio's innovations and sequencing advances over the past two years have enabled the company to deliver significantly higher quality sequencing at dramatically lower prices, bringing its offerings closer to those of Illumina in terms of both capability and price.

46. PacBio's share of the NGS Market is 2-3% today. Both PacBio and Illumina project [redacted]. Some of that [redacted].

C. Other Market Participants

47. Oxford Nanopore Technologies ("Oxford Nanopore") is a U.K.-based NGS company that markets native long-read sequencing systems based on a nanopore technology. This technology, which functions differently than PacBio's, generates longer—but significantly less accurate—reads than other systems. Oxford Nanopore [redacted] a unique device that is portable and serves only niche use cases. The low accuracy of Oxford Nanopore's technology has limited its acceptance among customers.

48. Thermo Fisher Scientific ("Thermo Fisher") markets short-read, benchtop sequencing systems. Thermo Fisher is the second-leading provider of NGS systems, albeit well behind Illumina. Thermo Fisher's systems have significant technological limitations that constrain the company's ability to compete for business outside the application of targeted sequencing for clinical use. Thermo Fisher's technology is not an option for most customers of NGS products and services.

49. No other firm attempting to develop a sequencing system [redacted]. One firm, Beijing Genomics Institute ("BGI"), currently provides sequencing instruments outside of the United States, but it is deterred from participating in the U.S. NGS Market due to Illumina's claims that BGI's instruments infringe Illumina's patents.

D. Market Shares

50. Illumina makes the dominant NGS system and earns revenues [redacted] greater than those of the next-largest firm.

51. Illumina, which has held its dominant position for years, currently maintains a share of more than 90% of the U.S. NGS Market. PacBio holds a share approximately 2-3% of the NGS Market in the United States.

VI.

CONDITIONS OF ENTRY OR EXPANSION

52. Entry into the U.S. NGS Market is time consuming and extremely difficult. A new entrant into the NGS Market would need to overcome significant scientific, legal, and commercial barriers.

53. DNA sequencing systems are highly complex systems comprising advanced chemistry, sensitive optics, and powerful semiconductors. Integrating these components into a system that delivers value and performance sufficient to compete with existing systems, is scalable, and is cost effective to manufacture and operate is an immense challenge that requires considerable investment of capital and time.

54. The intellectual property landscape surrounding existing sequencing technologies is broad, dense, and difficult to invent around. Illumina has an extensive patent portfolio—with hundreds of U.S. patent registrations—that it devotes considerable resources to enforcing. Illumina's patent enforcement efforts have prevented, and likely will continue to prevent, new competitors from emerging in the United States. PacBio, which also owns a substantial patent portfolio, uses a different sequencing technology than Illumina. Accordingly, PacBio is not vulnerable to a patent infringement suit from Illumina, but both Illumina and PacBio have a long history of asserting their patents to exclude competitive technologies from the U.S. NGS Market, and the combined firm will have a strong incentive to exclude any firm seeking to enter the United States with a new long-read or short-read product.

55. Gaining acceptance in the marketplace after launching a product takes significant time and effort. A new system must prove itself reliable and robust before it can expect significant sales to customers in the research and clinical communities. New entrants typically must convince key opinion leaders to use their technology and publish papers to support the use of their products by other researchers, which takes a significant amount of time and creates uncertainty about whether new products, even after they are launched, would be able to compete effectively with existing, proven products.

VII.

HARM TO COMPETITION

A. The Acquisition Removes PacBio as a Competitive Threat to Illumina

56. By late 2018, improvements to PacBio's sequencing system had positioned PacBio as a significant threat to Illumina's longstanding monopoly.

57. As early as 2014, Illumina identified PacBio in internal documents as [redacted] and recognized that [redacted]

58. As PacBio's continued innovation produced incrementally better sequencing offerings, Illumina became increasingly concerned. In 2016, Illumina characterized PacBio as a [redacted] and one executive commented that, [redacted]

59. Internally, Illumina refers to PacBio specifically as a [redacted], with the frequency of references to PacBio as [redacted].

60. Illumina identified two companies as [redacted]. Of those two companies, only PacBio sells sequencing systems in the United States.

61. Respondents' internal documents demonstrate intensifying head-to-head competition and a mutual recognition of the threat that an independent PacBio posed to Illumina going forward. As PacBio's CEO told investors in August 2018, PacBio was getting close to "demonstrat[ing] that a high-quality PacBio analysis of the human genome can be performed at a comparable cost [to short-read technologies]," a "milestone" where it "anticipate[s] seeing larger cohorts of population sequencing samples shift over [from short read] to PacBio."

62. In early 2018, PacBio senior executives contacted Illumina's top executives to explore potential partnership opportunities, which afforded Illumina the ability to evaluate the sequencing data generated by PacBio's new chemistry. An Illumina Principal Scientist [redacted]—describing it internally as [redacted]

63. In light of PacBio's improving technology and the increasing threat to its monopoly, Illumina in 2018 contemplated specific competitive responses, including discounting its NGS products to protect its market position and developing new products that could compete with PacBio, which Illumina recognized was [redacted]

64. Instead of discounting or accelerating its internal innovation projects to maintain its market share in the face of PacBio's significant advancements, Illumina began evaluating PacBio as an acquisition target, as it had done before with [redacted] In 2017, Illumina determined that [redacted].

65. By August 2018, Illumina recognized [redacted]" because of recent PacBio product improvements.

66. Illumina and PacBio agreed to merge on November 1, 2018, and shortly after, Illumina executives explained in the company's [redacted] that PacBio was [redacted]

B. The Proposed Acquisition Extinguishes All Current and Future Competition Between Illumina and PacBio

67. The proposed Acquisition will eliminate significant current and future competition between Illumina and PacBio, substantially harming consumers. As PacBio has improved its technology, customers have benefitted from these cost and quality improvements and moved sequencing volume from Illumina to PacBio systems in certain projects, use cases, and applications.

68. Respondents, customers, and other market participants recognize that, as an independent company, PacBio is poised to take increasing sequencing volume from Illumina in the future. In the absence of the merger, Illumina's response to that competition would likely include discounting the prices of its systems, improving their quality, and developing innovative new products.

69. When the parties entered into the Acquisition agreement, PacBio expected its Sequel II instrument and related chemistry improvements to be an inflection point for the company. The Sequel II will expand the projects and use cases for which customers could use PacBio, and will position PacBio as a much closer alternative to Illumina.

70. PacBio expected the Sequel II would [redacted] the NGS space. In 2018, as PacBio was planning to introduce a significant chemistry improvement, its executives directed the company's marketing department to [redacted] As a marketing executive described PacBio's focus in October 2018, [redacted]

71. The merger would harm consumers, in part, by hampering competition, particularly innovation competition. Both PacBio and Illumina have engaged in innovation efforts to compete with each other for years, they were engaged in such efforts at the time of the merger announcement, and both expected to compete against each other with new products in the future.

72. PacBio is continually improving its system to reduce costs, increase throughput, and take market share from Illumina. Illumina, in turn, is [redacted], motivated in large part by the competitive threat posed by PacBio.

73. The merger reduces the combined firm's incentives to innovate and develop new products relative to the incentives PacBio and Illumina faced as independent competitors. Post-acquisition, Illumina will have reduced incentives to develop new long-read systems that would cannibalize its existing short-read business, and Illumina will have little or no incentive to continue its efforts to launch new long-read products after acquiring PacBio's long-read business. As a result, consumers will have fewer innovative products to choose from, and they will lose the price and quality benefits that competition between Illumina's and PacBio's new products would have created absent the merger.

C. The Acquisition Presumptively Harms Competition in the NGS Market

74. The 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Horizontal Merger Guidelines") and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). HHI levels are calculated by totaling the squares of the market shares of each firm in the relevant market. A relevant market is "highly concentrated" if it has an HHI level of 2,500 or more. A merger or acquisition is presumed likely to create or enhance market power—and presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

75. Post-Acquisition U.S. NGS market concentration, and the change in concentration caused by the Acquisition, will exceed the thresholds established in the Horizontal Merger Guidelines. Pre-Acquisition, the U.S. NGS Market is highly concentrated, with an HHI of 8,290, which far exceeds the threshold level in the Horizontal Merger Guidelines. The Acquisition will increase the HHI of the U.S. NGS market by 443 points. Post-Acquisition, the HHI of the U.S. NGS Market will be 8,733.

76. The Acquisition is presumptively unlawful under the Horizontal Merger Guidelines and relevant case law.

VIII.

EFFICIENCIES AND PROCOMPETITIVE JUSTIFICATIONS

77. Respondents cannot verify or substantiate any merger-specific efficiencies. Even if Respondents could identify some efficiencies that would result from the Acquisition, they could not show that such savings would likely be passed on to customers. In any event, any cognizable efficiencies are far outweighed by the Acquisition's harm and do not justify the Acquisition.

78. Respondents' procompetitive justifications for the Acquisition are pretextual. To the extent that there are any procompetitive effects flowing from the Acquisition at all, those effects could be accomplished through other means, without eliminating all competition between Illumina and PacBio.

IX.

VIOLATIONS

COUNT I—MONOPOLIZATION

79. The allegations of Paragraphs 1 through 78 above are incorporated by reference.

80. Respondent Illumina has, and at all relevant times had, monopoly power in the U.S. NGS Market, as well as in any other market in which it sells DNA sequencing systems.

81. The Acquisition, if consummated, would eliminate the nascent competitive threat that an independently owned PacBio poses to Illumina's monopoly power. The Acquisition is anticompetitive conduct because it eliminates competition between Illumina and PacBio. The Acquisition is anticompetitive conduct reasonably capable of contributing significantly to Illumina's maintenance of monopoly power.

82. Illumina's claimed procompetitive justifications are pretextual and, in any event, do not outweigh the anticompetitive effect of the Acquisition.

83. The Acquisition constitutes monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

COUNT II—ILLEGAL ACQUISITION

84. The allegations of Paragraphs 1 through 78 above are incorporated by reference.

85. Respondents currently compete with each other in the highly concentrated NGS Market. Competition between Respondents has been increasing over time and will increase substantially in the future. Respondents cannot show that any cognizable efficiencies are of a character and magnitude such that the Acquisition is not likely to be anticompetitive.

86. The Acquisition, if consummated, may substantially lessen current and future competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

NOTICE

Notice is hereby given to the Respondents that the eighteenth day of August 2020, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 2 of the Sherman Act, Section 7 of the Clayton Act, as amended, and/or Section 5 of the Federal Trade Commission Act, as amended, the Commission may order such relief against the Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as Illumina and PacBio were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Illumina and PacBio that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Illumina and PacBio provide notice to the Commission of acquisitions, merger, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventeenth day of December, 2019.

By the Commission.

April J. Tabor
Acting Secretary

SEAL:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
Agnaten, SE, **a corporation,**	)	
Veterinary Specialists of North America, LLC **a limited liability company,**	)	
and	)	**Docket No. C-4707**
NVA Parent, Inc., **a corporation.**	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Agnaten, SE, ("Agnaten"), the owner of Veterinary Specialists of North America and Compassion-First Pet Hospitals, of Respondent NVA Parent, Inc. ("NVA"), collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional

facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Agnaten is a corporation organized, existing, and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Rooseveltplaz 4-5/Top 10, A-1090 Vienna, Austria, with its United States office for service of process located at 1701 Pennsylvania Ave., NW, Suite 801, Washington, DC 20006.

2. Respondent Veterinary Specialists of North America is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 106 Apple St, Tinton Falls, NJ 07724.

3. Respondent NVA is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 2000 Avenue of the Stars, 12th Floor, Los Angeles, CA 90067.

4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply and all other definitions used in the Order to Maintain Assets, shall apply:

A. "Agnaten" means Agnaten, SE, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Agnaten SE, including, but not limited to, Veterinary Specialists of North America, Compassion-First Pet Hospitals, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "NVA" means NVA Parent, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries,

partnerships, divisions, groups, and affiliates controlled by NVA Parent, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "MedVet" means MedVet Associates, LLC, a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Ohio, with its executive offices and principal place of business located at 350 East Wilson Bridge Road, Worthington, OH 43085.

D. "Acquirer" means: means:

1. MedVet; or

2. Any other Person the Commission approves to acquire the Divestiture Clinics pursuant to this Decision and Order.

E. "Acquisition" means the proposed acquisition by Agnaten of NVA, described in the Stock Purchase Agreement by and among NVA Group, L.P., NVA Parent, Inc., Dino Grandparent, Inc., Petcare Acquisition Co., and JAB Holdings, B.V., dated June 3, 2019.

F. "Acquisition Date" means the date Respondents consummate the Acquisition.

G. "Business Records" means all information, books and records, documents, files, correspondence, manuals, computer printouts, databases, and other documents, including all hard copies and electronic records wherever stored, including without limitation, client and customer lists, patient and payor information, referral sources, research and development reports, production reports, service and warranty records, maintenance logs, equipment logs, operating guides and manuals, documents relating to policies and procedures, financial and accounting records and documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists and contracts, salaries and benefits information, physician lists and contracts, supplier lists and contracts, and, subject to legal requirements, copies of all personnel files.

H. "Clinic Assets" means all of Respondents' rights, title, and interest in all property and assets, tangible or intangible, of whatever nature and wherever located, relating to or used in connection with the Divestiture Clinics, including, without limitation, all:

1. Real property interests (including fee simple interests and real property leasehold interests, whether as lessor or lessee), wherever located, including all easements, appurtenances, licenses, and permits, together

with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. Tangible Personal Property, including, without limitation, any Tangible Personal Property removed from and not replaced at the Divestiture Clinics, if such property was used by or in connection with the provision of veterinarian services at the Divestiture Clinics on or after June 3, 2019;

3. Rights under any and all contracts and agreements (e.g., leases, service agreements such as supply agreements, procurement contracts), including, but not limited to, contracts and agreements with physicians and other veterinary health care providers and support staff, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consigners, and consignees;

4. Rights and title in and to use the name or part of the name of the Divestiture Clinic on a permanent and exclusive basis (even as to Respondents), including, but not limited to, the name "Veterinary Care Center," the name "REACH Veterinary Specialists," and the name "The Veterinary Referral Center;"

5. Approvals, consents, licenses, certificates, registrations, permits, waivers, or other authorizations issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;

6. All consumable or disposable inventory kept in the normal course of business, including, but not limited to, janitorial, office, and medical supplies, and pharmaceuticals;

7. Accounts receivable;

8. Rights under warranties and guarantees, express or implied; and

9. Business Records.

PROVIDED, HOWEVER, that Clinic Assets do not include Excluded Assets.

PROVIDED FURTHER, HOWEVER, that Respondents may retain a copy of Business Records to the extent necessary to comply with applicable law, regulations, and other legal requirements.

I. "Commission" means the Federal Trade Commission.

J. "Confidential Business Information" means information not in the public domain

that is related to or used in connection with the Divestiture Clinics, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor information, commercial information, management system information, business processes and practices, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.

K. "Direct Cost" means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Transitional Services. "Direct Cost" to an Acquirer for its use of any of Respondents' employees' labor shall not exceed the then-current average wage rate for such employee, including benefits.

L. "Divestiture Agreement(s)" means:

1. Divestiture Agreement by and among Respondents and MedVet, dated October 25, 2019, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Non-Public Appendix E;

2. Divestiture Agreement by and among Veterinary Specialists of North America and MedVet, dated November 22, 2019, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Non-Public Appendix E; or

3. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to this Order) and an Acquirer to purchase the Divestiture Clinics, and all amendments, exhibits, attachments, agreements, and schedules thereto.

M. "Divestiture Clinics" means the following veterinary clinics owned and operated by Respondents:

1. REACH Veterinary Specialists, located at 677 Brevard Road, Asheville, NC 28806;

2. The Veterinary Care Center, located at 129 Glover Avenue, Norwalk, CT 06850; and

3. The Veterinary Referral Center, 8614 Centreville Road, Manassas, VA 20110.

N. "Divestiture Date" means the date on which Respondents (or a Divestiture Trustee appointed pursuant to this Order) consummate the divestiture of the

Divestiture Clinics as required by Paragraph II of this Order.

O. "Divestiture Trustee" means the person appointed pursuant to Paragraph VII of this Order.

P. "Emergency Veterinary Clinic" means a veterinary clinic that offers 24-hour or overnight service with the primary function of receiving, treating, and monitoring emergency patients during its specified hours of operation. A veterinarian is in attendance at all hours of operation and sufficient staff is available to provide timely and appropriate care. Veterinarians, support staff, instrumentation, medications, and supplies must be sufficient to provide an appropriate level of emergency care.

Q. "Excluded Assets" means:

1. Tax and medical records related to the Divestiture Clinics to the extent they are nontransferable by law;

2. Cash generated by the Divestiture Clinics prior to the Divestiture Date;

3. Intellectual Property;

4. Software, including, any third-party practice management software (to the extent not assignable);

5. Employee benefit plans;

6. Employee records (a) for any Relevant Employee that is not transferred to Acquirer, or (b) prohibited to be transferred by law; and

7. Compassion-First's Strontium-90 probe and the related Radioactive Materials License No. 6-35037-01 held by CF PC.

R. "Government Approvals" means any permissions or sanctions issued by any government or governmental organization, including, but not limited to, licenses, permits, accreditations, authorizations, registrations, certifications, certificates of occupancy, and certificates of need.

S. "Intellectual Property" means intellectual property of any kind including, but not limited to, patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

T. "Monitor" means the person appointed as Monitor in this Order.

U. "Person" means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity or governmental body.

V. "Relevant Notice Area" means the areas and veterinary clinics identified in Non-Public Appendix B to this Order.

W. "Relevant Employees" means any and all full-time employees, part-time employees, or contract employees, including but not limited to veterinarians, who work or worked at the Divestiture Clinics at any time during the 90 days preceding the date the Acquisition is completed or at any time after the date the Acquisition is completed, and whose duties relate or related to the Divestiture Clinic.

X. "Respondents" means Agnaten and NVA, collectively or individually.

Y. "Specialty Veterinarian" means a veterinarian who (i) legally holds himself or herself out as a specialist in veterinary medicine, and (ii) has board certification, in one, or more, of the following specialties: internal medicine, neurology, oncology, ophthalmology, radiation oncology, or surgery.

Z. "Specialty Veterinary Clinic" means a clinic where a Specialty Veterinarian practices.

AA. "Tangible Personal Property" means all machinery, equipment, spare parts, tools and tooling, fixtures, vehicles, furniture, inventories, office equipment, computer hardware, supplies and materials, and all other items of tangible personal property of every kind owned or leased by Respondents, wherever located, together with any express or implied warranty by the manufacturers, sellers, or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

BB. "Transitional Services" means support services regarding the transfer and operation of the Divestiture Clinics, including, but not limited to, administrative assistance, assistance relating to billing, accounting, governmental regulation, human resources management, information systems, clinical assistance, and purchasing, as well as providing assistance in acquiring and obtaining access to all software used in the provision of such services.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Respondents shall, within 10 days after the Acquisition Date, absolutely and in good faith, divest the Divestiture Clinics to MedVet, including all Clinic Assets related to those clinics, pursuant to and in accordance with the Divestiture Agreements, as ongoing businesses.

PROVIDED, HOWEVER, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that MedVet is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondents shall immediately notify the unacceptable Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than 5 business days, effect the rescission of the relevant Divestiture Agreement; and (2) Respondents shall, within 6 months of the date Respondents receive notice of such determination from the Commission, divest the Divestiture Clinics and Clinic Assets, as applicable, absolutely and in good faith, at no minimum price, as ongoing businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

PROVIDED FURTHER, HOWEVER, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which any of the divestitures accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent Agnaten shall not acquire Respondent NVA until it has obtained for all the Divestiture Clinics:

1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for real property of each Divestiture Clinic; and

2. Any and all Governmental Approvals necessary for the Acquirer to operate each Divestiture Clinic, as of the Divestiture Date, in substantially the same manner as the applicable Respondent operated such Divestiture Clinic.

C. At the option of the Acquirer, Respondents shall grant the Acquirer a royalty-free, worldwide, non-exclusive license for the use, without any limitation, of any Intellectual Property necessary to operate the Divestiture Clinics, including but not limited to, any hospital management software, to use for a period of 1 year following the Divestiture Date.

D. Respondents:

1. Shall not disclose Confidential Business Information relating exclusively to any of the Divestiture Clinics to any Person other than the Acquirer of the Divestiture Clinics; and

2. After the Divestiture Date:

a. Shall not use Confidential Business Information relating exclusively to any of the Divestiture Clinics for any purpose other than for complying with the terms of this Order, for complying with any law, or for the purposes of billing and collections; and

b. Shall destroy all records of Confidential Business Information relating exclusively to any of the Divestiture Clinics, except to the extent that: (i) Respondents are required by law to retain such information, and (ii) Respondents' inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Agnaten or NVA, respectively.

E. The purpose of the divestiture is to ensure the continuation of the Divestiture Clinics as ongoing viable businesses engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

III. Divestiture Agreements

IT IS FURTHER ORDERED that**:**

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreements shall constitute a violation of this Order; provided, however, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreements after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Asset Maintenance

IT IS FURTHER ORDERED that, until the Divestiture Date, Respondents shall:

A. Maintain each of the Divestiture Clinics and all Clinic Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents sign the Consent Agreement;

B. Take such actions that are consistent with the past practices of Respondents in connection with each Divestiture Clinic and all the Clinic Assets, and that are

taken in the ordinary course of business and in the normal day-to-day operations of the Divestiture Clinics;

C. Keep available the services of the current officers, employees, and agents of Respondents; and maintain the relations and goodwill with suppliers, veterinarians, landlords, patients, employees, agents, and others having business relations with the Divestiture Clinics and the Clinic Assets; and

D. Preserve the Divestiture Clinics and Clinic Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Divestiture Clinics and Clinic Assets would be diminished.

V. Employees

IT IS FURTHER ORDERED that, Respondents:

A. Shall, no later than 10 days after a request from an Acquirer, provide the Acquirer with the following information for each Relevant Employee, and, to the extent known and applicable, each independent contractor who has worked at a Divestiture Clinic since June 3, 2019, as and to the extent permitted by law (unless such information has already been provided):

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;

5. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);

6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

7. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the Relevant Employee.

B. Shall, within a reasonable time after a request from an Acquirer, provide to the Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees, and to make offers of employment to any one or more of the Relevant Employees.

C. Shall not interfere, directly or indirectly, with the hiring or employing by the

Acquirer of any Relevant Employees, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Relevant Employee by the Acquirer; *PROVIDED, HOWEVER,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph V; *PROVIDED FURTHER, HOWEVER,* that this Paragraph V shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

D. Shall remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with an Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by an Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from an Acquirer; *PROVIDED, HOWEVER*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing the employment of any employee.

E. Shall provide reasonable financial incentives for Relevant Employees, as identified by Respondents and any Acquirer, to continue in their positions. Such incentives may include, but are not limited to, guaranteeing a retention bonus for the veterinarians at the Divestiture Clinics to assure their continued employment at such clinic, a continuation of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting of pension benefits (as permitted by law and for those Relevant Employees covered by a pension plan), offered by Respondents.

F. Shall not, for a period of one (1) year following the Divestiture Date of the particular Divestiture Clinic, hire a Relevant Employee that is a doctor of veterinary medicine to work at any of Respondents' veterinary clinics in the areas identified in Appendix A, related to that particular Divestiture Clinic.

PROVIDED HOWEVER, Respondent Agnaten may offer part-time contract hours to a doctor of veterinary medicine at a particular Divestiture Clinic, who has been

working as a part-time contract veterinarian for Respondent Agnaten or NVA in the areas identified in Appendix A related to that particular Divestiture Clinic, if the part-time contract hours offered by Respondent Agnaten would not, in any way, interfere with the veterinarian's ability to fulfill his or her employment responsibilities to the Acquirer.

PROVIDED FURTHER, HOWEVER, that this Paragraph V shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee that is a doctor of veterinary medicine if an Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where the employee's employment has been terminated by the Acquirer.

G. Shall not, for a period of 2 years following the Divestiture Date of any Divestiture Clinic, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with an Acquirer to terminate his or her employment with the Acquirer; *PROVIDED, HOWEVER,* that Respondents may:

1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or

2. Subject to Paragraph V.F, above, hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph V; *PROVIDED FURTHER, HOWEVER,* that this Paragraph V shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if an Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

VI. Transition Assistance

IT IS FURTHER ORDERED that, at the request of an Acquirer, for a period not to exceed one (1) year, or as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

A. Respondents shall provide Transitional Services to the Acquirer sufficient to enable the Acquirer to operate the Divestiture Clinics, and to provide veterinary services at the Divestiture Clinics in substantially the same manner that Respondents have operated the Divestiture Clinics; and

B. Respondents shall provide the Transitional Services required by this Paragraph VI

at substantially the same level and quality as such services are provided by Respondents at the Divestiture Clinics.

PROVIDED, HOWEVER, that Respondents shall not (i) require any Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate their obligation to provide Transitional Services because of a breach by the Acquirer of any agreement to provide such assistance unless Respondents are unable to provide such services due to such breach.

VII. Monitor

IT IS FURTHER ORDERED that:

A. Thomas Carpenter shall be appointed Monitor to ensure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order.

B. No later than one (1) day after the Acquisition Date, Respondents shall, pursuant to the Monitor Agreement, attached as Appendix C and Non-Public Appendix D (Compensation) to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Agnaten, which consent shall not be unreasonably withheld. If Agnaten has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within 10 days after notice by the staff of the Commission to Agnaten of the identity of any proposed Monitor, Agnaten shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten 10 days after appointment of a substitute Monitor, Agnaten shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the terms of this Order and the Divestiture Agreements in a manner consistent with the purposes of this Order.

D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

a. Ensuring that Respondents expeditiously comply with all obligations and perform all responsibilities as required by this Order, and the Divestiture Agreements;

b. Monitoring any transition services agreements; and

c. Ensuring that Confidential Business Information is not received or used by Respondents, except as allowed in this Order.

2. The Monitor shall serve as an independent third party and not as an employee or agent of any Respondent or of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order and the Divestiture Agreements.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order and the Divestiture Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Agnaten, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondent Agnaten shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondent Agnaten shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Agnaten, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under this Order and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this Paragraph VII, every 60 days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order, and the Divestiture Agreements.

9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER*, such agreement shall not restrict the Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.

F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.

G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Divestiture Agreements.

H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to this Order.

VIII. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations imposed by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest any remaining Divestiture Clinics, and perform Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section

5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VIII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VIII, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures required by, and satisfy the additional obligations imposed by, this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to effectuate the required divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to divest, or believes the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *PROVIDED, HOWEVER,* the Commission may extend the divestiture period only 2 times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be

divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time for divestiture under this Paragraph VIII for a time period equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made in the manner and to an Acquirer as required by this Order; *PROVIDED, HOWEVER,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *PROVIDED FURTHER, HOWEVER,* that Respondents shall select such Person within 5 days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the

preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *PROVIDED, HOWEVER,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

10. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties and responsibilities.

E. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VIII.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

IX. Prior Notice

IT IS FURTHER ORDERED that:

A. For a period of 10 years from the date this Order is issued, Respondent Agnaten shall not, without providing advance written notification to the Commission in the manner described in this Paragraph IX:

1. Acquire any assets of, or financial interest in, any veterinary clinic identified, or located in, the Relevant Notice Areas; or

2. Enter into any contract to participate in the management, operation, or

control of any veterinary clinic identified, or located in, the Relevant Notice Areas.

B. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph IX may be requested and, where appropriate, granted by letter from the Bureau of Competition. *PROVIDED, HOWEVER*, that prior notification shall not be required by this Paragraph IX for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

X. Compliance

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and of the Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondent Agnaten shall file verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Paragraph II and Paragraph V (where applicable); annual compliance reports one year after the date this Order is issued, and annually for the next 5 years on the anniversary of that date;

and additional compliance reports as the Commission or its staff may request;

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance:

   a. a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order; and

   b. an identification of any and every Relevant Employee hired by Respondents, including a detailed explanation as to why hiring that Relevant Employee does not violate this Order.

3. Respondent Agnaten shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Order and provide copies of these documents to Commission staff upon request.

4. Respondent Agnaten shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XI. Change in Respondents

IT IS FURTHER ORDERED that Respondent Agnaten shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Agnaten SE;

B. Any proposed acquisition, merger, or consolidation of Agnaten SE; and

C. Any other change in Respondent Agnaten including, but not limited to,

assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to the applicable Respondent made to its principal United States offices, registered office of their United States subsidiaries, or headquarters addresses, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and

B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

XIII. Term

IT IS FURTHER ORDERED that this Order shall terminate on April 9, 2030.

By the Commission.

April J. Tabor
Acting Secretary

SEAL

ISSUED : April 9, 2020

APPENDIX A
No-Hire Areas

- REACH Veterinary Specialists area:
  - Buncombe, North Carolina
  - Greenville, South Carolina
  - Haywood, North Carolina
  - Henderson, North Carolina
  - Jackson, North Carolina
  - Madison, North Carolina
  - Mcdowell, North Carolina
  - Polk, North Carolina
  - Rutherford, North Carolina
  - Transylvania, North Carolina
  - Yancey, North Carolina

- The Veterinary Referral Center area:
  - Alexandria City, Virginia
  - Arlington County, Virginia
  - Fairfax County, Virginia
  - Fairfax City, Virginia
  - Falls Church City, Virginia
  - Fauquier County, Virginia
  - Loudoun County, Virginia
  - Manassas City, Virginia
  - Manassas Park City, Virginia
  - Prince William County, Virginia
  - Spotsylvania County, Virginia
  - Stafford County, Virginia

- The Veterinary Care Center area:
  - Bergen County, New Jersey
  - Bronx County, New York
  - Dutchess County, New York
  - Essex County, New Jersey
  - Fairfield County, Connecticut
  - Hartford County, Connecticut
  - Hudson County, New Jersey
  - Litchfield County, Connecticut
  - Middlesex County, Connecticut
  - Nassau County, New York
  - New Haven County, Connecticut
  - New York County, New York

- Orange County, New York
- Passaic County, New Jersey
- Putnam County, New York
- Rockland County, New York
- Suffolk County, New York
- Westchester County, New York

NON-PUBLIC APPENDIX B
Relevant Notice Areas

APPENDIX C
Monitor Agreement

NON-PUBLIC APPENDIX D
Monitor Compensation

NON-PUBLIC APPENDIX E
Divestiture Agreements

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Your Information

FTC Approves Otto Bock HealthCare North America, Inc.'s Application to Divest Assets It Gained through Acquisition of FIH Group Holdings, LLC

Divestiture preserves competition for microprocessor prosthetic knees

December 1, 2020

Tags: Competition | Bureau of Competition | Merger | Horizontal | Health Care | Medical Equipment and Devices

The Federal Trade Commission has approved an application by prosthetics manufacturer Otto Bock HealthCare North America, Inc. to divest to Proteor, Inc. certain assets it acquired when it consummated its acquisition of FIH Group Holdings, LLC, also known as Freedom Innovations, including all microprocessor prosthetic knee, or MPK, products and technology.

The application notes that Proteor, a French company with U.S. headquarters in Tempe, Arizona, is a well-established and reputable worldwide manufacturer and supplier of lower-limb prosthetic devices. Additionally, according to the divestiture application, the proposed divestiture would accomplish the final order's purposes by ensuring the continued operation of Freedom Innovations' MPK business within Proteor and by remedying the lessening of competition that was alleged in the complaint.

In November 2019, upholding an administrative law judge's decision, the Federal Trade Commission unanimously found that the merger was anticompetitive, and it issued the final order requiring Ottobock to divest the Freedom Innovations business, with limited exceptions. Upon approval of the divestiture application by the Commission, Ottobock will immediately withdraw its petition for re[illegible] which is currently stayed by the U.S. Court of Appeals for the D.C. Circuit.

AR_001071

The Commission vote to approve the application was 5-0.

The Federal Trade Commission works to promote competition, and protect and educate consumers. The FTC will never demand money, make threats, tell you to transfer money, or promise you a prize. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Press Release Reference

FTC Requests Public Comment on Otto Bock HealthCare North America, Inc.'s Application to Approve Divestiture of Assets It Gained through Acquisition of FIH Group Holdings, LLC

Contact Information

Media Contact

Betsy Lordan
Office of Public Affairs
202-326-2180

Staff Contact

Danielle Sims
Bureau of Competition
202-326-3241

AR_001072

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

The Procter & Gamble Company,
a corporation

and

Billie, Inc.,
a corporation.

Docket No. 9400

PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents The Procter & Gamble Company ("P&G") and Billie, Inc. ("Billie") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I. NATURE OF THE CASE

1. In late 2017, Billie, Inc. launched an online only, direct-to-consumer challenge to P&G's women's razor dominance. Among other things, Billie charged a low price, employed savvy marketing designed to draw attention to the "pink tax"—that is, the practice of charging a premium for razors marketed to women that are substantially similar to razors marketed to men—and positioned the Billie product as "anti-Venus."

2. Two years later, Billie had grown substantially and at P&G's expense. P&G now seeks to acquire Billie on the eve of Billie's expansion into brick-and-mortar retail. As P&G's CEO for Grooming observed, the "big" value from this acquisition to P&G is the "removal of the competitive threat." The removal of Billie as an independent competitor eliminates important and growing head-to-head competition between P&G and Billie, and is likely to harm consumers through higher prices, among other harms.

3. P&G is the market leader in the sale of women's and men's wet shave razors. Wet shave razors require the use of water and, typically, a shave prep product such as shaving cream, shave gel, or shave soap. Nearly all wet shave razors are system or disposable razors. System razors consist of a reusable handle and a detachable razor cartridge that a consumer can replace with refill cartridges. Disposable razors comprise a handle with permanently affixed blades that consumers throw away after use.

4. Launched in 2017, and backed by venture capital firms including Goldman Sachs and celebrity investors Venus and Serena Williams, Billie is a fast-growing online company that sells a mid-tier women's system razor. Billie built its brand by finding an underserved customer base of Generation Z and Millennial women. Billie won their business by, among other things, offering a low price and attacking the incumbents' perceived practice of charging a pink tax for women's razors. Billie also emphasized a "female-first" message. Billie challenged traditional portrayals of women's razors. Billie became the first brand to use advertisements that normalized female body hair, which many saw as a critique of P&G Venus's advertising. Billie targeted P&G from the start, with a vision to "[d]ethrone Gillette Venus to become the number one women's razor brand in the U.S." Billie's objective was to shake up the women's shaving category, and even P&G recognized Billie as "anti-Venus."

5. The Proposed Acquisition is likely to result in significant harm by eliminating competition between the market leader and an important and growing head-to-head competitor. The Proposed Acquisition arrests Billie's progress as it was on the cusp of expanding into brick-and-mortar retail stores, which would have greatly heightened the already fierce competition between P&G and Billie.

6. P&G's CEO of Grooming viewed the "big" value from this acquisition as the "removal of the competitive threat." P&G's Senior Vice President of Grooming in North America encouraged others to "think of" the value created by acquiring Billie in terms of the "reduction of the competitive threat."

7. The Proposed Acquisition would significantly increase concentration in relevant antitrust markets that are already highly concentrated today. As a result, the Proposed Acquisition is presumptively anticompetitive. Current market share statistics and concentration measures understate Billie's future competitive significance, however, because Billie is a fast-growing brand that would grow even faster after its expansion into brick-and-mortar retail.

8. Respondents cannot show that the Proposed Acquisition will induce new entry or repositioning by existing razor suppliers that would be timely, likely, or sufficient to counteract the anticompetitive effects of the Proposed Acquisition. Billie's first-mover advantage targeting Millennial and Gen Z women online, the high costs of and challenges inherent in establishing a razor brand, the rising costs of online advertising, and the now crowded space at brick-and-mortar retailers (due to P&G's launch of Joy, Harry's launch of Flamingo, and Billie's likely addition to [redacted] among other things, combine to make entry or repositioning in response to the merger unlikely.

9. Respondents cannot show cognizable, merger-specific efficiencies that would offset the likely and substantial competitive harm resulting from the Proposed Acquisition.

II. JURISDICTION

10. Respondents are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

III. RESPONDENTS

12. P&G is a publicly held company, headquartered in Cincinnati, Ohio, that specializes in the manufacture and sale of consumer goods. P&G generated net sales across all business units of approximately $71 billion for the fiscal year ending June 30, 2020. P&G manufactures, produces, and sells a variety of razors and shave products online and in brick-and-mortar retail, under brands that include Gillette, Venus, Joy, Braun, Bevel, and The Art of Shaving. P&G generated approximately $6 billion in FY 2020 net sales from its Global Grooming business unit, which encompasses most of its razors and ancillary products. From January 2020 to March 2020, P&G generated approximately [redacted] in revenue in wet shave products, [redacted] of which was attributable to women's wet shave razors.

13. Billie, Inc. ("Billie") is a privately held company based in New York, New York, that sells a five-blade wet shave systems razor through its DTC platform under the Billie brand. Billie [redacted] Billie also sells shave cream, body wash, lotion, lip balm, dry shampoo, and facial wipes. Billie's 2019 sales of women's system razors accounted for [redacted] in net sales. [redacted]

IV. THE ACQUISITION

14. On December 31, 2019, P&G and Billie signed an Agreement and Plan of Merger, pursuant to which P&G will acquire 100 percent of the voting securities of Billie for approximately [redacted]

V. RELEVANT MARKETS

15. A relevant market in which to evaluate the effects of the Proposed Acquisition is no broader than production and sale of wet shave system razors and disposable razors ("wet shave razors") sold in the United States.

16. It is also appropriate to analyze the effects of the Proposed Acquisition in at least two narrower relevant markets within the wet shave razor market: (1) the market for the production and sale of women's wet shave razors in the United States and (2) the market for the production and sale of wet shave system razors in the United States.

A. Relevant Product Markets

17. The relevant product market is no broader than the production and sale of wet shave razors, which includes system and disposable razors [redacted] that is, customers purchase razors both online and in brick and mortar retail stores.

18. System razors consist of a reusable handle and a detachable razor cartridge. Consumers typically replace the razor cartridge with refill cartridges sold by the same manufacturer without the need to replace the handle.

19. Disposable razors comprise a single assembly of handle with permanently affixed blade(s). Consumers discard disposable razors after they finish using them.

20. Other forms of hair removal, such as electric (or "dry") shaving razors and alternative hair removal products (*e.g.*, hair removal creams or waxes) are not close substitutes for wet shave razors. Industry participants and Respondents recognize that wet shave razors are distinct from dry shave razors and alternative hair removal products and sell these products at distinct price points to distinct consumers.

21. Customers would not switch from wet shave razors to dry shave razors or alternative hair removal products in sufficient numbers to defeat a small but significant non-transitory increase in price ("SSNIP") by a hypothetical monopolist of wet shave razors.

22. The Proposed Acquisition would produce anticompetitive effects within at least two narrower relevant markets, in addition to producing anticompetitive effects in the broader wet shave razor market. The Proposed Acquisition would harm competition in narrower relevant markets for the production and sale of: (i) women's wet shave razors and (ii) system razors (including both women's and men's).

23. Industry participants recognize narrower product markets divided along gender lines (women's or men's) and by product type (system or disposable). Industry participants recognize each segment as distinct from others and conduct their business accordingly.

24. In each of these narrower relevant markets, a hypothetical monopolist could profitably impose a SSNIP on purchasers of the relevant product.

B. Relevant Geographic Market

25. The relevant geographic market in which to analyze the Proposed Acquisition is no broader than the United States. Razor suppliers negotiate distinct terms of sale with customers for different countries and, in some cases, offer distinct product assortments in different countries. Respondents and other industry participants generally do not make granular or distinctive purchasing or sale decisions for smaller regions within the United States.

26. A hypothetical monopolist of wet shave razors in the United States profitably could impose a SSNIP on U.S. customers. Customers based in the United States cannot defeat a price increase in the United States via arbitrage or substitution.

VI. MARKET PARTICIPANTS

27. P&G is the leading manufacturer of branded systems razors globally and in the United States. P&G is also a major producer of disposable razors. P&G's razor brands include the Gillette family (including the Joy and Venus women's razor brands), Braun, Bevel, and The Art of Shaving. P&G holds a dominant market position in the sale of wet shave razors, accounting for more than [redacted] of sales by revenue in some relevant markets. P&G manufactures its own blades and cartridges for its wet shave razor brands.

28. Billie is a fast-growing, digitally-native company that began selling a five-blade women's system razor in November 2017. [redacted]

29. Edgewell is a consumer products company that sells a full line of system and disposable razors marketed separately to men and women. Edgewell owns over 25 established brand names, including razor brands Schick and Personna/American Safety Razor. Edgewell also sells private label wet shave products and components in North America through its Private Brands Group to retailers and non-integrated razor companies [redacted].

30. Société BiC ("BiC") manufactures and sells consumer products including disposable lighters, pens, and razors. [redacted] of BiC's wet shave razor sales in the United States are men's and women's disposable razors, although BiC also sells a system razor. [redacted]

31. Harry's Inc. ("Harry's") manufactures and sells five-blade men's and women's system razors. Harry's sells its men's system razor under the Harry's brand and its women's system razor under the Flamingo brand. The vast majority of Harry's branded razor sales are made under the Harry's brand. [redacted] Harry's does not manufacture or sell disposable razors.

32. Dollar Shave Club, Inc. ("Dollar Shave Club"), now owned by Unilever plc/Unilever N.V. ("Unilever"), sells system razors purchased predominantly by men. Dollar Shave Club does not manufacture or sell disposable razors.

VII. THE PROPOSED ACQUISITION IS PRESUMPTIVELY ILLEGAL

33. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-acquisition market concentration level above 2500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in HHI of more than 200 points renders an acquisition presumptively unlawful. Transactions resulting in highly concentrated markets—markets with an HHI above 2500 points—with an HHI increase of more than 100 points potentially raise significant competitive concerns and warrant scrutiny. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market.

34. The market for the production and sale of wet shave razors in the United States is already highly concentrated, with an HHI of over 3000. The Proposed Acquisition increases the

concentration by more than 125 points and therefore potentially raises significant competitive concerns and warrants scrutiny.

35. The market for the production and sale of women's wet shave razors in the United States is already highly concentrated, with an HHI of more than 2500. The Proposed Acquisition increases the concentration in this market by more than 300 points and is therefore presumptively illegal.

36. The market for the production and sale of women's and men's wet shave system razors in the United States is already highly concentrated, with an HHI of over 4000. The Proposed Acquisition increases the concentration in this market by more than 200 points and is therefore presumptively illegal.

37. Changes in HHI based on current market shares understate the competitive significance of the Proposed Acquisition because Billie is rapidly growing. Billie was about to expand its sales into additional channels, particularly brick-and-mortar retail, before the Proposed Acquisition arrested its progress.

VIII. ANTICOMPETITIVE EFFECTS

38. In each of the relevant markets, the Proposed Acquisition would eliminate substantial and growing head-to-head competition between P&G and Billie, likely leading to higher prices and other harm for consumers.

39. P&G has long been the market leader in sales of women's and men's wet shave system razors. Billie saw an opportunity to attack P&G's position and shake up the category by entering the market positioned as an "anti-Venus" razor fighting the practice of charging women a "pink tax."

A. Billie Competes Aggressively Against P&G Today

40. In November 2017, Billie began selling a $9 woman's system razor through an online direct-to-consumer ("DTC") platform. Billie targeted Generation Z and Millennial women as customers, with "female first" messaging that challenged traditional marketing approaches to women's razors.

41. Billie successfully built its brand through marketing campaigns focused on fighting the pink tax and normalizing body hair on women. As Billie's website explains, "[w]e noticed that women were overpaying for razors and shamed for having body hair. Kind of a double whammy, when you think about it. So, we did away with the Pink Tax and put body hair on the big screen."

42. Billie grew from [redacted] in net sales in 2017 to [redacted] in net sales in 2018. Billie's growth caught P&G's attention, especially after Harry's and Dollar Shave Club's recent

disruption of P&G's stable market leadership in men's wet shave razors.[1] A mid-2018 draft memorandum discussing [redacted]

43. By August 2018, P&G set up a women's system razor DTC business, called Venus Direct, as a competitive response to Billie. Venus Direct offered customers a subscription service featuring the same line-up of Venus razors available in brick-and-mortar stores.

44. P&G's new DTC business did not stop Billie's growth. [redacted]

45. From the start, Billie positioned its product to attack P&G's Gillette Venus product. Billie told its initial investors that its goal was to "Dethrone Gillette Venus." P&G noted the attack: "Billie has positioned itself as notably 'anti-Venus,' with negative references to portraying women as 'a goddess just for shaving.'"

46. P&G, for its part, was "being proactively paranoid," according to its CEO of Grooming. In addition to its DTC offering, in March 2019, P&G launched its Joy razor exclusively with Walmart. Joy became part of P&G's plan to offer a youthful-oriented mid-tier female razor, much like Billie. [redacted] P&G launched Joy quickly as an online DTC brand [redacted]

47. Joy and Billie target a similar age group. P&G hoped that they could get Generation Z and Millennial women to join the Joy family before Billie (or Flamingo) could sign them up.

48. Joy's branding has a number of resemblances to the Billie product. Upon seeing the Joy razor, Billie's cofounder wrote that Joy "just ripped off a bunch of our stuff," even "the tile choice of the bathroom." Industry observers likewise recognize that Joy and Billie are close competitors.

49. P&G considered Billie's vocal stance on the "pink tax" and Billie's pricing before setting Joy's suggested retail price, among other factors. In response to Joy's launch, Billie's cofounder guessed that Joy [redacted]

50. Joy was priced at $8.97 at Walmart (Joy prices at other locations vary). Billie prices its razor at $9.

[1] *See In the Matter of Edgewell Personal Care Company and Harry's, Inc.*, FTC Docket No. 9390, Complaint (Filed Feb. 3, 2020) (describing disruption by Harry's and Dollar Shave Club in men's razors).

B. The Proposed Acquisition Halted Billie's Expansion Into Brick-And-Mortar Retail, Which Would Have Increased Competition Between P&G And Billie

51. Billie was poised to expand into brick-and-mortar [redacted] prior to the P&G deal.

52. Billie and [redacted] understood that Billie needed to transition from a DTC-only brand to one that is available at brick-and-mortar retailers as well. [redacted] believed that expanding into brick-and-mortar stores would help Billie achieve profitability. [redacted]

53. [redacted]

[redacted] P&G worried about Billie's expansion into retail and took steps with retailers with the hope of delaying or blocking Billie's expansion. [redacted]

55. Nevertheless, Billie was close to completing negotiations to expand into retail before the Proposed Acquisition abruptly halted its talks. [redacted]

56. [redacted]

57. [redacted] If Billie were to resume those negotiations, there is no reason to doubt that Billie would successfully conclude its negotiations to expand into brick-and-mortar retail stores. [redacted] Regardless of the Proposed Acquisition, Billie will successfully expand into brick and mortar retail.

58. If Billie expands into brick-and-mortar retail, it will do so at P&G's (and others') expense. Regardless of which retailer or retailers agree to carry Billie, Billie is likely to take significant sales and shelf space from P&G. [redacted]

59. P&G's senior grooming executives recognize the heightened competition that would follow Billie's expansion into brick-and-mortar retail. They viewed preventing Billie's retail expansion—in a posture where Billie was a competitor to P&G—as a primary motivation for pursuing the Proposed Acquisition.

60. In mid-2019, P&G Senior Vice President of Grooming provided a list of ways in which P&G would "create value from this [the purchase of Billie]." He included on his list the "reduction of the competitive threat." P&G's CEO of Grooming responded to the list: "The big one is removal of the competitive threat." A P&G analyst observed that the proposed transaction would remove a significant disruptor from the market: "This is big news!"

61. [redacted]

IX. LACK OF COUNTERVAILING FACTORS

62. Respondents cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Acquisition.

63. Operating a successful DTC business requires a product or service that is delivering an unmet need in a category. Among other things, Billie enjoyed a first-mover advantage that led to success in the DTC channel, which, in turn, led to interest from brick-and-mortar retailers that a new entrant could not easily replicate. Billie identified and exploited a previously unsatisfied consumer need for a mid-tier women's system razor appealing to Generation Z and Millennial women. Billie earned its loyal customer base and reputation through its marketing campaigns against P&G and other incumbents' practice of charging a pink tax, among other things.

64. In the words of one of Billie's co-founders: "it's harder to enter into the market as a second mover." Any new entrant will find it difficult to secure a sufficient return on investment because Billie already secured the most readily available DTC online customers. Attracting new online customers will now require higher advertising spend. A new entrant is unlikely to be able to enter through retailers because retailers are typically not interested in carrying a razor supplier that has not previously shown an ability to secure sales online. A new entrant is also unlikely to be able to enter as an online DTC brand to pave a path to retailers as did Harry's and Billie because of the high cost of online advertising and Billie's first-mover advantage.

65. In addition, the costs of online advertising are increasing significantly year over year. Any new DTC entrant would face higher costs than Billie did. These growing costs are a stronger entry barrier than Billie faced.

66. The failure of current "second movers" to replicate Billie's significance in the woman's razor space confirms that successful new entry or repositioning is unlikely. No DTC company has been able to replicate Billie's online success to date. Established razor manufacturers Harry's and P&G followed Billie's successful online launch with launches of women's system razors at similar price points (Flamingo and Joy, respectively). Despite backing from established razor companies and access to mass retailers, these products have lagged behind

Billie in market share and sales. The space is now crowded, further impeding entry or repositioning in response to the anticompetitive effect of the acquisition.

67. Respondents cannot demonstrate cognizable and merger-specific efficiencies that would be sufficient to rebut the presumption and evidence of the Proposed Acquisition's likely anticompetitive effects.

68. Respondents also cannot demonstrate that Billie's business will fail and that its assets will exit the market absent the proposed acquisition.

X. VIOLATION

Count I – Illegal Agreement

69. The allegations of Paragraphs 1 through 68 above are incorporated by reference as though fully set forth.

70. The Merger Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

Count II – Illegal Acquisition

71. The allegations of Paragraphs 1 through 70 above are incorporated by reference as though fully set forth.

72. The Merger, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the twenty-second day of June, 2021, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.2l(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.3l(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended,

the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as P&G and Billie were offering and planning to offer prior to the Merger.

2. A prohibition against any transaction between P&G and Billie that combines their businesses in the relevant markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, P&G and Billie provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Billie as a viable, independent competitor in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this eighth day of December, 2020.

By the Commission, Commissioner Wilson dissenting.

April J. Tabor
Acting Secretary

SEAL:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
DaVita Inc.,	)	**DECISION AND ORDER**
a corporation, and	)	**Docket No. C-**
Total Renal Care, Inc.,	)	
a corporation.	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Total Renal Care, Inc., a wholly owned subsidiary of Respondent DaVita Inc. ("Respondents"), of certain assets comprising dialysis clinics owned and operated by the University of Utah. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly

considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent DaVita Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 2000 16th Street, Denver, Colorado 80202.

2. Respondent Total Renal Care, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of California, with its executive offices and principal place of business located at 601 Hawaii Street, Segundo, California 90245.

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3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "DaVita" or "Respondent" means DaVita Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Total Renal Care, Inc., partnerships, divisions, groups, and affiliates controlled by DaVita Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Total Renal Care" or "Respondent" means Total Renal Care, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Total Renal Care, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "University of Utah" means the public research University of the State of Utah, with its office and principal place of business located at 201 Presidents Circle, Salt Lake City, Utah 84112-9018.

D. "Respondents" means both DaVita and Total Renal Care.

E. "Commission" means the Federal Trade Commission.

F. "Acquirer" means: (1) Sanderling or (2) any other Person that acquires the Divestiture Clinic Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in the Asset Purchase Agreement dated September 24, 2021, between Total Renal Care, Inc., a corporation owned by DaVita Inc., and the University of Utah.

H. "Acquisition Date" means the date the Acquisition is consummated.

I. "Business Information" means books, records, data, and information, wherever located and however stored, including electronic medical records, documents, written information, graphic materials, and data and information in electronic format. Business Information includes records and information relating to sales, marketing, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, research and development, registrations, licenses, permits (to the extent transferable), and operations. For clarity, Business Information includes rights and control of any owner of a Divestiture Clinic over information and material provided to any other Person.

J. "Clinic" means a facility that provides outpatient hemodialysis or peritoneal dialysis services to patients suffering from kidney disease.

K. "Clinic Physician Contract" means all agreements to provide the services of a Physician to a Clinic, regardless of whether any of the agreements are with a Physician or with a medical group, including, agreements for the services of a medical director for the Clinic and "joinder" agreements with Physicians in the same medical practice as a medical director of the Clinic.

L. "Confidential Business Information" means all Business Information not in the public domain that is related to or used in connection with the Divestiture Clinic Assets or the Dialysis Business of any Divestiture Clinic, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

M. "Consent" means any approval, consent, ratification, waiver, or other authorization.

N. "Contract" means an agreement, contract, mutual understanding, arrangement, license agreement, lease, consensual obligation, commitment, promise and undertaking (whether written or oral and whether express or implied), whether or not legally binding.

O. "Dialysis Business" means all activities relating to the business of a Clinic, including:

1. Attracting patients to such Clinic for dialysis services;

2. Providing dialysis services to patients of such Clinic, and dealing with their physicians, including, services relating to hemodialysis and peritoneal dialysis;

3. Providing medical products to patients of such Clinic;

4. Maintaining the equipment on the premises of such Clinic, including, the equipment used in providing dialysis services to patients (which machines shall be delivered to the Acquirer in a condition that meets or exceeds all current operational, functional, and productive capabilities required to perform dialysis);

5. Purchasing supplies and equipment for such Clinic;

6. Negotiating leases for the premises of such Clinic;

7. Providing counseling and support services to patients receiving products or services from such Clinic;

8. Contracting for the services of medical directors for such Clinic;

9. Dealing with Payors, including, negotiating contracts with such Payors and submitting claims to such Payors; and

10. Obtaining or maintaining Governmental Permits relating to such Clinic or otherwise dealing with government entities that regulate operations of the Clinic.

P. "Direct Cost" means a cost not to exceed the actual cost of labor, materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the then-current average hourly wage rate for the employee providing such labor.

Q. "Divestiture Agreement" means

1. Asset Purchase Agreement by and between Sanderling and Total Renal Care, dated September 24, 2021, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Order as Nonpublic Appendix I; or

2. Any other agreement between a Respondent or the Divestiture Trustee and an Acquirer to purchase the Divestiture Clinic Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

R. "Divestiture Clinic" means any one, or all, of the following:

1. University of Utah's Provo, UT Clinic, located at 1675 N Freedom Boulevard, Suite 15, Provo, Utah, 84604;

2. University of Utah's Payson, UT Clinic, located at 15 S 1000 E, Suite 50, Payson, Utah, 84651; and

3. University of Utah's American Fork, UT Clinic, located at 1159 E 200 N, Suite 150, American Fork, Utah, 84003.

S. "Divestiture Clinic Assets" means the rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible of every kind and description, wherever located, used in or relating to the Dialysis Business of each Divestiture Clinic, other than the Excluded Assets, including:

1. All rights under the Clinic's Physician Contracts;

2. All rights to all of the leasehold interest in the real property at which the Divestiture Clinic is located and the building and improvements thereon (including rights in any related parking facility or lot);

3. At least a three-week supply of all general medical products regularly used in the conduct of the Dialysis Business at the Divestiture Clinic that are intended for one-time or temporary use (*e.g.*, gloves, needles, paper products, syringes, and wipes) and any other medical supplies, including dialysis supplies and pharmaceuticals including erythropoietin;

4. At least a three-week supply of janitorial supplies, including such supplies as are required to prevent exposure to potentially infectious materials;

5. All Fixtures and Equipment;

6. All computers and computer equipment, printers, software and databases, routers, servers, switches and time clocks and documentation relating to any of the foregoing used or held for use in the operation of the Dialysis Business of each of the Divestiture Clinics (all cabling within each facility shall remain in place), which shall also include access to any computer databases or patient information connected or related to each Divestiture Clinic held outside the respective Divestiture Clinic;

7. All Intellectual Property;

8. All Business Information;

9. Respondents' Medicare and Medicaid provider numbers, to the extent transferable;

10. All permits and licenses, to the extent transferable; and

11. Any other assets that are used in, or necessary for, the Dialysis Business of a Divestiture Clinic.

Provided, however, that "Divestiture Clinic Assets" do not include Excluded Assets.

T. "Divestiture Clinic Employee" means any full-time, part-time, or contract individual employed in the Dialysis Business of the Divestiture Clinic, as of September 1, 2020.

U. "Divestiture Date" means the date on which Respondents (or the Divestiture Trustee) close on a transaction to divest the Divestiture Clinic Assets.

V. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

W. "Employee Information" means for each Divestiture Clinic Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

X. "Excluded Assets" means those assets listed on Appendix II.

Y. "Fixtures and Equipment" means all furniture, fixtures, furnishings, machinery (including dialysis machines), equipment, supplies and other tangible personal property used or held

for use in the operation of the Dialysis Business of each of the Divestiture Clinics respectively, or if leased, the leasehold interest therein.

Z. "Governmental Permit" means all Consents, licenses, permits, approvals, registrations, certificates, rights, or other authorizations from any governmental entity necessary to effect the complete transfer and divestiture of the Divestiture Clinic Assets to the Acquirer and for such Acquirer to operate the Divestiture Clinic.

AA. "Intellectual Property" means intellectual property of any kind including patents, patent applications, mask works, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, written and unwritten know-how, trade secrets, and proprietary information.

BB. "License" means a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights.

CC. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

DD. "Orders" means this Order and the Order to Maintain Assets entered in this action.

EE. "Payor" means any Person that administers, pays, or insures health or medical expenses on behalf of beneficiaries or recipients including the following: government entities (*e.g.*, Medicare or Medicaid), health insurance companies; preferred provider organizations; point of service organizations; prepaid hospital, medical, or other health service plans; healthcare maintenance organizations; employers or other persons providing or administering self-insured health benefits programs; and patients who purchase medical goods or services for themselves.

FF. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, or other entity or a governmental body.

GG. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

HH. "Policies and Procedures" means the dialysis policies and procedures manual, whether in hard copy or electronic copy, that have been in effect at the Divestiture Clinic.

II. "Real Property" means the real property on which, or in which, any Divestiture Clinic is located, including real property used for parking and for other functions related to the Divestiture Clinic.

JJ. "Sanderling" means (1) Sanderling Renal Services-USA LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, (2) SRS-Utah, LLC, a limited liability company organized, existing and doing business under the laws of the State of Delaware with its executive offices and principal place of business located at 511 Union Street, #1800, Nashville, Tennessee 37219, and (3) any Person controlled by or under common control of Sanderling Renal Services-USA LLC or SRS-Utah, LLC.

KK. "Transition Assistance" means technical services, personnel, assistance, training, and other logistical, administrative, and other transitional support as required by the Acquirer to facilitate the transfer of the Divestiture Clinic Assets to the Acquirer, including training, personnel, and support related to: audits, finance and accounting, accounts receivable, accounts payable, employee benefits, payroll, pensions, human resources, general medical products supply, purchasing, quality control, transfer of information technology and related systems, maintenance and repair of facilities and Fixtures and Equipment, use of any name or brand used in the Dialysis Business of the respective Divestiture Clinic for transitional purposes, Governmental Permits, regulatory compliance, sales and marketing, patient services, and supply chain management and patient transfer logistics.

LL. "University of Utah Medical Protocols" means medical protocols promulgated by the University of Utah, whether in hard copy or electronic copy, that are or have been in effect at a Divestiture Clinic, *provided, however*, "University of Utah Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by the University of Utah.

II. Divestiture

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall divest the Divestiture Clinic Assets, absolutely and in good faith, as an ongoing business, to Sanderling.

Provided, however, that, if within 12 months after the date the Commission issues this Order, the Commission determines, in consultation with the Acquirer and the Monitor (if one has been appointed), the Acquirer needs one or more of the Excluded Assets to operate the Dialysis Business of the Divestiture Clinics in a manner that achieves the purpose of this Order, Respondents shall divest or license, absolutely and in good faith, such needed Excluded Assets to the Acquirer.

B. If Respondents have divested the Divestiture Clinic Assets to Sanderling prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. Sanderling is not acceptable as the acquirer of the Divestiture Clinic Assets, then Respondents shall immediately rescind the Divestiture Agreement, and shall divest the Divestiture Clinic Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture of the Divestiture Clinic Assets to Sanderling was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Divestiture Clinic Assets as the Commission may determine are necessary to satisfy the requirements of this Order.

C. Respondents shall assist the Acquirer to conduct a due diligence investigation of the Divestiture Clinic Assets that the Acquirer seeks to purchase, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording the Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, and Business Information, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

D. Respondents shall grant to Acquirer, absolutely and in good faith, a royalty-free, fully paid-up, perpetual, irrevocable, transferable, and sub-licensable license and such tangible embodiments of the licensed rights (including physical and electronic copies) as may be necessary or appropriate to enable the licensee to use the rights, for the use, without any limitation, of all Policies and Procedures related to the Divestiture Clinics, including the University of Utah Medical Protocols for the Divestiture Clinics.

E. Respondents shall not consummate the Acquisition until they have obtained for all the Divestiture Clinics:

1. All approvals for the assignment to the Acquirer of the rights, title, and interest to each lease for Real Property of each Divestiture Clinic;

2. All approvals for the assignment to the Acquirer of the Clinic Physician Contracts related to each Divestiture Clinic; and

3. All Governmental Permits.

F. Respondents shall:

1. Place no restrictions on the use by the Acquirer of any of the Divestiture Clinic Assets to be divested to such Acquirer, or interfere with or otherwise attempt to interfere with any Acquirer's use of any of the Divestiture Clinic Assets to be divested to such Acquirer, including seeking or requesting the imposition of governmental restrictions on the Acquirer's business operations relating to the Divestiture Clinic Assets.

2. Assign to the Acquirer all of the Clinic Physician Contracts related to each Divestiture Clinic.

   Provided, however, that (i) if the Acquirer enters into a Clinic Physician Contract for a Divestiture Clinic before such Clinics are divested pursuant to Paragraph II.A of this Order, and (ii) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondents shall not be required to make the assignment for such Clinics as required by Section II.

3. With respect to all contracts included in the Divestiture Clinic Assets other than Clinic Physician Contracts, at the Acquirer's option and on the Divestiture Date of each Divestiture Clinic:

   a. if such contract can be assigned without third party approval, assign Respondents' rights under the contract to the Acquirer; and

   b. if such contract can be assigned to the Acquirer only with third party approval, assist and cooperate with the Acquirer in obtaining such third party approval and in assigning the contract to the Acquirer, or in obtaining a new contract.

G. For 2 years following the Divestiture Date, Respondents shall not solicit the business of any patient who received any goods or services from the Divestiture Clinics between September 1, 2020, and the Divestiture Date.

Provided, however, Respondents may (i) make general advertisements for the business of such patients including in newspapers, trade publications, websites, or other media not targeted specifically at such patients, and (ii) provide advertising and promotions directly to any patient that initiates discussions with, or makes a request to, any employee of Respondents.

III. Divestiture Agreement

IT IS FURTHERED ORDERED that:

A. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of a Divestiture Agreement shall constitute a violation of this Order; *provided, however*, that no Divestiture Agreement shall limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transition Assistance

IT IS FURTHER ORDERED that:

A. At the option of the Acquirer, Respondents shall provide the Acquirer with Transition Assistance sufficient to (1) efficiently transfer the Divestiture Clinic Assets and the related Dialysis Business to the Acquirer, and (2) assist the Acquirer in operating the Divestiture Clinics in all material respects in the manner in which they were operated prior to the Acquisition.

B. Respondents shall provide such Transition Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at Direct Cost; and

3. For a period sufficient to meet the requirements of Section IV, which shall be, at the option of the Acquirer, the later of (1) up to one year after the Divestiture Date, or (2) the date the Acquirer has its own Centers for Medicare & Medicaid Service billing numbers for each of the Divestiture Clinic locations, unless the Acquirer terminates the provision of such Transition Assistance at an earlier date. *Provided however,* that upon the Acquirer's request, Respondents must file with the Commission a written request to extend the time period.

C. Respondents shall allow the Acquirer to terminate, in whole or part, any Transition Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

D. Respondents shall not cease providing Transition Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents' breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 6 months after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer of the Divestiture Clinic Assets to evaluate independently and offer employment to the Divestiture Clinic Employees.

B. Until 90 days after the Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to the Acquirer a list of all Divestiture Clinic Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to meet outside the presence or hearing of any employee or agent of any Respondent with any of the Divestiture Clinic Employees, and to make offers of employment to any of the Divestiture Clinic Employees;

3. Remove any impediments within the control of Respondents that may deter Divestiture Clinic Employees from accepting employment with the Acquirer, including removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Divestiture Clinic Employee who receives an offer of employment from the Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Divestiture Clinic Employees compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits while they are employed by Respondents;

5. Provide reasonable financial incentives for Divestiture Clinic Employees to

continue in their positions, and as may be necessary, to facilitate the employment of such Divestiture Clinic Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Divestiture Clinic Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Divestiture Clinic Employee by the Acquirer.

C. Respondents shall not, for a period of 180 days following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Divestiture Clinic Employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Divestiture Clinic Employees; or

3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section V.

D. With respect to each Physician who has provided services to a Divestiture Clinic pursuant to any of the Clinic Physician Contracts in effect at any time during the 4 months preceding the Divestiture Date of the Divestiture Clinic ("Contract Physician"), Respondents shall not, for a period of 180 days, offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to a Divestiture Clinic acquired by the Acquirer, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer any information related to the operation of a Divestiture Clinic.

E. Respondents:

1. Shall not enforce, directly or indirectly, any non-compete provision or agreement, and not enter into any new non-compete provision or agreement, with any Physician employed by the University of Utah, that limit the Physician's right to be a medical director at any Clinic owned or operated by a Person other than the Respondents within the State of Utah; *provided, however*, Respondents may require, directly or indirectly, any University of Utah nephrologist serving under a Respondent's Clinic Physician Contract at a dialysis clinic operated by Respondents to abide by a non-compete provision or agreement effective solely to restrict such nephrologist from simultaneously being a medical director at a clinic

not operated by Respondents; and

2. Shall give each Physician affected by Paragraph V.E.1 written notice of Paragraph V.E.1. Such notice shall include the contents of Paragraph V.E.1 and a description of its terms, including notice that Respondents cannot enforce any non-compete that prevents the Physician from serving as a medical director, at any time and without penalty, at a Clinic owned or operated by a Person other than the Respondents except as provided above, in Paragraph V.E.1.

F. Respondents shall not enter into any agreement with the Acquirer that restricts the Acquirer from soliciting Respondents' employees for employment at the Acquirer.

VI. Asset Maintenance

IT IS FURTHER ORDERED that until the Divestiture Clinic Assets have been fully transferred to the Acquirer, Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Divestiture Clinic Assets and Divestiture Clinics are operated and maintained in the ordinary course of business consistent with past practices, and shall:

A. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, to minimize any risk of loss of competitive potential of the Divestiture Clinic Assets and Divestiture Clinics, to operate the Divestiture Clinic Assets and Divestiture Clinics in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Clinic Assets and Divestiture Clinics, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Divestiture Clinic Assets and Divestiture Clinics (other than in the manner prescribed in the Orders), nor take any action that lessens the full economic viability, marketability, or competitiveness of the Divestiture Clinic Assets and Divestiture Clinics; and

B. Not terminate the Dialysis Business of the Divestiture Clinics, and shall conduct or cause to be conducted the Dialysis Business of the Divestiture Clinics in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, marketability, and competitiveness of the Divestiture Clinic Assets and Divestiture Clinics, and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Divestiture Clinics.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Divestiture Clinic Assets and consistent with the purposes of the Orders.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall (x) not disclose (including as to Respondents' employees), and (y) not use, for any reason or purpose, any Confidential Business Information received or maintained by Respondents, *provided, however,* that Respondents may disclose or use such Confidential Business Information in the course of:

1. Performing their obligations or as permitted under the Orders or any Divestiture Agreement; or

2. Complying with financial reporting requirements, historical record-keeping for audit purposes, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Divestiture Clinic Assets or Divestiture Clinics, or as required by law, rule or regulation.

B. Respondents shall only disclose Confidential Business Information to an employee or any other Person if disclosure is permitted in Paragraph VII.A and the employee or other Person has signed an agreement to maintain the confidentiality of such information and not violate the disclosure requirements of this Order.

C. Respondents shall enforce the terms of Section VII and take necessary actions to ensure that their employees or other Persons comply with its terms, including implementing access and data controls, training of employees, and taking other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Richard Shermer of R. Shermer & Co. as the Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of Section VIII or the Section relating to the Monitor in the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies

from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders on a schedule set by Commission staff and at any other time requested by Commission staff; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI, and file a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission shall select the substitute Monitor, subject to the consent of the Respondents.

Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B; or (b) receives Commission approval.

G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Clinic Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If

Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission,

   Provided, however, the Commission may extend the divestiture period only 2 times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under Section IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to Acquirers that receive the prior approval of the Commission as required by this Order,

   Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

   Provided further, however, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Clinic Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Section IX, and who will have the same authority and responsibilities of the original Divestiture Trustee pursuant to Section IX.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Approval

IT IS FURTHERED ORDERED that Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without the prior approval of the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Clinic, within the 6 months prior to the date of such proposed acquisition, within the State of Utah;

B. Acquire any ownership interest in any Person that owns any interest in or operates a Clinic within the State of Utah, *provided, however*, Respondents are not required to obtain the prior approval of the Commission if the only Clinic ownership interest is a Clinic owned or operated by Respondents within the State of Utah; and

C. Enter into any contract for Respondents to participate in the management or Dialysis Business of a Clinic located in within the State of Utah;

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction, opening, or participation in the management of new facilities.

Provided further, however, that if Respondents propose to acquire any ownership interest in any Person that owns any interest in or operates Clinics within both the State of Utah and other states, including if such an acquisition requires a Hart-Scott-Rodino premerger notification, this Section applies only to the Clinics within the State of Utah.

XI. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and each Divestiture Date no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the relevant Divestiture Date.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

   a. Interim compliance reports 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections II, IV, and VI;

   b. Annual compliance reports one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and

   c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures

Respondents have implemented and plan to implement to comply with each paragraph of the Orders.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov*; provided, however*, that Respondents need only file electronic copies of the interim reports required by Paragraph XI.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XII. Change in Respondent

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of DaVita Inc. or Total Renal Care Inc., respectively;

B. The proposed acquisition, merger, or consolidation of DaVita Inc. or Total Renal Care Inc., respectively; or

C. Any other change in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XIII. Access

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts,

correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XIV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure the Acquirer can operate the Dialysis Business related to each of the Divestiture Clinics and Divestiture Clinic Assets at least equivalent in all material respects to the manner in which the Dialysis Business was operated prior to the Acquisition.

XV. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

April J. Tabor
Secretary

SEAL:

ISSUED:

NONPUBLIC APPENDIX I

Divestiture Agreements

APPENDIX II

Excluded Assets

1. All cash, cash equivalents, and short term investments of cash, securities and other instruments;

2. Accounts receivable and rights to bill (including all proceeds thereof) for all services delivered or performed and products provided in connection the business of a Clinic before a Clinic is divested to an Acquirer or which remain outstanding and unpaid before a Clinic is divested to an Acquirer;

3. General ledgers and accounting records of University of Utah;

4. Income tax refunds and tax deposits due to Respondents;

5. Unbilled costs and fees, recoupments, claims, demands, deposits, rebates, and bad debt recovery claims against any Payor including Medicare, arising before a Clinic is divested to an Acquirer;

6. Rights to the names "DaVita" and "University of Utah" and any variation of those names (unless otherwise licensed to an Acquirer pursuant to the Order) and other copyrights, trademarks, trade names, service marks, and logos relating to the "DaVita" and "University of Utah" names;

7. Insurance policies and all benefits and claims thereunder;

8. Rights in connection with and assets of University Health Plans;

9. Minute books, personnel records, (other than governing body minute books of a Clinic), tax returns, and other corporate books and records;

10. Any inter-company balances due to or from Respondents or its affiliates;

11. All employee benefits plans;

12. All writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the operation of a Clinic;

13. All DaVita or University of Utah software;
14. DaVita and University of Utah e-mail addresses, websites, and domain names;

15. Office equipment and furniture that (a) is not, in the ordinary course of business, physically located at any University of Utah Clinic, (b) is shared with Clinics other than the Divestiture Clinics, and (c) is not necessary to the operation of a Divestiture Clinics;

16. All assets of (i) University Hospitals and Clinics; and (ii) the evaluation and maintenance clinic, primary care provider, and hospital assets in the University of Utah's hospital building, including computers and furniture;

17. Licensed intangible property;

18. University of Utah Policies and Procedures, including medical protocols, subject to the licensing provisions in this Order;

19. Strategic planning documents that (a) related to the operation of a Clinic other than a Divestiture Clinic and (b) are not located on the premises of a Divestiture Clinic;

20. Telephone numbers that cannot be transferred;

21. Utility accounts for telephone, television, waste disposal, gas, and electrical services;

22. Rights under agreements with suppliers that do not relate exclusively to any Divestiture Clinic, that are not assignable even if the University and Respondent approve such assignment, or for which Acquirer has not elected to take assignment;

23. All employer numbers, national provider identification numbers, payer identification numbers, payer licenses, business licenses, or fire clearances issued to the University for any University Clinic, except for the University's Medicare and Medicaid provider numbers and CLIA Certificates;

24. Acute dialysis services agreements;

25. Servers, domains, data storage services, software licenses, and vehicles belonging to the University that do not relate exclusively to any Divestiture Clinic;

26. Business operations and other services provided by the University;

27. Purchase orders placed by the University; and

28. Computer hardware, telecommunications systems and equipment, and information systems equipment that Acquirer has elected not to take.

29. Assets of the University that are not transferring to DaVita under the Asset Purchase Agreement between Total Renal Care, Inc., a corporation owned by DaVita, Inc. and the University of Utah.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
DTE Energy Company,	)	
a corporation,	)	**Docket No. C-4691**
Enbridge Inc.,	)	
a corporation, and	)	
NEXUS Gas Transmission LLC,	)	
a limited liability corporation.	)	

ORDER REOPENING AND MODIFYING ORDER

DTE Energy Company ("DTE") submitted a petition to the Commission on September 21, 2021, to request that the Decision and Order ("Order") in this matter be set aside as to it, and continue as to its successor, DT Midstream, Inc. DTE bases its request on the fact that it spun off its non-utility natural gas pipeline, storage, and gathering business, including its ownership interest in Respondent NEXUS Gas Transmission, LLC ("Nexus"), to DT Midstream. DTE no longer has any natural gas pipeline transportation assets or business in the area addressed by the Order, i.e., Lucas, Ottawa, and Wood counties in northwest Ohio ("Relevant Area"). DT Midstream, a standalone publicly traded company, acknowledges itself as successor of DTE for purposes of complying with the Order.

DTE's petition was available for public comment for thirty days until November 5, 2021, and no public comments were filed. For the reasons stated below, the Commission has determined to grant DTE's petition and reopen and modify the Order as requested.

BACKGROUND

The Commission issued the Order on November 21, 2019, to remedy the anticompetitive effects resulting from Nexus's acquisition of Generation Pipeline LLC ("Generation") from North Coast Gas Transmission LLC ("NCGT") and its joint owners. DTE held a 50% ownership interest in Nexus at the time of the transaction. The Commission did not find the transaction to

substantially lessen competition in natural gas pipeline transportation. However, the Commission found that a non-compete provision in the parties' purchase agreement unreasonably restrained trade by prohibiting NCGT from competing for new natural gas pipeline transportation business in the Relevant Area three years post-close.

Nexus, along with its parents at the time, DTE and Enbridge, were named as Respondents to the Order. The Order addressed the concern relating to the non-compete by requiring the parties to remove the provision from the purchase agreement, and the parties to the agreement executed an amendment that eliminated the non-compete prior to closing of Nexus's acquisition of Generation. The Order also prohibits Respondents from entering into, enforcing, or soliciting any agreements with a "Pipeline Competitor" that restrict competition for natural gas pipeline transportation in the Relevant Area, absent prior Commission approval. The Order defines "Pipeline Competitor" as a firm that owns, operates, or markets capacity on a natural gas pipeline in the Relevant Area. The Order further requires Respondents to provide prior notice of intent to acquire an interest in NCGT's pipeline or another natural gas transportation pipeline in the Relevant Area, and to file annual compliance reports. The Order terminates on November 21, 2029.

STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in Section 5(b) of the Federal Trade Commission Act and Section 2.51(b) of the Commission's Rules of Practice and Procedure.[1] Section 5(b) and Commission Rule 2.51(b) provide that the Commission must reopen an order to consider whether it should be modified if the respondent makes either "a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside" or if the public interest so requires.[2] A satisfactory showing sufficient to require reopening is made when a request demonstrates in detail the nature of the changed conditions and the reasons why these changes eliminate the need for the order or make continued application of it inequitable or harmful to competition, or provides specific reasons why the public interest would be served by the requested modification.[3] The requester's showing must be supported by evidence that is credible and reliable. Commission Rule 2.51(b) requires, for example, affidavits setting forth admissible facts, and that all information and material that the requester would like the Commission to consider be contained in the request at the time of filing.[4] The requester's burden is not a light one given the broad public interest in the finality of Commission orders.[5]

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[1] 15 USC §45(b); 16 C.F.R. 2.51(b).
[2] *Id.*
[3] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the Order. Reopening may occur even where the petition itself does not plead facts requiring modification.").
[4] 16 C.F.R. § 2.51 (b).
[5] *See, e.g., Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

DTE'S PETITION

DTE's petition establishes that DTE experienced a significant change in circumstances after the Order was issued. DTE exited the natural gas pipeline transportation business in the Relevant Area pursuant to its spin-off of DT Midstream on July 1, 2021. Therefore, DTE no longer holds an ownership interest in Respondent Nexus or in Generation, nor does it hold an ownership interest in DT Midstream.[6] DTE's Senior Vice President and Chief Legal Officer, who has been responsible for overseeing DTE's compliance with the Order, affirms in an affidavit that DTE is no longer a competitor for natural gas pipeline transportation in the Relevant Area and has no plans to re-enter the market that it has recently exited.[7]

As a result of the spin-off of DT Midstream, DTE's petition explains that requiring DTE to continue to comply with the Order's obligations is not needed to protect the public interest.[8] The potential harm that the Order seeks to prevent is related to agreements that may restrict competition for natural gas pipeline transportation in the Relevant Area. DTE, however, no longer has any natural gas pipeline transportation assets or business in the Relevant Area; DT Midstream has assumed this business. DT Midstream acknowledges and agrees to assume the Order's obligations as DTE's successor.[9]

THE ORDER WILL BE REOPENED AND MODIFIED

DTE has made the requisite showing that changed conditions and the public interest support setting aside the Order as to DTE. DTE's spin-off of its non-utility natural gas assets, including its ownership interest in Respondent Nexus, to DT Midstream is a material change of fact. DT Midstream is successor to DTE under the Order and is in the best position to fulfill the continuing obligations of the Order. Further, DT Midstream acknowledges and agrees to assume DTE's obligations under the Order. DTE has no ownership interest in DT Midstream or in any natural gas pipeline transportation assets or business in the Relevant Area, and as such, does not have the ability or incentive to interfere with the remedial purposes of the Order. Neither the interests of the Commission nor the public interest requires DTE to remain subject to the Order. Setting aside the Order as to DTE, but not as to DT Midstream, is consistent with past Commission rulings on similar petitions.[10]

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[6] DTE Petition at 5.
[7] DTE Petition at Exhibit 4; DTE Petition at 5.
[8] DTE Petition at 8.
[9] DTE Petition at Exhibit 5.
[10] *See, e.g.,* Pfizer Inc., et al., Docket No. C-4267, Order Reopening and Modifying Order (Apr. 6, 2016); AEA Investors 2006 Fund L.P., et al., Docket No. C-4297, Order Reopening and Modifying Order (Apr. 30, 2013); Duke Energy Corp., et al., Docket No. C-3932, Order Reopening and Modifying Order (Sept. 26, 2007); and Entergy Corporation, et al., Docket No. C-3998, Order Reopening and Modifying Order (July 8, 2005).

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4691 be, and hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, set aside as to DTE Energy Company but not as to DTE Energy Company's successor, DT Midstream, Inc.

By the Commission.

April J. Tabor
Secretary

SEAL
ISSUED: November 23, 2021

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

Nvidia Corporation,
a corporation,

Softbank Group Corporation,
a corporation,

and

Arm, Ltd.,
a corporation.

Docket No. 9404

REDACTED-PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by the FTC Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents Nvidia Corporation ("Nvidia"), Softbank Group Corporation ("Softbank"), and Arm Ltd. ("Arm") have executed a merger agreement in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

NATURE OF THE CASE

1. Nvidia is one of the world's largest and most valuable computing companies. Nvidia proposes to acquire Arm, the world's largest and most significant licensor of designs and architectures for computer processors, in a deal valued at more than $40 billion (the "Proposed Acquisition"). If consummated, the Proposed Acquisition would allow the combined firm to use its control of Arm to harm Nvidia's rivals in ways that substantially lessen competition—including innovation, price, and feature competition—in multiple markets.

2. Arm develops and licenses central processing unit ("CPU") designs and architectures ("Arm Processor Technology"). Arm Processor Technology consists of specific designs for CPUs that Arm develops and licenses to others and a CPU instruction set architecture that Arm licenses to others who want to develop their own specific CPU designs. As part of the Arm Processor Technology business, Arm also provides customers with corresponding services, support, and ancillary products. Through the combination of its advanced technology and neutral licensing business model, Arm has become a de facto industry standard for CPU processor technology contained in billions of computer chips worldwide. According to Nvidia's CEO, Arm is "the world's most popular computing platform."

3. Arm Processor Technology is at the foundation of many innovative products of our modern digital age, including nearly every smartphone on the market, advanced driver assistance features in recent and upcoming cars, web servers that can provide significantly better cost performance over the most comparable non-Arm servers, and many other examples. In these products, Arm Processor Technology is a critical input. The wide deployment of Arm's Processor Technology has fostered a vibrant ecosystem of software and hardware developers, software, and devices.

4. Arm does not make or sell computer chips ("chips") or chip-based devices. Rather, Arm licenses Arm Processor Technology, also referred to in the industry as CPU intellectual property or "IP," using an industry-described neutral, open licensing approach. Arm is often dubbed the "Switzerland" of the semiconductor industry for this approach. Arm partners with its licensees to promote and support Arm's technologies, even as those partners compete with each other to sell chips and devices relying on Arm Processor Technology in downstream markets (the "Downstream Markets"). Arm's partnerships with its licensees regularly result in Arm receiving sensitive business information from its licensees. The fact that Arm does not itself compete in the Downstream Markets gives its partners a high level of trust in Arm as a critical input supplier that will not exploit its control over those inputs to gain a competitive advantage against its partners.

5. Unlike Arm, Nvidia supplies and markets finished chips and devices. Nvidia is best known as the dominant supplier of standalone graphics processing units ("GPUs") for personal computers ("PCs") and datacenters, which are computing facilities with large numbers of server computers. GPUs are widely used for artificial intelligence ("AI") processing and graphics processing, among other computational tasks.

6. For years, Nvidia has licensed Arm's Processor Technology to create a wide range of computing products, many of which compete with products of other Arm licensees. For

example, Nvidia and its competitors alike use Arm Processor Technology to create chips for advanced driver assistance systems for passenger cars. Nvidia and other companies also develop additional categories of Arm-based products, including advanced networking products and datacenter CPUs, among other products. While Nvidia's designs for standalone GPUs do not incorporate Arm Processor Technology, Nvidia integrates or plans to integrate its GPU technology with Arm Processor Technology in certain products, such as its chips for advanced driver assistance systems for passenger cars.

7. The Proposed Acquisition will substantially lessen competition in multiple markets because it will create a combined firm that has both the ability and the incentive to use its control of Arm to diminish competition by undermining Nvidia's rivals.

8. Post-Acquisition, Nvidia will have the ability to disadvantage its rivals through its control of Arm through various mechanisms, including by manipulating levers such as Arm's pricing, the terms and timing of access to Arm's Processor Technology (including withholding or delaying access), Arm's technological developments and features, and Arm's provision of service and support, among other mechanisms.

9. Post-Acquisition, Nvidia will have strong incentives to harm its Arm-reliant rivals. In markets in which Nvidia competes using Arm Processor Technology, the profits on additional sales that Nvidia would earn as a chip supplier are generally higher than the profits that Arm would earn from licensing its Processor Technology to Nvidia's rivals. Here, this relationship gives Nvidia a strong economic incentive to preference winning business for its own downstream products over licensing Arm Processor Technology or providing the same level of support, access, and investment to its own rivals after the Proposed Acquisition.

10. In addition to the harm Nvidia can directly inflict on its rivals, aligning Arm with Nvidia will likely result in further harms due to a critical loss of trust in Arm by its own licensees, and overall investment and innovation in the Arm ecosystem will likely be reduced. Today, for example, Arm's licensees—including Nvidia's rivals—share competitively sensitive information with Arm. Recognizing that Nvidia would be able to misuse this information for Nvidia's own competitive purposes, Nvidia's rivals will be less likely to share competitively sensitive information with Arm if the Proposed Acquisition closes. Innovation and other procompetitive actions that otherwise would have occurred through the open sharing of information with Arm will be chilled.

11. The Proposed Acquisition also will likely further harm innovation because, today, Arm regularly receives innovative ideas from its licensees across the semiconductor industry and pursues new technological developments that it believes will yield the most benefit to its business. But Nvidia would be less likely to dedicate Arm's resources toward otherwise beneficial innovative developments of Arm Processor Technology that would harm Nvidia.

12. These effects are likely to be felt throughout the computing industry. Among the markets affected, the Proposed Acquisition is likely to substantially lessen competition in key emerging and quickly-developing markets for products used in datacenters, including for networking and central processing, and in advanced driver assistance systems that are increasingly used in the automotive industry.

JURISDICTION

13. Respondents Nvidia, Arm, and Softbank are each "corporations" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

14. Respondents are engaged in activities in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. The Proposed Acquisition constitutes a merger subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

RESPONDENTS AND THE PROPOSED ACQUISITION

16. Respondent Nvidia is a publicly-traded Delaware corporation, headquartered in Santa Clara, California, and founded in 1993. Its total revenues in the fiscal year ended January 31, 2021 were $16.68 billion. Nvidia develops and markets microprocessor products and associated software. Nvidia is the leading global supplier of standalone GPUs and has consistently maintained its position as the dominant supplier of such products. Nvidia also develops and markets chips, devices, and associated software for other applications, including advanced networking products, advanced driver assistance systems, datacenter CPUs, and other product lines.

17. Respondent Arm is a corporation, headquartered in Cambridge, United Kingdom, and founded in 1990. Arm's total revenues in 2020 were $1.86 billion. Arm is currently owned by SoftBank, which acquired Arm in 2016. Arm develops semiconductor processor technology, licenses it to chip designers, and provides related service and support. Arm describes itself as [redacted] As of January 2020, Arm had over [redacted] licensees.

18. Respondent Softbank is a corporation, headquartered in Tokyo, Japan, and established in 1986. Softbank owns Arm. Softbank operates as a strategic investment holding company, aiming to invest in "a diverse group of companies with outstanding technologies or business models in their respective fields." As of March 31, 2021, Softbank counted 335 subsidiaries and affiliates among its group companies. Softbank's net sales in fiscal year 2020 were 5,204.4 billion yen (approximately $47 billion). Softbank began exploring the sale of Arm in [redacted] In June 2020, Arm's CEO described the company in an email to a Softbank board member as [redacted]

19. Ultimately, Softbank and affiliated entities entered into a Share Purchase Agreement to sell Arm to Nvidia on September 13, 2020. The deal was valued at $40 billion at signing. Due to increases in the value of Nvidia's stock since then, it is now valued at over $50 billion.

20. Before the merging parties entered into the Share Purchase Agreement, the merging parties and industry analysts recognized that the Proposed Acquisition was likely to face significant antitrust scrutiny. In recognition of this problem, Nvidia agreed to pay Arm's owner, Softbank, a $1.25 billion fee if the transaction terminates after a failure to obtain antitrust approvals.

BACKGROUND

21. This case is about Nvidia's proposed takeover of Arm. Arm Processor Technology is incorporated in billions of chips and devices sold today—including products from Nvidia's competitors as well as Nvidia itself. If the Proposed Acquisition were allowed to proceed, Nvidia would gain control of Arm's Processor Technology, a critical input that currently enables these competitors to compete vigorously with Nvidia. Nvidia will have the ability and incentive to use its control of Arm's Processor Technology to undermine its competitors, reducing competition and ultimately resulting in reduced product quality, reduced innovation, higher prices, and less choice, harming the millions of Americans who benefit from products that incorporate Arm's Processor Technology.

I. Arm and Its Neutral Licensing Model

22. Arm licenses Arm Processor Technology to more than a thousand licensees. These range from innovative startups who have yet to make their first sale to large, established technology companies. Many of Arm's licensees, including Nvidia, are "fabless" semiconductor companies. This means that they design and market computer chips (or products containing chips) but outsource the physical manufacturing of these chips to specialized manufacturers.

23. Arm achieved its status as a foundational technology for so many innovative products because of its neutral licensing business model that fosters trust, collaboration, and engagement between Arm and its licensees. As Arm's longtime chief architect has explained, [redacted]

24. Arm's licensing model is based on upfront license fees and royalties. Arm offers two basic categories of technology licenses: architectural licenses and implementation licenses. Architectural licenses grant holders the right to create their own Arm-based CPU designs using Arm's instruction set architecture ("ISA"). Implementation licenses grant holders the right to use Arm's own specific CPU designs in their products. Arm's business model is based on its current commercial incentives and has contributed substantially to the growth, innovation, and success of Arm and the Arm ecosystem.

25. Arm typically profits when its licensees sell more units. Thus, Arm has an incentive to expand the usage of Arm Processor Technology under its royalty-based model. Arm therefore devotes considerable effort to enabling its licensees to succeed. According to Arm's president, [redacted]

26. Arm actively solicits input from its licensees for enhancing Arm's ISA and implementation designs. Arm also collaborates with licensees on the development of major features. Licensees regularly suggest new features to Arm, expecting that if Arm agrees to implement their suggestion, Arm will incorporate the feature in a manner that permits the new feature's proponent to benefit, while also generally making the improvement available to other licensees. This joint innovation and research and development benefits the computing industry and, ultimately, consumers.

27. Licensees routinely share confidential and commercially sensitive information with Arm when collaborating. Licensees share information such as strategic plans, project timelines and development schedules, manufacturing process plans, use cases, customer requirements, and product bugs or challenges. This type of information sharing depends on trust, enables licensees to bring better products to market faster, and is critical to Arm's success and history of innovation.

28. Arm also collaborates and works with licensees to develop, produce, troubleshoot, and implement the licensees' Arm-based products. For instance, Arm may advise licensees that a particular technical decision is unlikely to succeed, thereby steering the licensee away from a costly error. Arm also helps its licensees by explaining aspects of the Arm architecture and resolving technical difficulties.

29. In tandem with collaborating with licensees on product innovation and development, Arm also dedicates time, effort, and resources to promoting the adoption of Arm-based products in Downstream Markets that include multiple licensees' products. Arm interacts with its licensees' customers to understand their markets, explain Arm's capabilities and benefits, and help sell licensees' products. Arm's actions to promote its licensees' Arm-based products today involve supporting and promoting the products of multiple licensees who themselves are competitors.

II. Computer Processors

30. There are different types of computer processors. According to Nvidia, three of the most important are central processing units ("CPUs"), graphics processing units ("GPUs"), and data processing units ("DPUs"). Nvidia's CEO has described the CPU, GPU, and DPU as "the three most important," "central," "fundamental" technologies in a computer.

31. CPUs are processors that execute the primary computing instructions for electronic computing devices such as laptops, smartphones, datacenter servers, and chips supporting advanced driver assistance features in a passenger vehicle. When one or more CPUs are combined on a single chip with additional circuitry for performing other functions of a computer system, such as memory or co-processors, the resulting chip is sometimes termed a "system-on-a-chip" or "SoC." CPUs may consist of one or more CPU "cores," which are the individual processing units within a CPU chip. Multiple cores may be combined into one multi-core "CPU" chip or SoC. At times, however, the terms "cores" and "CPUs" are used interchangeably in the industry.

32. CPUs are based on an instruction set architecture ("ISA"). CPU ISAs include the Arm ISA, the x86 ISA, the RISC-V ISA, and the MIPS ISA, among others.

33. Software written for use by CPUs based on one ISA is generally not natively compatible with CPUs based on a different ISA. Each ISA has its own ecosystem of associated and natively compatible software, hardware, developers, and users. An ecosystem is generally more attractive if it has more software, hardware, developers, and users for any given computing market.

34. The x86 ISA has predominantly been deployed in CPUs for laptops, desktops, and servers. Intel created the x86 ISA, and Intel and AMD are the only two suppliers of x86 CPUs. Historically, the x86 ISA has not been licensable, and Intel and AMD have designed and marketed their own chips based on the x86 ISA. In 2021, Intel indicated that it planned to make some x86 technology available for license by customers of its chip manufacturing plants under certain circumstances. [redacted] involves limitations, including the apparent requirement to use Intel manufacturing plants and relying on a potentially competing chip supplier, Intel, for a critical input.

35. RISC-V is a free, open-source ISA that researchers at the University of California, Berkeley first developed. RISC-V was released to the public in 2011. Development of the RISC-V ISA is managed by a nonprofit foundation. The RISC-V ISA has predominantly been deployed in less complex applications, such as for low-end, embedded processors that do not run external software applications—for instance, processors found in relatively simple 'Internet of Things' devices like 'smart' doorbells or other 'smart' appliances. Many Arm licensees view the RISC-V technology and software ecosystem as inferior to Arm Processor Technology and the Arm ecosystem for many applications.

36. MIPS is an ISA that MIPS Computer Systems developed and that Wave Computing owns today. The MIPS architecture is declining in relevance and Wave Computing has announced that it will no longer develop MIPS in the future.

37. CPUs based on the Arm ISA are found in billions of chips worldwide, making Arm "the world's most popular computing platform" and [redacted] according to Nvidia. Arm-based CPUs, which are known in particular for their low power consumption, are found in the vast majority of smartphones, tablets, and other low-powered computing devices.

38. Arm-based CPUs also are increasingly found in laptop and desktop personal computers (PCs), and in datacenter servers. For example, in 2020, Apple began switching its entire line of Mac laptops and desktops from Intel x86 CPUs to an Arm-based SoC that Apple designed (called the "M1"). When Apple launched the M1, it emphasized its high performance and low power consumption, describing it as "the world's best CPU performance per watt," enabling significant computing performance increases "all while enabling battery life up to 2x longer than previous-generation Macs." Arm-based CPUs from chip suppliers such as MediaTek and Qualcomm are also deployed in laptops, and [redacted] Similarly, large cloud service providers, such as [redacted] are now deploying or planning to deploy Arm-based CPUs in datacenter servers. Because cloud datacenters often consume large amounts of electricity, the lower power consumption of Arm-based CPUs is seen as particularly attractive.

39. Most of the chip suppliers competing to supply SoCs for high-level automotive advanced driver assistance systems (ADAS) use Arm-based chip designs, including Nvidia. High-Level ADAS systems for passenger vehicles offer computer-assisted driving functions, such as automated lane changing, lane keeping, highway entrance and exit, and collision prevention, as discussed below.

40. Some computing devices also contain one or more GPUs to assist in certain tasks. As the name suggests, GPUs were originally developed to perform specific graphics tasks in applications such as video games. However, because GPUs excel more generally at parallel processing tasks, GPUs are now deployed in many other applications including in datacenters for accelerating tasks like machine learning algorithms (a type of artificial intelligence processing). Nvidia also integrates or plans to integrate its GPUs into other devices, such as its ADAS SoCs. GPUs do not run on their own without a host CPU. Nvidia anticipates GPUs to be central in "modern AI — the next era of computing — with the GPU acting as the brain of computers, robots and self-driving cars that can perceive and understand the world."

41. DPUs or DPU SmartNICs (also referred to as infrastructure processing units ("IPUs")) are an important emerging category of networking devices designed for datacenters and other networked environments. As Nvidia describes it, "The DPU places a 'computer in front of the computer' for each server, delivering separate, secure infrastructure provisioning that is isolated from the server's application domain." More specifically, a DPU is a network interface device that incorporates software-programmable CPU cores for offloading and isolating networking, security, virtualization, and other datacenter support tasks from the server's main (or "host") CPU. By isolating these tasks away from the host CPU, DPUs provide added security and free up the host CPU to focus on running users' desired applications, rather than datacenter infrastructure functions. Nvidia, in its internal documents, refers to DPUs as one of the "three pillars" or the "holy trinity" of computing, along with CPUs and GPUs, and Nvidia believes that eventually every server will incorporate a DPU. Nvidia's DPUs rely on Arm Processor Technology, as do those of most other competitors.

III. Nvidia and Its Arm-Based Products Today

42. Nvidia is one of the largest and most valuable chip suppliers in the world. Nvidia competes in a wide range of computing markets today and expects to compete in more markets in the future.

43. Nvidia has been an Arm licensee for many years. During that time, Nvidia has successfully developed and sold chips that incorporate Arm-based designs that Nvidia developed itself using an architectural license from Arm as well as chips that incorporate Arm-based designs that Nvidia obtained from Arm via implementation licenses.

44. Nvidia can already receive the benefits of Arm Processor Technology without acquiring Arm. Nvidia has invested in the Arm ecosystem over many years and continually developed innovative, cutting-edge products by combining Arm Processor Technology with Nvidia's proprietary technology. For example:

a. Nvidia's Orin product is an Arm-based SoC for High-Level advanced driver assistance systems (ADAS) that is "the new mega brain of the software-defined

vehicle," capable of "power[ing] all the intelligent computing functions inside vehicles."

b. Nvidia's Grace product is an Arm-based CPU that Nvidia views as the "basic building block of the modern data center." According to Nvidia, this product is capable of "deliver[ing] 10x the performance of today's fastest servers on the most complex AI and high performance computing workloads."

c. Nvidia's Bluefield-3 product is an Arm-based DPU SmartNIC that "delivers the most powerful software-defined networking, storage and cybersecurity acceleration capabilities available for data centers," with processing equivalent to "up to 300 CPU cores, [thereby] freeing up valuable CPU cycles to run business-critical applications."

d. Nvidia makes other Arm-based computing products, including chips for video gaming consoles, high-performance "Internet of Things" industrial devices, and more.

45. Nvidia committed to developing a wide variety of Arm-based products long before pursuing this Proposed Acquisition. On September 14, 2020, Nvidia's CEO told investors (in a public investor call announcing the Proposed Acquisition) that "last year"—before Softbank had even offered Arm for sale—Nvidia had already "decided [for datacenters] that we would adopt and support the Arm architecture for the full NVIDIA stack, and that was a giant commitment." "The day we decided to do that," he continued, "we realized this is going to be for as long as we shall live. And the reason for that is because once you start supporting the ecosystem, you can't back out."

IV. The Proposed Acquisition Will Result in an Anticompetitive Change in Incentives

46. Prior to the Proposed Acquisition, Arm's incentive has been to expand broadly the use of Arm Processor Technology because Arm typically profits when its licensees sell more units. To that end, Arm partners with its licensees to develop competitive products. This collaboration includes development of major features of Arm Processor Technology, support for licensees' own efforts to innovate using Arm Processor Technology, and promotion (and other sales help) for its licensees as they compete to sell their products. In short, Arm's incentives as an independent firm cause it to encourage the success of Arm licensees in the Downstream Markets.

47. Nvidia's incentives are starkly different than Arm's. Nvidia competes to sell its products against many of Arm's other licensees. Nvidia makes profits when it makes a sale and loses profits when another Arm licensee makes a sale in its place.

48. After the Proposed Acquisition, the combined firm will not have Arm's same premerger incentive to enable its licensees' success in the Downstream Markets. Instead, the combined firm will have the incentive to engage in foreclosure strategies. Foreclosure strategies involve withholding a critical input from rivals, delaying or degrading access to the input (including delaying or degrading service and support), unfavorably changing the terms on which the input is made available to rivals, or otherwise using the critical input to raise their costs or

disadvantage them. In each relevant market at issue in this case, Nvidia already has a strategic imperative to win sales from its rivals, and Nvidia's profits on additional sales in the downstream market are likely to be larger than the profits from continuing to neutrally license Arm's Processor Technology or to provide the same level of support, access, and investment to licensees. Moreover, because of the evolving nature of computing markets, Nvidia's incentives to use Arm to harm its rivals are amplified by the benefits of preventing innovations in Arm Processor Technology that could lead to greater future competition against Nvidia, including competition with Nvidia's GPU business.

49. Arm employees recognize the problematic change in incentives that the Proposed Acquisition will cause. For example, in response to the Proposed Acquisition, Arm employees asked (or predicted licensees would ask) questions highlighting the basic conflicts of interest associated with Nvidia buying Arm, such as:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

50. Arm's CEO likewise has recognized that [redacted] He further recognized that [redacted]

51. Nvidia insiders also recognized the anticompetitive change in incentives. For example, insiders asked:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

52. Nvidia insiders also [redacted] For example, a Bank of America Securities analyst noted "[a]ny potential deal could face intense and prolonged regulatory scrutiny given ARM's currently neutral position as a technology enabler for the entire semis industry including many of [Nvidia's] competitors." An analyst from another large investment firm wrote: "[T]here could be a myriad of conflict of interest issues whereby [Nvidia] could have access to competitor strategies/technologies in a variety of [Nvidia] markets, notably Auto and perhaps to an increasing extent, datacenter."

53. Post-Acquisition, the combined firm will also have the ability to harm Nvidia's Arm-reliant rivals. There are numerous full or partial foreclosure strategies that it can use to disadvantage its rivals—sometimes without the rival ever knowing the strategy was executed.

RELEVANT MARKETS AND ANTICOMPETITIVE EFFECTS

54. The Proposed Acquisition is likely to substantially lessen competition in multiple relevant antitrust markets, resulting in reduced innovation and more expensive or lower quality products.

55. The Proposed Acquisition will result in a combined firm with the ability and incentive to use foreclosure strategies involving a critical input to undermine its rivals in one or more relevant markets, and the Acquisition will not produce cognizable procompetitive effects.

56. The transaction is likely to substantially lessen competition in relevant antitrust markets for DPU SmartNICs, High-Level Automotive ADAS Central Compute SoCs, and Arm-Based Datacenter CPUs for Cloud Computing Service Providers.

57. In addition, the transaction is likely to harm competition by giving Nvidia access to the competitively sensitive information of Arm's licensees and by decreasing the incentive for Arm to pursue innovations in its Processor Technology that are perceived to conflict with Nvidia's business interests.

I. DPU SmartNICs are a Relevant Product Market

58. DPU SmartNICs are a relevant product market for evaluating the likely competitive effects of the Proposed Acquisition. The corresponding relevant geographic market is worldwide.

59. DPU SmartNICs are network interface devices that incorporate software-programmable CPU cores for offloading and isolating processing tasks related to networking, security, virtualization, and other datacenter support services from the server's main CPU (also called the "host" CPU). DPU SmartNICs increase server compute efficiency and security.

60. The DPU SmartNIC market is nascent but growing rapidly.

61. Nvidia is a significant, aggressive, and rapidly growing participant in this market with its Arm-based Bluefield product line.

62. Nvidia competes against several other companies currently vying to supply DPU SmartNIC solutions, including Pensando, [redacted] Xilinx, Broadcom, Marvell, and Intel. All of these suppliers use Arm-based designs for DPU SmartNIC products, including Intel, despite its unfettered access to the x86 architecture.

63. There are no commercially reasonable interchangeable substitutes for DPU SmartNICs. For example, Network Interface Controllers (NICs) that lack software-programmable CPU cores are not reasonably interchangeable substitutes. These products are part of a spectrum of network devices that range from "basic" NICs with no offload capabilities to more advanced NICs that also perform some networking acceleration processing tasks but lack software-programmable CPU cores. DPU SmartNICs have distinct features and functionality compared to such products. For instance, DPU SmartNICs allow valuable network security features by isolating computing workloads to protect applications running on the main server CPU from attacks. DPU SmartNICs also have distinct (and higher) prices compared to other NIC products.

II. The Proposed Acquisition is Likely to Harm Competition for DPU SmartNICs

64. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for DPU SmartNICs.

65. After the Proposed Acquisition, the combined firm would have the ability to harm Nvidia's rivals for DPU SmartNICs. Arm Processor Technology is a critical input for DPU SmartNIC products. Virtually all major DPU SmartNIC suppliers, including Nvidia and its direct competitors, incorporate Arm Processor Technology and rely on the Arm architecture as a critical component in their products. According to Nvidia's own definition, DPUs include "[a]n industry-standard, high-performance, software-programmable, multi-core CPU, ***typically based on the widely used Arm architecture***. . . ." (emphasis added).

66. DPU SmartNICs depend on Arm Processor Technology for multiple reasons, including, but not limited to:

a. Arm Processor Technology offers the ability to build high-performance CPU cores that are customizable and scalable.

b. Arm-based cores offer the necessary high performance without the cost of increased power usage. Efficient power usage is critical for DPU SmartNIC applications because these applications often have power constraints.

c. Significant investments have been made in Arm-compliant software, which would be costly and risky to reinvent. Arm has developed and delivered on a vibrant roadmap, which has sparked the development of a rich set of tools and applications comprising the Arm ecosystem.

d. Arm provides broad support for product development and improvement. Arm collaborates with and provides assistance to its partners on the development and deployment of DPU SmartNICs, including on design, features, production, testing, marketing, sales, and other activities.

67. There are no close substitutes for Arm Processor Technology for DPU SmartNICs. Even if there were a close alternative to Arm, switching, in and of itself, is a large cost to impose on Arm's customers. Such architectural switches are time and resource intensive and expensive.

68. Other CPU architectures are not close alternatives to Arm for DPU SmartNICs. MIPS is an ISA whose use in the computing industry has been declining and which lacks a vibrant ecosystem, especially compared to Arm. RISC-V lacks the performance, support, and advanced software ecosystem that characterize Arm. x86 CPUs are not well suited for DPU SmartNIC applications. Even Intel, the company that introduced and owns the x86 CPU ISA, is using Arm Processor Technology in certain Intel DPU SmartNIC products.

69. The Proposed Acquisition would give the combined firm the ability to use foreclosure strategies to disadvantage rivals in the market for DPU SmartNICs through a variety of mechanisms, including by controlling Arm's pricing, the terms and timing of access to its Processor Technology, its technological development and features, and its provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to undermine Nvidia's rivals.

70. The Proposed Acquisition also would give the combined firm the incentive to use foreclosure strategies to harm Nvidia's DPU SmartNIC rivals. Nvidia already views winning the DPU SmartNIC market as a key strategic priority. As Nvidia's CEO put it in one email, [redacted]

71. Nvidia's dedication makes good sense. The DPU SmartNIC market is expected to grow rapidly into a multi-billion dollar market as the DPU SmartNIC takes its place as what Nvidia views as the third pillar in datacenters next to CPUs and GPUs.

72. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from additional sales of DPU SmartNICs would

be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's DPU SmartNIC rivals.

73. Current competition with Arm licensees has already forced Nvidia to lower its DPU SmartNIC prices and drives Nvidia to improve its product. [redacted] Internal business documents confirm Nvidia's Bluefield [redacted] Internal documents also show that [redacted]

74. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the DPU SmartNIC market using foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the DPU SmartNIC market leading to reduced innovation and more expensive or lower quality products.

75. DPU SmartNICs are a relevant antitrust market. The anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are also likely to occur in any relevant antitrust market that contains DPU SmartNICs.

III. High-Level Automotive Advanced Driver Assistance System Central Compute SoCs are a Relevant Product Market

76. High-Level Advanced Driver Assistance System ("ADAS") Central Compute SoCs ("High-Level ADAS market") are a relevant product market for evaluating the competitive effects of the Proposed Acquisition. The corresponding relevant geographic market is worldwide.

77. The level of automation in a given vehicle is generally categorized using an industry-wide standard set by SAE International, a professional standard setting organization in the mobility industry. SAE specifies six levels of automation for a given vehicle, ranging from L0 (minimal driver assistance such as lane departure and blind spot warnings) to L5 (a fully automated vehicle driving itself with no restrictions).

78. High-Level ADAS refers to SAE Levels 2 through Level 3, including the industry-recognized "L2+" or "advanced L2" level, which refers to the most advanced L2 capabilities. Within High-Level ADAS, L2+ and L3 are especially important for future competition, as automakers are now developing competing solutions incorporating L2+/L3 features for release in the coming years. High-Level ADAS provides advanced, computerized driving assistance along with various automated features that still require the driver to participate in driving the car (at L2) or to remain ready to take control of the car at a moment's notice (at L3). L2 ADAS typically incorporates features such as using automated lane centering, acceleration, and braking technologies simultaneously, while keeping a human driver in ultimate control of the vehicle. L3 ADAS typically incorporates L2 capabilities as well as higher-level functions capable of location-to-location routing monitored by the automated system when certain traffic conditions are met. While the car is in ultimate control at the L3 level, the driver must be ready to take back control on short notice. High-Level ADAS systems rely on SoCs that

provides the required performance, power efficiency, and programmability to enable the system to run features specific to High-Level ADAS. This complaint refers to SoCs that handle the compute workload necessary to enable the features of High-Level ADAS as "Central Compute SoCs." Market participants may refer to these high-performance ADAS SoCs by a number of names, including "central compute," "brain of the system," and "features" SoCs.

79. High-Level ADAS systems may also incorporate other chips besides the Central Compute SoC. Other chips within High-Level ADAS systems, such as those used for discrete sensor processing (e.g., the Front View Camera), generally do not have to be as high performing or as highly programmable as those used for Central Compute processing. As such, Central Compute SoCs have distinct competitive conditions compared to other chips used for other purposes within High-Level ADAS systems. Therefore, chips for other purposes within High-Level ADAS systems, such as discrete sensor processing, are not included in the relevant market.

80. The Entry-Level (L0/L1) ADAS category is generally characterized by more competitors, lower performance requirements, and lower prices. These Entry-Level systems generally require a lower level of chip performance than High-Level ADAS. Competition for supplying chips for Entry-Level ADAS systems is therefore not included in the relevant market.

81. The Fully Autonomous (L4/L5) category is at an earlier stage of development, and it is not yet technologically viable to implement Fully Autonomous private passenger vehicles on a commercial scale. The Fully Autonomous category is generally characterized by uncertain, though likely higher, performance requirements, additional competitors exclusively focused on developing Fully Autonomous solutions (rather than ADAS), and distinct opportunities wholly separate from High-Level ADAS opportunities. Additionally, the Fully Autonomous category is likely to initially focus on commercial vehicles, such as "robotaxis," rather than private passenger vehicles. In contrast, High-Level ADAS opportunities are generally for private passenger vehicles. Competition for supplying chips for Fully Autonomous (L4/L5) systems is therefore not included in the relevant market.

82. The market for High-Level ADAS Central Compute SoCs consists mainly of competitors selling Arm-based chips. Nvidia competes head-to-head against these other chipmakers who rely on Arm Processor Technology, including Qualcomm and Renesas. These companies all sell High-Level ADAS Central Compute SoCs to automakers or automotive suppliers. [redacted] The only significant chip supplier that Nvidia competes against for High-Level ADAS Central Compute SoCs that does not use Arm Processor Technology for the CPU function in its ADAS SoC is Mobileye, which uses chips based on the MIPS ISA.

IV. The Proposed Acquisition is Likely to Harm Competition for High-Level Automotive Advanced Driver Assistance System Central Compute SoCs

83. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for High-Level ADAS Central Compute SoCs.

84. After the Proposed Acquisition, the combined firm would have the ability to harm Nvidia's rivals for High-Level ADAS Central Compute SoCs. Arm Processor Technology is a critical input for most competitors in this market. Arm-based SoCs are well-suited to high-performance workloads, while consuming relatively little power, which is important given the limited available power in automobiles. In addition, Arm-based SoCs are highly programmable and support extensive third-party software ecosystems. These are features that many automakers require for their High-Level ADAS Central Compute SoCs.

85. Customers rely on Arm to such a degree that Arm considers itself the [redacted] for L2+ ADAS, and industry participants have acknowledged that the automotive industry is reliant on Arm for ADAS development. Arm has developed a product line of its Processor Technology targeted specifically for automotive end uses, including ADAS, under the "Automotive Enhanced" label, with the goal of [redacted]

86. Other ISAs are not close substitutes for Arm for automotive applications. x86-based CPUs are generally not used for High-Level ADAS. Not even Intel's automotive subsidiary, Mobileye, uses x86-based CPUs for High-Level ADAS. Nor does any significant competitor for High-Level ADAS today use RISC-V-based CPUs. RISC-V-based CPUs generally do not have the level of technical performance that High-Level ADAS system designers require, and, as a less mature architecture, they lack a comparable ecosystem and [redacted] Finally, MIPS, which Intel's Mobileye division uses, is not a viable future architecture for High-Level ADAS chips from other competitors. [redacted] And, the owner of MIPS is expected to phase out the MIPS architecture completely. Thus, while Mobileye currently competes for High Level ADAS Central Compute SoCs with a MIPS-based solution, MIPS is not a viable future architecture for High-Level ADAS for other competitors.

87. The Proposed Acquisition would give the combined firm the ability to foreclose, raise rivals' costs, or otherwise disadvantage rivals in the market for High-Level ADAS Central Compute SoCs through a variety of mechanisms, including by controlling Arm's Processor Technology with respect to its pricing, the terms and timing of access, technological development and features, and provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to harm Nvidia's rivals.

88. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm Nvidia's High-Level ADAS Central Compute SoC rivals.

89. Nvidia views winning this growing market as a strategic priority. The market is expected to grow exponentially over the next decade. Projections from a variety of sources, [redacted] indicate that the High-Level ADAS market, while currently small in terms of cars on the road, will grow significantly by 2030. Further, success in this market may provide an installed base that can facilitate successful chip vendors' transition into becoming preferred suppliers for Fully Autonomous vehicle solutions once those become technically feasible for deployment in passenger vehicles.

90. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from additional sales of High-Level ADAS Central Compute SoCs would be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's High-Level ADAS rivals.

91. Indeed, within the High-Level ADAS Central Compute SoC market, Nvidia has already competed closely against Arm-based competitors for valuable business opportunities at some of the world's largest automakers. Nvidia will have the incentive to harm Arm-reliant High-Level ADAS rivals as opposed to working collaboratively with them to help them succeed, as Arm does today, because Nvidia competes closely against these rivals for major business opportunities in High-Level ADAS.

92. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the High-Level ADAS market using foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the High-Level ADAS market leading to reduced innovation and more expensive or lower quality products.

93. High-Level ADAS Central Compute SoCs are a relevant antitrust market. However, the anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are likely to occur under any market definition that contains High-Level ADAS Central Compute SoCs.

V. Arm-Based Datacenter CPUs for Cloud Computing Service Providers is a Relevant Product Market

94. Arm-based datacenter CPUs for cloud computing service providers (including customized Arm CPU chips, or "ASICs") is a relevant product market for assessing the effects of the Proposed Transaction. The corresponding relevant geographic market is worldwide.

95. Datacenters consist of large numbers of server computers. Arm-based datacenter CPU technology is a new and emerging technology that leverages Arm's Processor Technology to meet the performance, power efficiency, and customizability needs of modern datacenters providing cloud computing services.

96. "Cloud computing" refers to the increasingly popular computing business model in which large datacenter operators provide computing services remotely and/or directly offer computing resources for rent, as well as provide other support services to customers who can then run applications, host websites, or perform other computing tasks on the leased remote servers—i.e., "the cloud." Cloud service providers ("CSPs") make their computers and associated services available for a price to many different types of computing customers in the general public, including individuals, businesses, and other organizations. CSPs are distinct from enterprise datacenter operators. Enterprise datacenters typically involve businesses, government agencies, or other organizations who operate their own on-premises server computers, while cloud computer service providers typically offer their customers off-premise, remote computing resources and services whose usage the customer can purchase incrementally. In general, cloud computing is growing, and datacenters overall are in transition from the

traditional computing model provided by on-premises enterprise servers to a model in which many computer services are cloud-based.

97. In the past, Arm-based CPUs were perceived as not having powerful enough performance to serve as datacenter server CPUs. As a result, datacenter CPUs have been historically dominated by x86-based products offered by Intel Corporation and AMD.

98. But after many years of research and development, innovation, and investment by Arm and Arm's licensees, datacenter CPUs using Arm Processor Technology have emerged as a distinct and highly attractive product offering capable of powering servers for CSPs. Arm-based CPUs now offer server-class compute performance, while also offering low costs per CPU core, high power efficiency, and a high degree of customizability. These attributes are particularly well-suited to the demands of cloud computing.

99. x86-based datacenter CPUs are more distant competitors to Arm-based datacenter CPUs and are thus properly excluded from the relevant product market. Arm-based datacenter CPUs are distinct from x86-based datacenter CPUs. Because the most fundamental "language" of the CPUs, the Instruction Set Architecture, differs between Arm-based CPUs and x86-based CPUs, these products cannot directly replace one another without significant costs, because they "speak" different "languages." As a result, they also have different associated ecosystems. Arm-based CPUs also typically have greater power efficiency and customizability. Power efficiency is an important product attribute for CSPs because electricity consumption is one of the largest costs for large datacenters and a better environmental footprint is also desirable. Greater customizability in chip design is also valuable to CSPs. Arm-based datacenters CPUs also have distinct prices, typically a significantly lower price per core than relevant x86-based CPUs.

100. Because there are numerous practical distinctions between the needs and capabilities of CSPs and operators of traditional on-premises datacenters at businesses or other organizations, the relevant product market is properly defined as Arm-based datacenter CPUs for CSPs. In particular, the large scale of CSPs' datacenters particularly benefit from the performance, power efficiency, and customizability advantages of Arm-based CPUs. And these CSPs' control over their large-scale datacenters and many computing workloads also makes them well-positioned to overcome the hurdle of ensuring that existing and new software is written to be both compatible and optimized for use with the Arm ISA. Further, Nvidia and other chip suppliers have the ability to easily identify CSP customers, and, through individual negotiations with CSPs, the combined firm would have the ability to engage in price discrimination for CSP customers.

101. Companies designing Arm-based datacenter CPUs today include Marvell, Ampere Computing, and Nvidia. Some CSPs, such as Amazon Web Services, also design their own Arm-based datacenter CPUs.

VI. The Proposed Acquisition Would Harm Competition for Arm-Based Datacenter CPUs for Cloud Computing Service Providers

102. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Nvidia's rivals in the market for Arm-based datacenter CPUs for CSPs.

103. The Proposed Acquisition would give the combined firm the ability to use foreclosure strategies to disadvantage rivals in the market for Arm-based datacenter CPUs for CSPs through a variety of mechanisms, including by controlling Arm's pricing, the terms and timing of access to its Arm Processor Technology, its technological development and features, and its provision of services and support, among other mechanisms. Arm already has such abilities today, but it does not have the incentive to use such mechanisms to undermine Nvidia's rivals.

104. Arm already has the ability to control whether licensees can produce Arm-based CPUs given its ownership of Arm Processor Technology. But, as with other markets, licensees rely on Arm as a trusted partner to develop and license Processor Technology on a neutral basis and to collaborate and provide support to bring new products to market. Indeed, Arm's support is so important that merely discontinuing it could result in licensees bringing inferior products to market, or licensees' products failing altogether.

105. The Proposed Acquisition would give the combined firm the incentive to use foreclosure strategies to impair the ability of Nvidia's rivals to compete in the market for Arm-based Datacenter CPUs for CSPs.

106. This market is a strategic priority for Nvidia. Nvidia views datacenters as core to its business and future, and espouses the importance of all three "pillars" of computing for datacenters—the CPU, the GPU, and DPU. In April 2021, Nvidia announced its plans to launch an Arm-based datacenter CPU product, called "Grace," which it has touted as the "basic building block of the modern datacenter." Nvidia also seeks to sell customized Arm-based datacenter CPUs to CSPs in the future. Nvidia's announcement of Grace came as multiple CSPs were deploying or planning to deploy Arm-based datacenter CPUs from other sources, [redacted]

107. Nvidia already can provide all three "pillars" of datacenter computing today because it has developed its own Arm-based datacenter CPU, "Grace," and it has the capability to design additional Arm-based CPUs, including custom and semi-custom designs, using its Arm license. Indeed, Nvidia told investors in 2021 that, "With Grace, NVIDIA has a 3-chip strategy with GPU, DPU and now CPU."

108. One of the rationales of the Proposed Acquisition was that the acquisition would [redacted] As Nvidia's CEO wrote to his Board of Directors regarding Arm, [redacted] Further emphasizing the relevance of Arm-based CPUs for CSPs to Nvidia's goals, Nvidia's CEO noted in a December 2020 email that [redacted] But as a

licensee of Arm, Nvidia can already supply such chips on equal footing with Arm's other licensees today. [redacted]

109. Post-Acquisition, the combined firm would likely have a substantial incentive to engage in foreclosure strategies because profits from selling additional Arm-based CPUs to CSPs would be higher than any foregone proceeds of licensing Arm Processor Technology to Nvidia's CPU rivals.

110. The Proposed Acquisition will create a firm with the incentive and ability to harm rivals in the market for Arm-based datacenter CPUs used by CSPs through foreclosure strategies. Consequently, the Proposed Acquisition is likely to result in a substantial lessening of competition in the market for Arm-based datacenter CPUs for CSPs, leading to reduced innovation, and more expensive or lower quality products.

111. Arm-based datacenter CPUs for CSPs is a relevant antitrust market. The anticompetitive effects of the Proposed Acquisition alleged in the paragraphs above are likely to occur in any relevant antitrust market that contains Arm-based datacenter CPUs for CSPs.

VII. The Proposed Acquisition Will Harm Competition By Providing Nvidia with Access to Rivals' Competitively Sensitive Information

112. The Proposed Acquisition will result in an additional substantial lessening of competition due to a critical loss of trust in Arm and its ecosystem. Today, Arm's licensees—including Nvidia's rivals—routinely share competitively sensitive information with Arm. Licensees rely on Arm for support in developing, designing, testing, debugging, troubleshooting, maintaining, and improving their products. As part of this collaborative relationship, Nvidia's rivals routinely share a broad spectrum of competitively sensitive information with Arm. Indeed, effective collaboration between Arm and its licensees often depends on this information sharing because of the competitive importance of innovation, feature competition, and fast time-to-market in the technology industry. Arm licensees are willing to share their competitively sensitive information with Arm because Arm is a neutral partner, not a rival chipmaker.

113. Nvidia's ownership of Arm would fundamentally upend Arm's status as a neutral partner and, at the same time, enable Nvidia to obtain access to its rivals' competitively sensitive information. With the benefit of its rivals' secrets, Nvidia could adjust its activities to undermine competition and harm customers. Recognizing that Nvidia would be able to misuse this otherwise unobtainable information, Nvidia's rivals will likely curtail their highly productive information sharing with Arm and otherwise refrain from making the same procompetitive contributions that they would have absent Nvidia's access to their information. Nvidia's potential misuse of competitively sensitive information and the related chilling effect on collaboration among Arm and its licensees is a further anticompetitive effect of the Proposed Acquisition, and is likely to result in reduced innovation, and more expensive or lower quality products regardless of whether Arm engages in foreclosure strategies.

VIII. The Proposed Acquisition Will Further Harm Innovation By Skewing the Path of Arm Processor Technology Development

114. In addition to the harms to innovation that will result from the foreclosure strategies and the access to competitively sensitive information described above, the Proposed Acquisition is likely to lead to an additional substantial lessening of competition by eliminating innovations that Arm would have pursued but for a conflict with Nvidia's interests.

115. Today, Arm develops its Processor Technology based on input from its licensees and its analysis of the marketplace. Its roadmap for development thus reflects the input of the Arm ecosystem. Absent the transaction, innovation will continue in this direction.

116. But because the transaction would put Nvidia in charge of Arm's Processor Technology roadmap and future development, the merged firm would have less incentive to develop or enable otherwise beneficial new features or innovations if Nvidia determines they are likely to harm Nvidia. The innovation interests of Nvidia are not synonymous with the Arm ecosystem, but the transaction will inevitably skew innovation in the direction of Nvidia's interests. As one Arm executive observed about Nvidia's proposed takeover of Arm, [redacted]

117. Nvidia would have the ability and incentive to ensure that Arm does not develop features or innovations that could threaten its downstream businesses, including its GPU business. For example, in some contexts, CPUs and GPUs compete with each other as alternative processors for handling evolving computing workloads, and Nvidia, for instance, actively markets its GPUs for AI inferencing workloads, which some CPUs, including Arm-based CPUs, also perform. In recent years, Arm expended substantial efforts to add certain built-in AI processing functionality directly into its CPU technology. The development of on-chip AI functions and innovations for CPUs and SoCs that are not tied to Nvidia's proprietary hardware or software is not likely to be in Nvidia's interest.

118. Consequently, innovation is likely to be harmed since Nvidia is unlikely to undertake or permit substantial efforts at attempting CPU innovations that could threaten demand for Nvidia's chips, including GPUs. Post-Acquisition, Nvidia would have the incentive to channel Arm's innovation activities in directions that ensure Arm's CPU technology does not pose any threats to its own chip businesses, including its GPU-centric computing business.

ABSENCE OF ADDITIONAL FACTORS

119. Respondents cannot demonstrate that entry or expansion of products in the Relevant Markets that do not incorporate Arm Processor Technology would be timely, likely, or sufficient to reverse the anticompetitive effects of the Proposed Acquisition.

120. Respondents cannot demonstrate that the Proposed Acquisition would likely generate verifiable, cognizable, merger-specific efficiencies that would reverse the likely competitive harm from the Proposed Acquisition. [redacted] Thus, regardless

of the Proposed Acquisition, Nvidia has and will continue to have access to all Arm Processor Technology, and it can continue to innovate and develop Arm-based products, as it was already planning to do, and as many other companies, including Nvidia's competitors, also do. Indeed, as one Arm executive observed, in response to a report about the potential for the Proposed Acquisition by Nvidia, [redacted]

VIOLATION

COUNT I – ILLEGAL ACQUISITION

121. The allegations above in paragraphs 1 to 120 are incorporated by reference as though fully set forth.

122. The Proposed Acquisition, if consummated, would be likely to lessen competition substantially in interstate trade and commerce in the Relevant Markets throughout the country. If the Proposed Acquisition were to proceed, it would result in substantial harm to competition, including as a result of the combined firm's ability and incentive to disadvantage rival suppliers of downstream products in the Relevant Markets, the chilling effect on innovation induced by the combined firm's access to its rivals' competitively sensitive information supplied to Arm, and the combined firm's ability and incentive to stifle innovations that are unfriendly to its business interests.

123. The Proposed Acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and is an unfair method of competition that violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the ninth day of August, 2022, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between Nvidia and Arm that combines their businesses, except as may be approved by the Commission.

2. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, businesses, with the ability to offer such products and services as Nvidia and Arm were offering and planning to offer prior to the Acquisition.

3. A requirement that, for a period of time, Nvidia and Arm provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses with any other company.

4. A requirement to file periodic compliance reports with the Commission.

5. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore Arm as an independent business.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this second day of December, 2021.

By the Commission.

April J. Tabor
Secretary

SEAL:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
ANI PHARMACEUTICALS, INC.,	)	
a corporation;	)	**DECISION AND ORDER**
NOVITIUM PHARMA LLC,	)	**Docket No. C-**
a limited liability company;	)	
and	)	
ESJAY LLC,	)	
a limited liability company.	)	

DECISION

The Federal Trade Commission initiated an investigation of Respondent ANI Pharmaceuticals, Inc.'s proposal to acquire the non-corporate interests of Respondent Novitium Pharma LLC, whose ultimate parent entity is Respondent Esjay LLC (collectively "Respondents"). The Commission's Bureau of Competition prepared and furnished to each Respondent the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (collectively "Acts").

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true; (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that

Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings, and issues the following Decision and Order ("Order"):

1. Respondent ANI Pharmaceuticals, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 210 Main Street West, Baudette, Minnesota 56623.

2. Respondent Novitium Pharma LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 70 Lake Drive, East Windsor, New Jersey 08520.

3. Respondent Esjay LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its executive offices and principal place of business located at 16732 Strasbourg Lane, Delray Beach, Florida 33446.

4. Prasco LLC is a limited liability company organized, existing and doing business under the laws of the State of Ohio with its executive offices and principal place of business located at 6125 Commerce Court, Mason, Ohio 45040.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "ANI" means ANI Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by ANI Pharmaceuticals, Inc., and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Novitium" means Novitium Pharma LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships,

divisions, groups, and affiliates controlled by Novitium Pharma LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Esjay" means Esjay LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, including Novitium Pharma LLC, partnerships, divisions, groups, and affiliates controlled by Esjay LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondents" means ANI, Novitium, and Esjay.

F. "Acquirer(s)" means:

1. Prasco; or
2. Any other Person that the Commission approves to acquire Divestiture Assets pursuant to this Order.

G. "Acquisition" means the proposed acquisition described in agreement titled the *Agreement and Plan of Merger* by and among ANI Pharmaceuticals, Inc., Nile Merger Sub LLC, Novitium Pharma LLC, Esjay LLC, Chali Properties LLC, Chad Gassert, Muthusamy Shanmugam, Thorappadi Vijayaraj, and Shareholder Representative Services LLC, dated as of March 8, 2021.

H. "Acquisition Date" means the date of the closing on the above-referenced *Agreement and Plan of Merger*.

I. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes the FDA.

J. "Biosimilar" means any biologic drug product that is highly similar to, and has no clinically meaningful difference from, an existing FDA-approved biologic drug product or that otherwise meets the FDA's criteria for classification as a biosimilar.

K. "Business Information" means all written information, wherever located or stored, relating to or used in a Divestiture Product Business, including documents, graphic materials, and data and information in electronic format. Business Information includes records and information relating to research and development (including copies of Product Development Reports), manufacturing, process technology, engineering, product formulations, production, sales, marketing (including Product Marketing Materials), logistics, advertising, personnel, accounting, business strategy, information technology systems, customers, customer purchasing histories, customer preferences, delivery histories, delivery routing information, suppliers and all other aspects of the Divestiture Product Business. For clarity, Business Information includes any Respondent's rights and control over information and material provided by that Respondent to any other Person. Business Information includes Confidential Business Information.

L. "cGMP" means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.

M. "Confidential Business Information" means all Business Information that is not in the public domain.

N. "Customer" means any Person that is either a direct purchaser or who negotiates price on behalf of a direct purchaser (*e.g.*, group purchasing organization) of any Divestiture Product from a Respondent or the Acquirer.

O. "Development" means all research related to a Product, and all studies of the safety or efficacy of a Product, including: discovery or identification of a new chemical entity, test method development; toxicology; bioequivalency; bioavailability; formulation; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; stability testing; statistical analysis and report writing; conducting studies of the safety or efficacy of a Product in animals or humans for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, labeling, and sale of a Product(including any government price or reimbursement approvals). "Develop" means to engage in Development.

P. "Dexamethasone Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to ANDA No. 080399, and any supplements, amendments, or revisions to this ANDA, and any other Products that are or were in Development or Developed by ANI as of March 8, 2021 (the date the Respondents signed the *Agreement and Plan of Merger*) that are orally administered tablets and contain, as the active pharmaceutical ingredient, dexamethasone at a 0.75mg strength.

Q. "Dexamethasone Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Dexamethasone Products, including all of the Divestiture Assets related to the Dexamethasone Products.

R. "Direct Cost" means a cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of a Respondent's employees shall not exceed then-current average hourly wage rate for such employee.

S. "Divestiture Agreements" mean:

1. Asset Purchase Agreement by and between Prasco and ANI Pharmaceuticals, Inc. dated as of October 21, 2021; and all amendments, exhibits, attachments, agreements to the above-referenced agreement; and

2. Any other agreement between a Respondent(s) and the Acquirer (or between a Divestiture Trustee and the Acquirer, or between Respondents for the benefit of the Acquirer) that has been approved by the Commission to accomplish the requirements of this Order.

T. "Divestiture Assets" mean Respondents' equitable and legal right, title, and interests in and to all tangible and intangible assets that are not Excluded Assets, wherever located, relating to a Divestiture Product Business, including the following:

1. All Product Approvals;
2. All FDA Authorizations;
3. All Product Development Reports;
4. All Product Intellectual Property;
5. At the option of the Acquirer, Product Manufacturing Equipment;
6. All technological, scientific, chemical, biological, pharmacological, toxicological, regulatory materials and information, including studies of the safety, efficacy, stability, bioequivalency, bioavailability, and toxicology of a Product;
7. All website(s), Domain Names, and social media sites related exclusively to the Divestiture Product and the content thereon related exclusively to the Divestiture Product, and the content related exclusively to the Divestiture Product that is displayed on any website that is not dedicated exclusively to the Divestiture Product;
8. At the option of the Acquirer, Product Contracts;
9. All Business Information;
10. At the option of the Acquirer, all inventory and all ingredients, materials, or components used in the manufacture of the specified Divestiture Product in existence as of the Divestiture Date including, the active pharmaceutical ingredient(s), excipient(s), raw materials, packaging materials, work-in-process, and finished goods related to that Divestiture Product; and
11. At the option of the Acquirer, the right to fill any or all unfilled Customer purchase orders for the specified Divestiture Product as of the Divestiture Date.

U. "Divestiture Date" means the date on which a Respondent (or a Divestiture Trustee) closes on a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey rights or assets related to a Divestiture Product to the Acquirer as required by Section II of this Order.

V. "Divestiture Products" means the:

1. Dexamethasone Products; and
2. Sulfamethoxazole/Trimethoprim Products.

W. "Divestiture Product Business" means the research, Development, manufacture, commercialization, distribution, marketing, advertisement, importation, and sale related to a Divestiture Product.

X. "Divestiture Trustee" means any Person appointed by the Commission to serve as a divestiture trustee pursuant to the Orders.

Y. "Domain Name" means the domain name(s) and the related uniform resource locator(s) and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration.

Z. "Employee Information" means the following, for each Relevant Employee, as and to the extent permitted by law:

1. With respect to each such employee, the following information:
    a. Name, job title or position, date of hire, and effective service date;
    b. Specific description of the employee's responsibilities;
    c. Base salary or current wages;
    d. Most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;
    e. Employment status (*i.e.,* active or on leave or disability; full-time or part-time); and
    f. All other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
2. At the option of the Acquirer, copies of all employee benefit plans and summary.

AA. "Erythromycin/Ethylsuccinate Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to ANDA No. 211991, and any supplements, amendments, or revisions to this ANDA, and any other Products in Development or Developed, marketed or sold by any Person other than a Respondent that are orally administered granules (for suspension) and contain, as the active pharmaceutical ingredients, erythromycin and ethylsuccinate at the EQ 200mg, BASE 5ml strengths.

BB. "Excluded Assets" mean:

1. Any real estate and the buildings and other permanent structures located on such real estate;
2. Corporate names or corporate trade dress of a Respondent or the related corporate logos thereof; or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by a Respondent or the related corporate logos thereof; or general registered images or symbols by which a Respondent can be identified or defined;
3. The portion of any Business Information that contains information about any of a Respondent's business other than a Divestiture Product Business, in those cases in which the redaction does not impair the usefulness of the information related to the Divestiture Product Business;
4. Any original document that a Respondent has a legal, contractual, or fiduciary obligation to retain the original; *provided, however,* that Respondents shall provide

copies of the document to the Acquirer and shall provide that Acquirer access to the original document if copies are insufficient for regulatory or evidentiary purposes;

5. Any tax asset relating to (a) the Divestiture Assets for pre-Divestiture Date tax periods or (b) any tax liability that any Respondent is responsible for arising out of the divestiture of the Divestiture Assets;

6. All accounts receivable, notes receivable, rebates receivable and other miscellaneous receivables of any Respondent that are related to the Divestiture Product Business and arising out of the operation of the Divestiture Product Business prior to the Divestiture Date;

7. All cash, cash equivalents, credit cards and bank accounts of any Respondent; and

8. Any records or documents reflecting attorney-client, work product or similar privilege of any Respondent or otherwise relating to the Divestiture Assets as a result of legal counsel representing any Respondent in connection with the divestiture of the Divestiture Assets pursuant to this Order or the Divestiture Agreements.

CC. "FDA" means the United States Food and Drug Administration.

DD. "FDA Authorization(s)" means all of the following: "New Drug Application" ("NDA"), "Abbreviated New Drug Application" ("ANDA"), "Supplemental New Drug Application" ("SNDA"), or "Marketing Authorization Application" ("MAA"), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes an "Investigational New Drug Application" ("IND") filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the holder and the FDA related thereto. "FDA Authorization" also includes any Biologic License Application ("BLA") filed or to be filed with the FDA pursuant to 21 C.F.R. 601.2, et seq., and Section 351 of the Public Health Service Act, and any NDA deemed to be a BLA by the FDA, and all supplements, amendments, revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between the Respondents and the FDA or other government regulatory authority relative thereto.

EE. "Licensed Intellectual Property" means; (a) all Product Manufacturing Technology that is used (but not exclusively, predominantly, or primarily used) in the manufacture of a Divestiture Product, and (b) copyrights used (but not exclusively, predominantly, or primarily used), to commercialize, distribute, market, advertise, or sell any Divestiture Product as of the applicable Divestiture Date.

FF. "Manufacturing Designee" means any Person other than a Respondent that has been designated by the Acquirer to perform any part of the manufacturing process, including the finish or packaging of a Divestiture Product on behalf of that Acquirer.

GG. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to the Orders.

HH. "NDC Number(s)" means the National Drug Code number, including both the labeler code assigned by the FDA and the additional numbers assigned by the labeler as a product code and package size code for a specific Product.

II. "Order Date" means the date on which the final Decision and Order in this matter is issued by the Commission.

JJ. "Order to Maintain Assets" means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.

KK. "Orders" means this Decision and Order and the Order to Maintain Assets.

LL. "Patent(s)" means all patents and patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention, and statutory invention registrations, in each case filed, or in existence, on or before the Divestiture Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

MM. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or government entity, and any subsidiaries, divisions, groups, or affiliates thereof.

NN. "Prasco" means Prasco, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Prasco, LLC, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

OO. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient, or that is the subject of an FDA Authorization.

PP. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other regulatory approvals, and pending applications and requests therefor, required by applicable Agencies, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage, or transport of a Product, and includes, without limitation, all approvals, registrations, licenses, or authorizations granted in connection with any FDA Authorization related to that Product.

QQ. "Product Contracts" means all contracts, agreements, mutual understandings, arrangements, or commitments related to the Divestiture Product Business, including those:

1. Pursuant to which any third party, including a Customer, purchases, or has the option to purchase, a Product from a Respondent or negotiates the purchase price

on behalf of another Customer;

2. Pursuant to which a Respondent had, or has as of the Divestiture Date, the ability to independently purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s), from any third party for use in connection with the manufacture of a Product;
3. Relating to any study of the safety or efficacy of a Product;
4. With universities or other research institutions for the use of a Product in scientific research;
5. For the marketing of a Product or educational matters relating solely to the Products;
6. Pursuant to which a third party manufactures or plans to manufacture a Product as a finished dosage form on behalf of a Respondent;
7. Pursuant to which a third party provides or plans to provide any part of the manufacturing process, including, without limitation, the finish or packaging of a Product on behalf of a Respondent;
8. Pursuant to which a third party licenses any Product Intellectual Property or Product Manufacturing Technology related to a Product to a Respondent;
9. Pursuant to which a third party is licensed by a Respondent to use any of the Product Intellectual Property or Product Manufacturing Technology;
10. Constituting confidentiality agreements involving a Product;
11. Involving any royalty, licensing, covenant not to sue, or similar arrangement related to a Product;
12. Pursuant to which a third party provides any specialized services necessary to the research, Development, manufacture, or distribution of a Product to a Respondent including, consultation arrangements; and
13. Pursuant to which any third party collaborates with a Respondent in the performance of research, Development, marketing, distribution, or selling of a Product.

RR. "Product Development Reports" means information related to the Development of a Product, including:

1. Pharmacokinetic study reports;
2. Bioavailability study reports;
3. Bioequivalence study reports;
4. All correspondence, submissions, notifications, communications, registrations, or other filings made to, received from, or otherwise conducted with the FDA relating to the FDA Authorization(s);

5. Annual and periodic reports related to the above-described FDA Authorization(s), including any safety update reports;
6. FDA approved labeling or other Agency-approved labeling;
7. Currently used or planned product package inserts (including historical change of controls summaries);
8. FDA approved patient circulars;
9. Adverse event reports, adverse experience information, and descriptions of material events and matters concerning safety or lack of efficacy;
10. Summaries of complaints from physicians or other health care providers;
11. Summaries of complaints from ultimate users of the Product;
12. Summaries of complaints from Customers;
13. Product recall reports filed with the FDA or any other Agency, and all reports, studies, and other documents related to such recalls;
14. Investigation reports and other documents related to any out of specification results for any impurities or defects found in any Product;
15. Reports from any Person (e.g., any consultant or outside contractor) engaged to investigate or perform testing for the purposes of resolving any Product or process issues, including, without limitation, identification and sources of impurities or defects;
16. Reports from vendors of the component(s), active pharmaceutical ingredient(s), excipient(s), packaging component(s), and detergent(s) used to produce any Product that relate to the specifications, degradation, chemical interactions, testing, and historical trends of the production of any Product;
17. Analytical methods development records;
18. Manufacturing batch or lot records;
19. Stability testing records;
20. Change in control history; and
21. Executed validation and qualification protocols and reports.

SS. "Product Intellectual Property" means intellectual property of any kind (other than Licensed Intellectual Property), that is owned, licensed, held, or controlled by a Respondent as of the Divestiture Date, including Patents, patent applications, trademarks, service marks, copyrights, trade dress, commercial names, internet web sites, internet domain names, inventions, discoveries, know-how, trade secrets, and proprietary information.

TT. "Product Manufacturing Equipment" means equipment that is being used, or has been used to manufacture the specified Divestiture Product.

UU. "Product Manufacturing Technology" means all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable, or otherwise) related to the manufacture of a Product, including the following: all product specifications, processes, analytical methods, product designs, plans, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the conformance of any Product Approvals, conformance with any Agency requirements, and cGMP compliance, labeling and all other information related to the manufacturing process, and supplier lists.

VV. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the United States as of the Divestiture Date that are owned or controlled by a Respondent, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), Customer information (including Customer net purchase information to be provided on the basis of dollars and units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, website content, artwork for the production of packaging components, television masters, and other similar materials related to the specified Divestiture Product.

WW. "Product Releasee(s)" means any of the following Persons:

1. The Acquirer;
2. Any Person controlled by or under common control with that Acquirer;
3. Any Manufacturing Designee(s); and
4. Any licensees, sublicensees, manufacturers, suppliers, marketers, distributors, and Customers of that Acquirer, or of such Acquirer-affiliated entities, in each such case, as related to each Divestiture Product acquired by that Acquirer.

XX. "Relevant Employees" includes:

1. Manufacturing Employees means all employees of a Respondent who have participated at any time during the 3-year period immediately prior to the Acquisition Date (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: (a) Developing and validating the commercial manufacturing process, (b) formulating the manufacturing process performance qualification protocol, (c) controlling the manufacturing process to assure performance Product quality, (d) assuring that during routine manufacturing the process remains in a state of control, (e) collecting and evaluating data for the purposes of providing scientific evidence that the manufacturing process is capable of consistently delivering quality Products, (f)

managing the operation of the manufacturing process, or (g) managing the transfer of the Product Manufacturing Technology to a different facility; and

2. Marketing Employees means all management-level employees of a Respondent who have participated at any time during the 3-year period immediately prior to the Acquisition date (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax, or financial compliance) in any of the following related to the specified Divestiture Product: sales management, brand management, sales training, market research, or marketing and contracting with any of the following: drug wholesalers or distributers, group purchasing organizations, pharmacy benefit organizations, managed care organizations, or hospitals, *excluding* administrative assistants.

YY. "Retained Product(s)" means any Product(s) other than a Divestiture Product that is manufactured, in Development, marketed, sold, owned, controlled, or licensed by a Respondent anywhere in the world on or before the Acquisition Date and that has not been discontinued or permanently withdrawn from the market.

ZZ. "Sulfamethoxazole/Trimethoprim Products" mean the Products in Development or authorized for marketing or sale in the United States pursuant to the following FDA Authorizations: ANDA No. 077612, and any supplements, amendments, or revisions to this ANDAs.

AAA. "Sulfamethoxazole/Trimethoprim Divestiture Assets" means all rights, title and interest in the Divestiture Product Business related to the Sulfamethoxazole/Trimethoprim Products, including all of the Divestiture Assets related to the Sulfamethoxazole/Trimethoprim.

BBB. "Supply Cost" means the actual cost of materials, ingredients, packaging, direct labor, and direct overhead *excluding* any allocation or absorption of costs for excess or idle capacity, and *excluding* any intracompany transfer profits *plus* the actual cost of shipping and transportation in cases in which those costs are incurred by a Respondent.

CCC. "Technology Transfer Standards" mean requirements and standards sufficient to ensure that the information and assets required to be transferred and delivered are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, as related to the specified Divestiture Product(s), *inter alia*:

1. Designating employees or other Persons working on behalf of a Respondent knowledgeable about the Product Manufacturing Technology who will be responsible for communicating directly with the receiving Person, and a Monitor, for the purpose of effecting such delivery;

2. Preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Product that are acceptable to the receiving Person;

3. Preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all

other materials, and projected time lines for the delivery of all such Product Manufacturing Technology to the receiving Person;

4. For any part of the manufacturing process that is performed by a Respondent, permitting employees of the receiving Person to visit the Respondent's facility where that process occurs for the purposes of evaluating and learning that process or discussing the process with employees of the Respondent involved in that process (including, without limitation, use of equipment and components, manufacturing steps, time constraints for completion of steps, and methods to ensure batch or lot consistency); and

5. Providing, in a timely manner, assistance and advice to enable the receiving Person to:

   a. Manufacture the Product in the quality and quantities achieved by a Respondent prior to the Acquisition Date;

   b. Obtain any Product Approvals necessary for the receiving Person to manufacture the Product for the Acquirer in a manner that allows that Acquirer to distribute, market, and sell the Product in commercial quantities and to meet all Agency-approved specifications for the Product; and

   c. Receive, integrate, and use all Product Manufacturing Technology used in, and all Product Intellectual Property that is related to, the manufacture of the Product.

DDD. "Therapeutic Equivalent" means a drug product that is classified by the FDA as being therapeutically equivalent to another drug product or that otherwise meets the FDA's criteria for such classification.

EEE. "United States" means the United States of America, and its territories, districts, commonwealths, and possessions.

II. Divestitures

IT IS FURTHER ORDERED that:

A. No later than 10 days after the Acquisition Date, Respondents shall, absolutely and in good faith, divest the Dexamethasone Divestiture Assets and the Sulfamethoxazole/Trimethoprim Divestiture Assets and grant a perpetual, non-exclusive, fully paid up, fully transferable, and royalty-free license to use the related Licensed Intellectual Property in the related Divestiture Product Business to Prasco.

Provided, however, that, if within 12 months after the Order Date, the Commission determines, in consultation with the Acquirer and a Monitor, the Acquirer needs one or more Excluded Assets to operate any of the Divestiture Product Businesses in a manner that achieves the purposes of this Order, Respondents shall divest or license (as applicable) absolutely and in good faith, the needed Excluded Assets to that Acquirer.

B. If Respondents have divested any of the Divestiture Assets or granted or assigned rights

to the Divestiture Products to Prasco prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. The named Acquirer is not an acceptable purchaser of any of the Divestiture Assets or rights related to the Divestiture Products, then Respondents shall immediately rescind the transaction with that Acquirer as directed by the Commission, and shall divest the respective Divestiture Assets or grant or assign the rights related to the Divestiture Products, as applicable, within 180 days after the Order Date, absolutely and in good faith, at no minimum price, to a different Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture was accomplished is not acceptable, then Respondents shall make such modifications to the manner of divestiture of the Divestiture Assets or the grant or assignment of rights to the Divestiture Products, as applicable, to the Acquirer named in this Order (including, entering into additional agreements or arrangements) as the Commission determines are necessary to satisfy the requirements of this Order.

C. Prior to the Divestiture Date, Respondents shall provide the Acquirer with the opportunity to review Product Contracts related to each of the Divestiture Products so that the Acquirer can determine whether to assume each Product Contract;

Provided, however, that in cases in which any Product Contract also relates to a Retained Product the Respondent shall, at the option of that Acquirer, assign or otherwise make available to that Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product.

D. Prior to the Divestiture Date, Respondents shall secure all approvals, consents, ratifications, waivers, or other authorizations from all non-governmental third parties that are necessary to permit Respondents to divest the Divestiture Assets and to grant or assign rights to the Divestiture Products to the Acquirer, and to permit that Acquirer to continue in the related Divestiture Product Business in the United States without interruption or impairment.

E. As related to the Product Manufacturing Technology and any ingredient, material, or component used in the manufacture of the Divestiture Product, Respondents shall not enforce any agreement against a third party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the third party a license or other right to the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product. Such agreements include agreements that might limit the ability of a third party to disclose Confidential Business Information related to such Product Manufacturing Technology to the Acquirer. No later than 10 days after the Divestiture Date, Respondents shall grant a release to each third party that is subject to any such agreement that allows the third party to provide the Product Manufacturing Technology or any ingredient, material, or component used in the manufacture of the Divestiture Product to

the Acquirer. Within 5 days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer;

Provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant third parties.

F. Respondents shall transfer the Product Manufacturing Technology related to the Divestiture Products to the Acquirer, or at the Acquirer's option, to its Manufacturing Designee, in a manner consistent with the Technology Transfer Standards. Respondents shall bear all costs related to these transfers.

G. No later than 10 days after the Divestiture Date, Respondents shall designate employees of Respondents knowledgeable about the marketing, distribution, warehousing, and sale of each of the Divestiture Products to assist the Acquirer of each of the Divestiture Products to transfer and integrate the related Divestiture Product Business.

H. No later than 10 days after the Divestiture Date, Respondents shall provide the following to the relevant Acquirer of each of the Divestiture Products:

1. A list of any finished batch or lot of the relevant Divestiture Product that any Respondent, any manufacturer for a Respondent, or regulatory Agency determined to be out-of-specification at any time during the three-year period immediately preceding the Divestiture Date, and, for each such batch or lot: (a) a detailed description of the known deficiencies or defects (*e.g.*, impurity content, incorrect levels of the active pharmaceutical ingredient, stability failure); (b) the corrective actions taken to remediate any cGMP deficiencies in that Divestiture Product; and (c) to the extent known by any Respondent, the employees (whether current or former) responsible for taking such corrective actions;

2. A list by stock-keeping unit by Customer that contains the current net price per unit as packaged for sale (*i.e.*, the price net of all customer-level discounts, rebates, or promotions) for the relevant Divestiture Product for each order sold to that Customer during the two-year period prior to the Divestiture Date;

3. A list of the inventory levels (weeks of supply) of the relevant Divestiture Product in the possession of each Customer to the extent known or available to any Respondent, as of the date prior to and closest to the Divestiture Date as is available;

4. A list of any pending reorder dates for the relevant Divestiture Product by Customer as of the Divestiture Date to the extent known by any Respondent;

5. A list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by law, to control, prohibit, or otherwise limit the use, including the use in Customer cross-referencing, of such NDC numbers by the Respondents, *unless* that Divestiture Product has not been marketed or sold in the United States prior to the Divestiture Date; and

6. The quantity and delivery terms in all unfilled Customer purchase orders for the relevant Divestiture Product as of the Divestiture Date.

I. Respondents shall not join, file, prosecute, or maintain any suit, in law or equity, against the Product Releasees under any Patent that was pending or issued on or before the Acquisition Date if such suit would limit or impair the Acquirer's freedom to research and Develop, or manufacture anywhere in the world the Divestiture Product(s), or to distribute, market, sell, or offer for sale within the United States any such Divestiture Product.

J. Upon reasonable written request from the Acquirer to a Respondent, that Respondent shall provide, in a timely manner, assistance of knowledgeable employees of that Respondent (*i.e.*, employees of that Respondent that were involved in the Development of the Divestiture Products) to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a third party related to the Product Intellectual Property for the Divestiture Products acquired by that Acquirer from a Respondent. A Respondent shall make its employees available to that Acquirer for the fee provided in the relevant Divestiture Agreement, or if no fee is provided, at no greater than Direct Cost.

K. For any patent infringement suit that is filed or to be filed within the United States that is (x) filed by, or brought against, a Respondent prior to the Divestiture Date related to any Divestiture Product or (y) any potential patent infringement suit that a Respondent has prepared, or is preparing, to bring or defend against as of the Divestiture Date that is related to any Divestiture Product, that Respondent shall:

1. Cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation, and witnesses from that Respondent in connection with obtaining resolution of such patent infringement suit;

2. Waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent the Acquirer in any such patent infringement suit; and

3. Permit the transfer to the Acquirer of all of the litigation files and any related attorney work product in the possession of that Respondent's outside counsel related to such patent infringement suit.

III. Divestiture Agreements

IT IS FURTHER ORDERED that:

A. The Divestiture Agreements shall be incorporated by reference into this Order and made a part hereof, and any failure by a Respondent to comply with any term of the Divestiture Agreements shall constitute a violation of this Order;

Provided, however, that the Divestiture Agreements shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreements varies from or conflicts with any provision in this Order such that the Respondents cannot fully comply with both, Respondents shall comply with this Order.

B. Respondents shall include in the Divestiture Agreements a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth

of the Respondents' obligations to the Acquirer pursuant to this Order.

C. Respondents shall not modify or amend any of the terms of any Divestiture Agreement without the prior approval of the Commission, *except* as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

IV. Transition Services and Manufacturing by Respondents

IT IS FURTHER ORDERED that:

A. At the request of the Acquirer, in a timely manner, at no greater than Direct Cost or at such cost as provided in a Divestiture Agreement, Respondents shall provide transition services sufficient to enable the Acquirer of each of the Divestiture Products to operate the related Divestiture Product Business in substantially the same manner that Respondents have operated that Business prior to the Acquisition Date.

B. Upon reasonable written notice and request from the Acquirer, Respondents shall manufacture, deliver and supply, or cause to be manufactured, delivered, and supplied, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, that Acquirer's requested supply of each of the Divestiture Products and any of the active pharmaceutical ingredients used in the Divestiture Products that are made by a Respondent, as applicable, hereinafter "Supplied Products." The requested supply of Supplied Products shall be provided at no greater than Supply Cost or at such cost as provided in a Divestiture Agreement.

C. The Respondents shall make representations and warranties to the Acquirer that the Supplied Products meet the relevant Agency-approved specifications and, with the consent of the Acquirer, shall amend any agreement between the Respondents and the Acquirer that is related to the quality controls of a Divestiture Product to address any necessary changes to the agreement in order to comply with relevant Agency regulations or recommendations.

D. The Respondents shall agree to indemnify, defend, and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses, or losses alleged to result from the failure of the Supplied Products to meet cGMP, but the Respondents may make this obligation contingent upon the Acquirer giving the Respondents prompt written notice of such claim and cooperating fully in the defense of such claim;

Provided, however, that the Respondents may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with the Respondents' responsibilities to supply the Supplied Products in the manner required by this Order;

Provided further, however, that this obligation shall not require the Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by the Respondents to the Acquirer in a Divestiture Agreement.

E. The Respondents shall agree to hold harmless and indemnify the Acquirer for any liabilities, loss of profits, or consequential damages resulting from the failure of the Respondents to deliver the Supplied Products to the Acquirer in a timely manner *unless* (1) Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents, and (2) Respondents are able to cure the supply failure no later than 30 days after the receipt of notice from that Acquirer of a supply failure.

F. The Respondents shall give priority to supplying the Acquirer over the supplying of Products for any Respondent's own use or sale.

G. During the term of any agreement for a Respondent to supply the Supplied Products, upon written request of the Acquirer or a Monitor, the Respondent shall make available to the supplied Acquirer and a Monitor all records generated or created after the Divestiture Date that relate directly to the manufacture of the applicable Supplied Products.

H. The Respondents shall provide the Acquirer with the actual costs incurred or the price paid for active ingredients, components, and excipients the Respondents use to manufacture the applicable Supplied Products.

I. During the term of any agreement for a Respondent to supply the Supplied Products, Respondents shall take all actions as are reasonably necessary to ensure an uninterrupted supply of each of the Supplied Products.

J. Respondents shall not be entitled to terminate any agreement to supply the Supplied Products due to (x) a breach by the Acquirer of a Divestiture Agreement, or (y) that Acquirer filing a petition in bankruptcy, or entering into an agreement with its creditors, or applying for or consenting to appointment of a receiver or trustee, or making an assignment for the benefit of creditors, or becoming subject to involuntary proceedings under any bankruptcy or insolvency law;

Provided, however, that this Paragraph IV.J shall not prohibit a Respondent from seeking compensatory damages from the Acquirer for that Acquirer's breach of its payment obligations to the Respondent under the agreement.

K. The Respondents shall permit the Acquirer to terminate the agreement for the supply of the Supplied Products on a product-by-product basis, at any time, upon commercially reasonable notice, and without cost or penalty (other than costs or penalties due by the Respondent to third parties pursuant to the termination of such agreement, which may be the responsibility of that Acquirer).

L. In the event that that a Respondent becomes (x) unable to supply or produce a Supplied Product from the facility that has been supplying the Acquirer, and (y) any Respondent has a different facility that is listed on the FDA Authorization for that Supplied Product and is still suitable for use to manufacture the Supplied Product, or any Respondent has a facility that manufactures the Therapeutic Equivalent of such Supplied Product, then such Respondent shall, at the option of the supplied Acquirer, provide a supply of either the Therapeutic Equivalent or the Supplied Product from the other facility under the same

terms and conditions as contained in the Divestiture Agreement to supply.

M. During the term of any agreement for a Respondent to supply the Supplied Products, the Respondents shall provide consultation with knowledgeable employees of Respondents and training, at the written request of the supplied Acquirer and at a facility chosen by the supplied Acquirer, for the purposes of enabling that Acquirer (or its Manufacturing Designee) to obtain all Product Approvals to manufacture the applicable Supplied Products in final form in the same quality achieved by, or on behalf of, Respondents and in commercial quantities, in a manner consistent with cGMP, independently of Respondents and sufficient to satisfy management of that Acquirer that its personnel (or its Manufacturing Designee's personnel) are adequately trained in the manufacture of the applicable Supplied Products.

N. For any Supplied Product that is made in a facility owned by Respondents, Respondents shall transfer such manufacturing to a facility owned, controlled, or operated by the Acquirer or, at the option of the Acquirer, to its Manufacturing Designee. Respondents shall bear all costs for this transfer including the cost to validate the Supplied Products at the changed facility and the costs for any changes in the specifications for any Supplied Product required by the FDA prior to the FDA's granting approval to market such Product from the changed site of manufacture.

O. For any Divestiture Product, at the Acquirer's option, Respondents shall bear the costs to qualify and obtain FDA regulatory approval to change the source of the active pharmaceutical ingredient(s).

V. Asset Maintenance

IT IS FURTHER ORDERED that, until the Respondents have physically transferred the Dexamethasone Divestiture Assets and the Sulfamethoxazole/Trimethoprim Divestiture Assets to the Acquirer pursuant to Section II of this Order, Respondents shall operate and maintain each of the respective Divestiture Assets and each of the respective Divestiture Product Businesses in the ordinary course of business consistent with past practices. Included in these obligations, Respondents shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of such Divestiture Product Businesses, to minimize the risk of loss of competitive potential of such Divestiture Product Businesses, to operate such Divestiture Product Businesses in a manner consistent with applicable laws and regulations, and to prevent the destruction, removal, wasting, or deterioration of any of the Divestiture Assets, except for ordinary wear and tear.

B. Not sell, transfer, encumber, or otherwise impair such Divestiture Assets, or terminate any of the operations of such Divestiture Product Businesses, other than in the ordinary course of business consistent with past practice or as prescribed in the Orders.

C. Make all payments required to be paid under any contract or lease when due, and pay all liabilities and satisfy all obligations associated with such Divestiture Product Businesses.

D. Provide such Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls, to perform routine or necessary maintenance, to repair or replace facilities and equipment, and to carry on, at least at their scheduled pace, all capital projects, business plans, promotional plans, capital expenditure plans, research and development plans, and commercial activities for such Divestiture Product Businesses.

E. Use best efforts to preserve the existing relationships and goodwill with suppliers, customers, employees, vendors, distributors, landlords, licensors, licensees, government entities, brokers, contractors, and others having business relations with such Divestiture Product Businesses.

F. Maintain the working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with such Divestiture Product Businesses, including by:

1. Filling vacancies that occur in the regular and ordinary course of business consistent with past practice; and

2. Not transferring any employees from such Divestiture Product Businesses to another of Respondents' businesses.

G. Maintain and preserve the Business Information of such Divestiture Product Businesses.

H. Provide the resources necessary for such Divestiture Product Businesses to respond to competition, prevent diminution in sales, and maintain its competitive strength.

I. Continue providing customary levels of support services to such Divestiture Product Businesses.

J. Maintain all licenses, permits, approvals, authorizations, or certifications used in the operation of such Divestiture Product Businesses, and operate such Divestiture Product Businesses in accordance and compliance with all regulatory obligations and requirements.

K. Maintain the levels of production, quality, pricing, service, or customer support typically associated with such Divestiture Product Businesses.

Provided, however, Respondents may take actions that the Acquirer has requested or agreed to in writing and that has been approved in advance by a Monitor (in consultation with Commission staff), in all cases to facilitate that Acquirer's acquisition of the Divestiture Assets and rights in the Divestiture Products and consistent with the purposes of the Orders.

VI. Employees

IT IS FURTHER ORDERED that:

A. Until 2 years after the Divestiture Date, Respondents shall cooperate with and assist the Acquirer to evaluate independently and offer employment to the Relevant Employees for

the Divestiture Products acquired by that Acquirer.

B. Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide to that Acquirer a list of all Relevant Employees and provide Employee Information for each Relevant Employee;

2. No later than 10 days after a request from the Acquirer, provide that Acquirer or its Manufacturing Designee an opportunity to meet individually and outside the presence or hearing of any employee or agent of Respondents with any of the Relevant Employees, and to make offers of employment to any of the Relevant Employees;

3. Remove any impediments within the control of Respondents that may deter Relevant Employees from accepting employment with the Acquirer or its Manufacturing Designee, including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee, and shall not make any counteroffer to a Relevant Employee who receives an offer of employment from that Acquirer or its Manufacturing Designee;

   Provided, however, that nothing in the Orders shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee; and

4. Not interfere, directly or indirectly, with the hiring or employing by that Acquirer or its Manufacturing Designee of any Relevant Employees, not offer any incentive to such employees to decline employment with that Acquirer or its Manufacturing Designee, and not otherwise interfere with the recruitment of any Relevant Employees by that Acquirer.

C. Respondents shall continue to provide Relevant Employees compensation and benefits, including regularly scheduled raises and bonuses, until the Divestiture Date or as may be necessary to comply with the provisions of the Orders to provide manufacturing and supply of Divestiture Products or transition services to the Acquirer.

D. Respondents shall provide reasonable financial incentives for Relevant Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Relevant Employees by the Acquirer.

E. If, at any point within 6 months of the Divestiture Date, the Commission, in consultation with the Acquirer and a Monitor, determines in its sole discretion that the Acquirer or its Manufacturing Designee should have the ability to interview, make offers of employment to, or hire any of Respondents' employees who were not included as Relevant Employees, but who either (1) were involved with any of the Divestiture Products, or (2) provided manufacturing and supply of Divestiture Products or transition services to the Acquirer, then the Commission may notify Respondents that such employees are to be designated as Relevant Employees, and Section VI of this Order shall apply to such

employees as of that notification date.

F. Respondents shall not, for a period of one year following the Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees who have accepted offers of employment with the Acquirer or its Manufacturing Designee to terminate the employee's employment with the Acquirer or its Manufacturing Designee;

Provided, however, Respondents may:

1. Hire an employee whose employment has been terminated by the Acquirer;
2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more of Relevant Employees; and
3. Hire an employee who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of Section VI.

VII. Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall transfer and deliver all Business Information related to a Divestiture Product Business to the Acquirer pursuant to the following:

1. Respondents shall deliver the Business Information to that Acquirer, at Respondents' expense, in good faith, in a timely manner (*i.e*. as soon as practicable, avoiding any delays in transmission), and in a manner that ensures the completeness and accuracy of all information and ensures its usefulness;
2. Pending complete delivery of all Confidential Business Information, Respondents shall provide that Acquirer with access to all Business Information and to employees who possess or are able to locate this information for the purposes of identifying the Business Information that contains Confidential Business Information and facilitating the delivery in a manner consistent with the Orders;
3. Not use, directly or indirectly, any such Confidential Business Information other than as necessary to comply with the following:
    a. The requirements of the Orders;
    b. Respondents' obligations to that Acquirer under the terms of the related Divestiture Agreements; or
    c. Applicable law;
4. Not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person *except* (a) that Acquirer, (b) other Persons specifically authorized by that Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services, manufacturing Divestiture Products, or who are engaged in the transfer and delivery of the Product Manufacturing Technology), (c) the Commission, or (d) a Monitor, and *except* to

the extent necessary to comply with applicable law;

5. Not provide, disclose, or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by a Respondent, other than those employees specifically authorized as described above;

6. Institute procedures and requirements to ensure that those employees of a Respondent that are authorized by that Acquirer to have access to such Confidential Business information:

    a. Do not provide, disclose, or otherwise make available, directly or indirectly, any such Confidential Business Information in contravention of the Orders; and

    b. Do not solicit, access, or use any such Confidential Business Information that they are prohibited from receiving for any reason or purpose; and

7. Take all actions necessary and appropriate to prevent access to, and the disclosure or use of, such Confidential Business Information by or to any Person(s) not authorized to access, receive, or use such information pursuant to the terms of the Orders or the Divestiture Agreements, including:

    a. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system or network controls and restrictions;

    b. To the extent practicable, maintaining such Confidential Business Information separate from other data or information of any Respondent; and

    c. Ensuring by other reasonable and appropriate means that such Confidential Business Information is not shared with a Respondent's personnel engaged in any Business related to the same or substantially the same type of Business as the Divestiture Products, including a Respondent's personnel engaged in the marketing and sale within the United States of Products Developed or in Development for the same or similar indications as the Divestiture Products or that use the same active pharmaceutical ingredients as the Divestiture Products.

B. As a condition of continued employment after the Divestiture Date, Respondents shall require each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one-year period prior to the Divestiture Date, and each employee that has responsibilities related to the Development, marketing, or sales of those Retained Products that are Developed or in Development for the same or similar indications as the Divestiture Products, in each case who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee, sign a confidentiality agreement pursuant to which that employee shall be required to maintain all such Confidential Business Information as strictly confidential, including the nondisclosure of that information to all other employees, executives, or other personnel of any Respondent (other than as necessary to comply with the requirements of the

Orders).

C. No later than 30 days after the Divestiture Date, Respondents shall provide written notification of the restrictions on the use and disclosure of the above-described Confidential Business Information by that Respondent's personnel to all of its employees who (1) may be in possession of such Confidential Business Information or (2) may have access to such Confidential Business Information. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for 2 years after the Divestiture Date. Respondents shall provide a copy of their notifications to the Acquirer. Respondents shall maintain complete records of all such notifications at the respective Respondent's principal executive offices within the United States and shall provide an officer's certification to the Commission affirming the implementation of, and compliance with, the acknowledgement program. Respondents shall provide that Acquirer with copies of all certifications, notifications, and reminders sent to that Respondent's personnel.

D. Each Respondent shall assure that its own counsel (including its own in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to the Acquirer or access original documents provided to that Acquirer, except under circumstances in which copies of documents are insufficient or otherwise unavailable, and for the following purposes:

1. To assure such Respondent's compliance with any Divestiture Agreement, the Orders, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable government entity, or any taxation requirements; or

2. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena, or other proceeding relating to the divestiture or any other aspect of an Divestiture Product, the Divestiture Assets, or the Divestiture Product Business;

Provided, *however*, that a Respondent may disclose such information as necessary for the purposes set forth in this Paragraph VII.D pursuant to an appropriate confidentiality order, agreement, or arrangement;

Provided further, *however,* that pursuant to this Paragraph VII.D, a Respondent needing such access to original documents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Denise Smart of Smart Consulting Group, LLC as Monitor to

observe and report on Respondents' compliance with the terms of the Orders.

B. The Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement shall:

1. Be subject to the approval of the Commission;

2. Not limit, and the signatories shall not construe it to limit, the terms of this Section VIII or Section VII of the Order to Maintain Assets ("Monitor Sections") and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of the Orders in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in the Orders, Respondents and the Monitor shall comply with the Orders.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in the Orders;

2. Act in consultation with the Commission or its staff;

3. Serve as an independent third party and not as an employee, or agent of the Respondents or of the Commission;

4. Shall serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional, or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with the Orders 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter, and at such other times as may be requested by staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents obligations to provide manufacturing and supply of Divestiture Products pursuant to this Order have expired or been terminated and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing the Monitor's duties for the purpose of reviewing Respondents' compliance with their obligations under the Orders, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform the Monitor's duties pursuant to the Orders;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing the Monitor's duties under the Orders, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out the Monitor's duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to the Orders; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under the Orders, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement provided that such agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with the Orders.

F. Respondents shall not require nor compel the Monitor to disclose to Respondents the substance of communications with the Commission, including the Monitor's written reports submitted to the Commission, or any other Person with whom the Monitor communicates in the performance of their duties.

G. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of the Orders. The Commission

shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;
2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and
3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph B of the Monitor Sections; or (b) receives Commission approval.

H. The Commission may on its own initiative or at the request of a Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If the Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets or the rights to the Divestiture Products as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under Section IX shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by a Respondent to comply with the Orders.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed

Divestiture Trustee.

C. No later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Section IX, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have one year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one-year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission;

   Provided, however, the Commission may extend the divestiture period only 2 times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestiture caused by a Respondent shall extend the time for divestiture under Section IX in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture(s) shall be made in the manner and to the Acquirer that receives the prior approval of the Commission as required by this Order;

   Provided, however, if the Divestiture Trustee receives bona fide offers from more

than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission;

Provided further, however, that Respondents shall select such Person within 5 days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement;

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection

with the performance of the Divestiture Trustee's duties.

F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in Section IX.

G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.

X. Prior Approval

IT IS FURTHER ORDERED that each Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any rights or interests in the Dexamethasone Products, the Sulfamethoxazole/Trimethoprim Products, and the Erythromycin/Ethylsuccinate Products, or the Therapeutic Equivalent or Biosimilar of any of these Products without the prior approval of the Commission.

XI. Prior Approval for Acquirer

IT IS FURTHER ORDERED that:

A. For a period of 3 years after the Divestiture Date, Prasco or any other Acquirer shall not sell or license, through subsidiaries or otherwise, without the prior approval of the Commission, any of the FDA Authorizations that were divested pursuant to Section II, to any Person; and

B. For a period of 7 years after the term of Paragraph XI.A ends, Prasco or any other Acquirer shall not sell or license, through subsidiaries or otherwise, without the prior approval of the Commission, any FDA Authorizations that were divested pursuant to Section II, to any Person who owns, directly or indirectly, an FDA Authorization, or is seeking approval from the FDA for an FDA Authorization, to manufacture and sell a Therapeutic Equivalent of a Divestiture Product.

Provided, however, Prasco is not required to obtain prior approval of the Commission under this Section XI for a change of control, merger, reorganization, or sale of all or substantially all of its business, or for a non-exclusive license to a contract manufacturer for the purpose of manufacturing a Divestiture Product.

XII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date and the Divestiture Dates no later than 5 days after the occurrence of each;

and

2. Submit the complete copies of each of the Divestiture Agreements to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.

B. Respondents shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondents shall submit interim Compliance Reports within 30 days after the Order to Maintain Assets is issued, and every 90 days thereafter until Respondents have completed all of the following: (a) the transfer and delivery of the Divestiture Assets and the rights to the Divestiture Products to the Acquirer, (b) the transfer and delivery of all of the Product Manufacturing Technology related to the Divestiture Products to the Acquirer or the Acquirer's Manufacturing Designee, (c) the transfer and delivery of all Business Information to the Acquirer, and (d) the Acquirer or the Acquirer's Manufacturing Designee is FDA approved to manufacture each of the Divestiture Products at a facility that is not owned or controlled by Respondents; and Respondents shall submit annual Compliance Reports one year after the Order Date, and annually for the following 4 years on the anniversary of the Order Date; and additional Compliance Reports as the Commission or its staff may request;

2. Each Respondent's Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether the Respondent is in compliance with the Orders. Conclusory statements that the Respondent has complied with its obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other information or documentation that may be necessary to demonstrate compliance:

   a. A detailed description of all substantive contacts, negotiations, or recommendations related to the transfer and delivery to the Acquirer of (i) the Divestiture Assets and the rights to the Divestiture Products, (ii) the Business Information related to each of the Divestiture Product Businesses, and (iii) the provision of manufacturing and supply of Divestiture Products to that Acquirer;

   b. A detailed description of the transfer of the Product Manufacturing Technology related to the Acquirer or the Acquirer's Manufacturing Designee and progress toward the manufacturing of these products at a facility that is not owned or controlled by Respondents; and

   c. A detailed description of the timing for the completion of such obligations.

3. Each annual Compliance Report shall include the previous year's market information for each market alleged in the Complaint including the aggregate size of the market in units and in dollars; the monthly sales in units and in dollars for each market participant; the market share for each market participant calculated based on units and on dollars; and, to the extent known, an explanation of any

significant changes in the total size of the market and any significant adverse impacts to the manufacture or supply of competing products to the market;

4. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under the Orders and provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondent shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondent shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIII. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The dissolution of: ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC;

B. Any proposed acquisition, merger, or consolidation of ANI Pharmaceuticals, Inc., Novitium Pharma LLC, and Esjay LLC; or

C. Any other change in Respondents including, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

XIV. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with the Orders, subject to any legally recognized privilege, upon written request, and upon 5 days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of that Respondent related to compliance with the Orders, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. To interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

XV. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy in a timely and sufficient manner the lessening of competition as alleged in the Commission's Complaint by:

A. Ensuring that the Acquirer can continue to use the Divestiture Assets and rights in the Divestiture Products granted or assigned pursuant to this Order for the purposes of each of the respective Divestiture Product Businesses within the United States; and

B. Creating a viable and effective competitor in the respective Divestiture Product Businesses within the United States.

XVI. Term

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

April J. Tabor
Secretary

SEAL

ISSUED:

NONPUBLIC APPENDIX I
AGREEMENTS RELATED TO THE DIVESTITURES
[cover page]

NONPUBLIC APPENDIX II
MONITOR COMPENSATION
[cover page]

AR_001174

PUBLIC APPENDIX
MONITOR AGREEMENT

[cover page]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
The Golub Corporation, a corporation,	)	**DECISION AND ORDER**
	)	**Docket No. C-4753**
Tops Markets Corporation, a corporation, and	)	**PUBLIC VERSION**
Project P Newco Holdings, Inc., a corporation.	)	

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of the proposed merger of Respondent The Golub Corporation with Respondent Tops Markets Corporation whereby each such entity shall become a subsidiary of Respondent Project P Newco Holdings, Inc. The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an Agreement Containing Consent Orders ("Consent Agreement") containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepted the Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments; at the same time, it issued and served its Complaint and Order to Maintain Assets. The Commission duly

considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34. Now, in further conformity with the procedure described in Rule 2.34, the Commission makes the following jurisdictional findings:

1. Respondent The Golub Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

2. Respondent Tops Markets Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 1760 Wehrle Drive, Williamsville, New York 14221.

3. Respondent Project P Newco Holdings, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware with its executive offices and principal place of business located at 461 Nott Street, Schenectady, New York 12308.

4. C&S Wholesale Grocers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Vermont with its executive offices and principal place of business located at 7 Corporate Drive, Keene, New Hampshire 03431.

5. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents and the proceeding is in the public interest.

ORDER

I. Definitions

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Golub" means The Golub Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by The Golub Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Tops" means Tops Markets Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by Tops Markets Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Holdco" means Project P Newco Holdings, Inc., its officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions,

groups, and affiliates controlled by Project P Newco Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "C&S" means C&S Wholesale Grocers, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates controlled by C&S Wholesale Grocers, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

E. "Respondents" means Golub, Tops, and Holdco collectively.

F. "Acquirer" means:

1. C&S; or

2. Any other person that the Commission approves to acquire any of the Supermarket Assets pursuant to this Order.

G. "Business Information" means books, records, data, and information, wherever located and however stored, including documents, written information, graphic materials, and data and information in electronic format. Business Information includes books, records, data, and information relating to sales, marketing, logistics, products, pricing, promotions, advertising, personnel, accounting, business strategy, information technology systems, customers, suppliers, vendors, research and development, registrations, licenses, and permits, and operations.

H. "Confidential Information" means all Business Information and knowledge of employees not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

I. "Consent" means an approval, consent, ratification, waiver, or other authorization.

J. "Contract" means an agreement, contract, lease, license agreement, consensual obligation, promise or undertaking with one or more third parties, whether written or oral and whether express or implied, and whether or not legally binding.

K. "Direct Cost" means the cost of labor, goods and materials, travel, and other expenditures. The cost of any labor included in Direct Cost shall not exceed the hours of labor provided times the then-current average hourly wage rate, including benefits, for the employee providing such labor.

L. "Divestiture Agreement" means:

1. The Second Amended and Restated Asset Purchase Agreement by and between GU Markets LLC, as Buyer, Tops Markets, LLC, as Seller with respect to Markets Store Locations and Tops PT, LLC, as Seller with respect to PT Store

Locations, and all amendments, exhibits, attachments, agreements, and schedules thereto, attached to this Decision and Order as Nonpublic Appendix A; or

2. Any agreement between Respondents (or a Divestiture Trustee appointed pursuant to Section IX of this Order) and an Acquirer to purchase the Supermarket Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto.

M. "Divestiture Date" means the date on which the assets relating to each Supermarket Business are divested. For example, the Divestiture Date in connection with the divestiture of the assets relating to the Cooperstown Supermarket Business would be the date on which the assets for that specific business are divested.

N. "Divestiture Trustee" means the Person appointed by the Commission pursuant to Section IX of this Order.

O. "Employee Information" means for each Supermarket Employee, to the extent permitted by law, the following information summarizing the employment history of each employee that includes:

1. Name, job title or position, date of hire, and effective service date;

2. Specific description of the employee's responsibilities;

3. The employee's base salary or current wages;

4. Most recent bonus paid, aggregate annual compensation for the last fiscal year, and current target or guaranteed bonus, if any;

5. Written performance reviews for the past three years, if any;

6. Employment status (*i.e.,* active or on leave or disability; full-time or part-time);

7. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

8. At the Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.

P. "Equipment" means all tangible personal property (other than inventories), including all: fixtures, furniture, computer equipment and third-party software, office equipment, telephone systems, security systems, registers, credit card systems, credit card invoice printers and electronic point of sale devices, money order machines and money order stock, shelving, display racks, walk-in boxes, furnishings, signage, parts, tools, supplies, and all other items of equipment or tangible personal property of any nature, together

with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part, to the extent such warranty is transferrable, and all maintenance records and other related documents.

Q. "Governmental Authorization" means a Consent, license, registration, or permit issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement.

R. "Intellectual Property" means all intellectual property, including: (1) commercial names, all assumed fictional business names, trade names, "doing business as" (d/b/a names), registered and unregistered trademarks, service marks and applications, and trade dress; (2) all patents, patent applications and inventions and discoveries that may be patentable; (3) all registered and unregistered copyrights in both published works and unpublished works; (4) all rights in mask works; (5) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (6) and all rights in internet web sites and internet domain names presently used.

S. "Merger" means the proposed merger described in the Agreement and Plan of Merger by and among (1) The Golub Corporation, (2) The Golub Stockholders Set Forth in Appendix A Hereto, (3) Tops Markets Corporation, (4) The Tops Stockholders Set Forth in Appendix B Hereto, (5) Project P Newco Holdings, Inc., (6) TMC Merger Sub, Inc., (7) Pines Merger Sub, Inc., (8) Shareholders Representative Services LLC, Solely in its Capacity as the Tops Stockholders Representative, and (9) Shareholder Representative Services LLC, Solely in its Capacity as the Golub Stockholders Representative, Dated as of February 8, 2021.

T. "Merger Date" means the date the Respondents consummate the Merger.

U. "Monitor" means any Person appointed by the Commission to serve as a monitor pursuant to this Order or the Order to Maintain Assets.

V. "Person" means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

W. "Relevant Area" means any of these counties in New York: Chenango, Clinton, Cortland, Franklin, Jefferson, Oneida, Otsego, Tioga, or Warren; or Rutland County in Vermont.

X. "Retained Assets" means the assets identified on Exhibit B of this Order.

Y. "Retained Intellectual Property" means any owned or licensed (as licensor or licensee) Intellectual Property (not included in the Retained Assets) relating to both the operation of the Supermarket Business and any other business owned by Tops prior to the Merger.

Z. "Supermarket" means any full-line retail grocery store that enables customers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with substantial offerings in each of the following product categories: bread and baked goods; dairy products; refrigerated food and beverage products; frozen food and beverage products; fresh and prepared meats and poultry; fresh fruits and vegetables; shelf-stable food and beverage products, including canned, jarred, bottled, boxed, and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, tea, and other staples; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by law, wine, beer, and/or distilled spirits.

AA. "Supermarket Assets" means all of Respondents' rights, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, used in, or relating to the Supermarket Business, including:

1. All real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. All Equipment;

3. At the Acquirer's option, any or all inventories;

4. All accounts receivable;

5. All Intellectual Property;

6. All Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

7. All Governmental Authorizations and all pending applications therefor or renewals thereof, to the extent transferable;

8. All Business Information; and

9. All intangible rights and property, including going concern value, goodwill, and telephone and telecopy listings;

Provided, however, that the Supermarket Assets need not include the (x) Retained Assets or (y) Retained Intellectual Property.

BB. "Supermarket Business" means the Cooperstown Supermarket Business, Cortland Supermarket Business, Norwich Supermarket Business, Owego Supermarket Business, Peru Supermarket Business, Rome Supermarket Business, Rutland Supermarket

Business, Saranac Lake Supermarket Business, Sherrill Supermarket Business, Warrensburg Supermarket Business, Watertown Supermarket Business, and Watertown II Supermarket Business defined in Appendix C of this Order.

CC. "Supermarket Employee" means each full-time, part-time, or contract individual employed by Tops whose job responsibilities relate or related to the Supermarket Business at any time after February 8, 2021.

DD. "Transitional Assistance" means services and support as required by the Acquirer to facilitate the transfer of the Supermarket Business and operation of the Supermarket Assets, including services and support related to payroll, employee benefits, accounting, information technology systems, back-office and front-office systems (including inventory and price management), distribution, warehousing, and use of trademarks or trade names for transitional purposes.

II. Divestiture

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Supermarket Assets, as ongoing businesses, absolutely and in good faith, to C&S as follows:

1. The assets relating to at least 2 of the Supermarket Businesses identified on Appendix C no later than January 17, 2022;

2. The assets relating to at least 4 of the Supermarket Businesses identified on Appendix C no later than January 24, 2022;

3. The assets relating to at least 6 of the Supermarket Businesses identified on Appendix C no later than January 31, 2022;

4. The assets relating to at least 8 of the Supermarket Businesses identified on Appendix C no later than February 7, 2022;

5. The assets relating to at least 10 of the Supermarket Businesses identified on Appendix C no later than February 14, 2022; and

6. The assets relating to all of the Supermarket Businesses identified on Appendix C no later than February 21, 2022.

Provided, however, that, if within 12 months after issuing the Order, the Commission determines, in consultation with the Acquirer and the Monitor, should one be appointed, that the Acquirer needs one or more Retained Assets to operate any of the Supermarket Assets in a manner that achieves the purposes of the Order, Respondents shall divest, absolutely and in good faith, such needed Retained Assets to the Acquirer; and

Provided further, however, that if Business Information relating to any of the Supermarket Assets includes information (1) that also relates to other retained businesses of Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Supermarket Assets or (2) where Respondents have a legal obligation to retain the original copies, then Respondents may provide copies of the Business Information (with redactions as appropriate) and shall provide the Acquirer access to the original materials if copies are insufficient for regulatory or evidentiary purposes;

B. If Respondents have divested any of the Supermarket Assets to C&S prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:

1. C&S is not acceptable as the acquirer of the applicable Supermarket Assets, then Respondents shall rescind the divestiture within 5 days of notification, and shall divest such Supermarket Assets no later than 180 days from the date this Order is issued, as ongoing businesses, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or

2. The manner in which the divestiture to C&S was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to modify the manner of divestiture of the Supermarket Assets as the Commission may determine is necessary to satisfy the requirements of this Order.

C. Respondents shall grant a license to the Acquirer under any Retained Intellectual Property that is needed for the Acquirer to operate the Supermarket Business.

D. Respondents shall obtain, no later than the applicable Divestiture Date and at their sole expense, all Consents from third parties and all Governmental Authorizations that are necessary to effect the complete transfer and divestiture of the relevant Supermarket Assets to the Acquirer and for the Acquirer to operate any aspect of the relevant Supermarket Business;

Provided, however:

1. Respondents may satisfy the requirement to obtain all Consents from third parties by certifying that the Acquirer has entered into equivalent agreements or arrangements directly with the relevant third party that are acceptable to the Commission, or has otherwise obtained all necessary Consents and waivers; and

2. With respect to any Governmental Authorization relating to any Supermarket Assets that are not transferable, Respondents shall, to the extent permitted under applicable law, allow the Acquirer to operate the relevant Supermarket Assets under Respondents' Governmental Authorization pending the Acquirer's receipt of its own Governmental Authorization, and Respondents shall provide such

assistance as the Acquirer may reasonably request in connection with its efforts to obtain such Governmental Authorization.

E. Respondents shall assist each potential Acquirer to conduct a due diligence investigation of the applicable Supermarket Assets and Supermarket Business, including by providing sufficient and timely access to all information customarily provided as part of a due diligence process, and affording each Acquirer and its representatives (including prospective lenders and their representatives) full and free access, during regular business hours, to the personnel, assets, Contracts, Governmental Authorizations, Business Information, and other documents and data relating to the applicable Supermarket Business, with such rights of access to be exercised in a manner that does not unreasonably interfere with the operations of Respondents.

III. Divestiture Agreement

IT IS FURTHER ORDERED that:

A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order;

Provided, however, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.

B. Respondents shall not modify or amend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

IV. Transitional Assistance

IT IS FURTHER ORDERED that:

A. Until Respondents have transferred all Business Information included in the Supermarket Assets, Respondents shall ensure that the Business Information is maintained and updated in the ordinary course of business and shall provide the Acquirer with access to records and information (wherever located and however stored) that Respondents have not yet transferred to the Acquirer, and to employees who possess the records and information.

B. At the option of Acquirer, Respondents shall provide the Acquirer with Transitional Assistance sufficient to (1) transfer efficiently the applicable Supermarket Assets to the Acquirer and (2) allow the Acquirer to operate the acquired Supermarket Business and Supermarket Assets in a manner that is equivalent in all material respects to the manner in which Respondents did so prior to the Merger.

C. Respondents shall provide Transitional Assistance:

1. As set forth in the Divestiture Agreement, or as otherwise reasonably requested by the Acquirer (whether before or after the applicable Divestiture Date);

2. At the price set forth in the Divestiture Agreement, or if no price is set forth, at no more than Direct Cost; and

3. For a time period sufficient to meet the requirements of this Paragraph, which shall be, at the option of the Acquirer, for up to 12 months after the applicable Divestiture Date;

Provided, however, that within 15 days after a request by the Acquirer, Respondents shall file with the Commission a request for prior approval to extend the term for providing Transitional Assistance as the Acquirer requests in order to achieve the purposes of this Order.

D. Respondents shall allow the Acquirer to terminate, in whole or part, any Transitional Assistance provisions of the Divestiture Agreement upon commercially reasonable notice and without cost or penalty.

E. Respondents shall not cease providing Transitional Assistance due to a breach by the Acquirer of the Divestiture Agreement, and shall not limit any damages (including indirect, special, and consequential damages) that the Acquirer would be entitled to receive in the event of Respondents breach of the Divestiture Agreement.

V. Employees

IT IS FURTHER ORDERED that:

A. Until 90 days after the applicable Divestiture Date, Respondents shall cooperate with and assist the Acquirer of any of the Supermarket Assets to evaluate independently and offer employment to any Supermarket Employee.

B. Until 90 days after the applicable Divestiture Date, Respondents shall:

1. No later than 10 days after a request from the Acquirer, provide a list of all Supermarket Employees and provide Employee Information for each;

2. No later than 10 days after a request from the Acquirer, provide the Acquirer an opportunity to privately interview any of the Supermarket Employees outside the presence or hearing of any employee or agent of any Respondent, and to make offers of employment to any of the Supermarket Employees;

3. Remove any impediments within the control of Respondents that may deter Supermarket Employees from accepting employment with the Acquirer,

including, but not limited to, removal of any non-compete or confidentiality provisions of employment or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Acquirer, and shall not make any counteroffer to a Supermarket Employee who receives an offer of employment from the Acquirer;

Provided, however, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

4. Continue to provide Supermarket Employees with compensation and benefits, including regularly scheduled raises and bonuses and the vesting of benefits;

5. Provide reasonable financial incentives for Supermarket Employees to continue in their positions, and as may be necessary, to facilitate the employment of such Supermarket Employees by the Acquirer; and

6. Not interfere, directly or indirectly, with the hiring or employing by the Acquirer of any Supermarket Employee, not offer any incentive to such employees to decline employment with the Acquirer, and not otherwise interfere with the recruitment of any Supermarket Employee by the Acquirer.

C. Respondents shall not, for a period of one year following the applicable Divestiture Date, directly or indirectly, solicit or otherwise attempt to induce any Person employed by the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, Respondents may:

1. Hire any such Person whose employment has been terminated by the Acquirer;

2. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at one or more Person employed by the Acquirer; or

3. Hire a Person who has applied for employment with Respondents, as long as such application was not solicited or induced in violation of this Section V.

D. Respondent shall not enforce any non-compete provision or non-compete agreement against any individual who seeks or obtains a position with the Supermarket Business or does business with the Supermarket Business.

VI. Asset Maintenance

IT IS FURTHER ORDERED that Respondents shall, subject to their obligations under the Order to Maintain Assets, ensure that the Supermarket Assets relating to each Supermarket Business are operated and maintained in the ordinary course of business consistent with past practices until such assets are fully transferred to the Acquirer, and shall:

A. Take all actions necessary to maintain the full economic viability, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets, to minimize the risk of any loss of their competitive potential, to operate them in a manner consistent with applicable laws and regulations, and to prevent their destruction, removal, wasting, deterioration, or impairment (other than as a result of ordinary wear and tear).

B. Not sell, transfer, encumber, or otherwise impair the Supermarket Business and related Supermarket Assets (other than in the manner prescribed in this Order and the Order to Maintain Assets) or take any action that lessens their full economic viability, marketability, or competitiveness;

C. Not terminate the operations of the Supermarket Business and related Supermarket Assets, and shall conduct or cause to be conducted the operations of the Supermarket Business and related Supermarket Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and as may be necessary to preserve the full economic viability, ongoing operations, marketability, and competitiveness of the Supermarket Business and related Supermarket Assets; and

D. Use best efforts to preserve the existing relationships with suppliers, customers, employees, governmental authorities, vendors, landlords, and others having business relationships with the Supermarket Business and related Supermarket Assets.

Provided, however, that Respondents may take actions that the Acquirer has requested or agreed to in writing and that have been approved in advance by Commission staff, in all cases to facilitate the Acquirer's acquisition of the Supermarket Assets and consistent with the purposes of this Order and the Order to Maintain Assets.

VII. Confidentiality

IT IS FURTHER ORDERED that:

A. Respondents shall not (x) disclose (including to Respondents' employees) or (y) use for any reason or purpose, any Confidential Information received or maintained by Respondents relating to the Supermarket Assets, Supermarket Business, or post-divestiture Supermarket Business; *provided, however,* that Respondents may disclose or use such Confidential Information in the course of:

1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or a Divestiture Agreement; or

2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Supermarket Assets or Supermarket Business, or as required by law or regulation, including any applicable securities exchange rules or regulations.

B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph VII.A of this Order, Respondents shall limit such disclosure or use (1) only to the extent such information is required, (2) only to those employees or Persons who require such information for the purposes permitted under Paragraph VII.A., and (3) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

C. Respondents shall enforce the terms of this Section VII and take necessary actions to ensure that their employees and other Persons comply with the terms of this Section VII, including implementing access and data controls, training its employees, and other actions that Respondents would take to protect their own trade secrets and proprietary information.

VIII. Monitor

IT IS FURTHER ORDERED that:

A. The Commission appoints Larry Appel to serve as Monitor to observe and report on Respondents' compliance with their obligations as set forth in the Orders.

B. Respondents and the Monitor may enter into an agreement relating to the Monitor's services. Any such agreement:

1. Shall be subject to the approval of the Commission;

2. Shall not limit, and the signatories shall not construe it to limit, the terms of this Section VIII or Section __ of the Order to Maintain Assets ("Monitor Sections"), and to the extent any provision in the agreement varies from or conflicts with any provision in the Monitor Sections, Respondents and the Monitor shall comply with the Monitor Sections; and

3. Shall include a provision stating that the agreement does not limit, and the signatories shall not construe it to limit, the terms of this Order in this matter, and to the extent any provision in the agreement varies from or conflicts with any provision in this Order, Respondents and the Monitor shall comply with this Order.

C. The Monitor shall:

1. Have the authority to monitor Respondents' compliance with the obligations set forth in this Order;

2. Act in consultation with the Commission or its staff;
3. Serve as an independent third party and not as an employee or agent of Respondents or of the Commission;

4. Serve without bond or other security;

5. At the Monitor's option, employ such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;

6. Enter into a non-disclosure or other confidentiality agreement with the Commission related to Commission materials and information received in connection with the performance of the Monitor's duties and require that each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants shall also enter into a non-disclosure or other confidentiality agreement with the Commission;

7. Notify staff of the Commission, in writing, no later than 5 days in advance of entering into any arrangement that creates a conflict of interest, or the appearance of a conflict of interest, including a financial, professional or personal conflict. If the Monitor becomes aware of a such a conflict only after it has arisen, the Monitor shall notify the Commission as soon as the Monitor becomes aware of the conflict;

8. Report in writing to the Commission concerning Respondents' compliance with this Order on a schedule as determined by Commission staff, and at any other time requested by the staff of the Commission; and

9. Unless the Commission or its staff determine otherwise, the Monitor shall serve until Commission staff determines that Respondents have satisfied all obligations under Sections II, IV, and VI of this Order, and files a final report.

D. Respondents shall:

1. Cooperate with and assist the Monitor in performing his or her duties for the purpose of reviewing Respondents' compliance with their obligations under this Order, including as requested by the Monitor, (a) providing the Monitor full and complete access to personnel, information and facilities; and (b) making such arrangements with third parties to facilitate access by the Monitor;

2. Not interfere with the ability of the Monitor to perform his or her duties pursuant to this Order;

3. Pay the Monitor's fees and expenses as set forth in an agreement approved by the Commission, or if such agreement has not been approved, pay the Monitor's customary fees, as well as expenses the Monitor incurs performing his or her duties under this Order, including expenses of any consultants, accountants, attorneys, and other representatives and assistants that are reasonably necessary to assist the Monitor in carrying out his or her duties and responsibilities;

4. Not require the Monitor to disclose to Respondents the substance of the Monitor's communications with the Commission or any other Person or the substance of written reports submitted to the Commission pursuant to this Order; and

5. Indemnify and hold the Monitor harmless against any loss, claim, damage, liability, and expense (including attorneys' fees and out of pocket costs) that arises out of, or is connected with, a claim concerning the performance of the Monitor's duties under this Order, unless the loss, claim, damage, liability, or expense results from gross negligence or willful misconduct by the Monitor.

E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to enter into a customary confidentiality agreement, so long as the agreement does not restrict the Monitor's ability to access personnel, information, and facilities or provide information to the Commission, or otherwise observe and report on the Respondents' compliance with this Order.

F. If the Monitor resigns or the Commission determines that the Monitor has ceased to act, has failed to act diligently, or is otherwise unable to continue serving as a Monitor due to the existence of a conflict or other reasons, the Commission may appoint a substitute Monitor. The substitute Monitor shall be afforded all rights, powers, and authorities and shall be subject to all obligations of the Monitor Sections of this Order. The Commission shall select the substitute Monitor, subject to the consent of the Respondents. Respondents:

1. Shall not unreasonably withhold consent to the appointment of the selected substitute Monitor;

2. Shall be deemed to have consented to the selection of the proposed substitute Monitor if, within 10 days of notice by staff of the Commission of the identity of the proposed substitute Monitor, Respondents have not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor; and

3. May enter into an agreement with the substitute Monitor relating to the substitute Monitor's services that either (a) contains substantially the same terms as the Commission-approved agreement referenced in Paragraph VIII.B.; or (b) receives Commission approval.

G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IX. Divestiture Trustee

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Supermarket Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Section shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Not later than 10 days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestitures required by this Order. Any failure by Respondents to comply with a trust agreement approved by the Commission shall be a violation of this Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed;

2. The Divestiture Trustee shall have one year from the date the Commission approves the trustee trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the one year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestitures can be achieved within a reasonable time, the divestiture period may be extended by the Commission,

   Provided, however, the Commission may extend the divestiture period only 2 times;

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays in divestitures caused by Respondents shall extend the time for divestitures under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer that receives the prior approve of the Commission as required by this Order,

   Provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring person for a divestiture, and if the Commission determines to approve more than one such acquiring person for the divestiture, the Divestiture Trustee shall divest to the acquiring person selected by Respondents from among those approved by the Commission,

   Provided further, however, that Respondents shall select such person within 5 days of receiving notification of the Commission's approval;

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture

Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee;

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets required to be divested by this Order;

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 30 days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and

9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

X. Prior Approval

IT IS FURTHER ORDERED that Respondents shall not, without the prior approval of the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Any ownership or leasehold interest in any facility that has operated as a Supermarket in a Relevant Area within 6 months prior to the date of such proposed acquisition; or

B. Any stock, share capital, equity, or other interest in any entity that owns any interest in or operates a Supermarket, or owned any interest in or operated a Supermarket in a Relevant Area within 6 months prior to such proposed acquisition.

Provided however, that Respondents are not required to obtain the prior approval of the Commission for the Respondents' construction or opening of new facilities.

XI. Additional Obligations

IT IS FURTHER ORDERED that Respondents shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Supermarket at any location formerly owned or operated by Respondents in a Relevant Area.

XII. Acquirer

IT IS FURTHER ORDERED that:

A. For a period of:

1. 3 years after the Divestiture Date, C&S or any other Acquirer shall not sell, license, or otherwise convey, through subsidiaries or otherwise, without the prior approval of the Commission, any Supermarket that was divested pursuant to Section II to any Person; and

2. 7 years after the term of Paragraph XII.A.1. ends, C&S or any other Acquirer shall not sell, license, or convey, through subsidiaries or otherwise, without the prior approval of the Commission, a Supermarket that was divested pursuant to Section II to any Person who owns, or within 6 months prior to such sale date, owned, directly, or indirectly, through subsidiaries or otherwise, a leasehold, ownership interest, or any other interest in whole or in part, in a Supermarket located in the same Relevant Area as the divested Supermarket;

Provided, however, C&S is not required to obtain prior approval of the Commission under this Paragraph XII.A. for a change of control, merger, reorganization, or sale of all or substantially all of its business.

B. C&S shall neither enter into nor enforce any agreement that restricts the ability of any Person to operate a Supermarket at any location formerly owned or operated by C&S in a Relevant Area.

XIII. Compliance Reports

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the Merger Date and of the Divestiture Date of the Supermarket Assets relating to each Supermarket Business no later than 5 days after the occurrence of each; and

2. Submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after Respondents close on a Divestiture Agreement.

B. Respondents shall file verified written reports ("Compliance Reports") in accordance with the following:

1. Respondents shall submit:

(a) Interim Compliance Reports 30 days after this Order is issued and every 30 days thereafter until Respondents have fully complied with the provisions of Sections II and IV of this Order;

(b) Annual Compliance Reports one year after the date this Order is issued and annually thereafter for the next nine years on the anniversary of that date; and

(c) Additional Compliance Reports as the Commission or its staff may request.

2. Each Compliance Report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of this Order.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in each Compliance Report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondent's obligations under this Order

during the period covered by such Compliance Report. Respondents shall provide copies of these documents to Commission staff upon request.

C. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall file its compliance reports with the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

XIV. Change in Respondents

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. The proposed dissolution of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.;

B. The proposed acquisition, merger, or consolidation of The Golub Corporation, Tops Markets Corporation, or Project P Newco Holdings, Inc.; or

C. Any other changes in Respondents, including assignment and the creation, sale, or dissolution of subsidiaries, if such changes may affect compliance obligations arising out of the Order.

XV. Access

IT IS FURTHER ORDERED that for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative of the Commission and at the expense of the Respondent; and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

XVI. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and to ensure the Acquirer can operate the Supermarket Business in a manner equivalent in all material respects to the manner in which Respondents operated the Supermarket Business prior to the Merger.

XVII. Term

IT IS FURTHER ORDERED that this Order shall terminate on January 20, 2032.

By the Commission.

April J. Tabor
Secretary

SEAL:
ISSUED: January 20, 2022

Nonpublic Appendix A

Divestiture Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix B

Retained Assets

- Corporate or regional offices
- Cash, cash equivalents, accounts, notes receivable, except for till cash
- Inventory as agreed between Respondents and the Acquirer
- Assets not stored at a location of a Supermarket Business or not used exclusively in the Supermarket Busines, including, without limitation, any and all of Respondent Tops' Medicare, Medicaid and other provider or supplier numbers and registrations that are not exclusive and unique to pharmacy and which are being, or could be used by Respondent Tops' pharmacies not subject to the merger agreement with Acquirer
- All contracts as agreed between Respondents and the Acquirer
- All trade names and trademarks used corporate-wide, and website content, domain names, or e-mail addresses that contain such trade names or trademarks
- Proprietary software, security codes located on any hardware of Respondent Tops or associated with any computer systems, network systems, point of sale (POS) systems, and any other software systems of Respondent Tops
- Signage, banners, display, and other assets containing, displaying or otherwise bearing any of Respondent Tops' intellectual property
- Minute books and organizational documents and financial and business records relating to the retained business operations of Respondent Tops
- Equity securities of Respondent Tops
- Rights under the documents and agreement governing the Merger
- Motor vehicles, including trucks and trailers
- Leased equipment and vendor-owned equipment as agreed between Respondents and the Acquirer
- Parcel pick-up equipment
- Tax returns of Respondent Tops and other documents related to Respondent Tops' taxes
- Tax assets or attributes of Respondent Tops, including tax refunds and prepayments
- Refunds and rebates owed to Respondent Tops

Appendix C

State	City	Business	Store Number	Description
NY	Cooperstown (Otsego County)	Cooperstown Supermarket Business	Tops 568	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 5 Commons Drive, Rt. 28 Cooperstown, New York 13326.
NY	Cortland (Cortland County)	Cortland Supermarket Business	Tops 517	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 3932 State Route 281, Cortland, New York 13045.
NY	Norwich (Chenango County)	Norwich Supermarket Business	Tops 569	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 54 East Main Street, Norwich, New York 13815.
NY	Owego (Tioga County)	Owego Supermarket Business	Tops 579	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 1145 Rt. 17-C, Owego, New York 13827.
NY	Peru (Clinton County)	Peru Supermarket Business	Tops 713	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 2 Gorman Way, Suite #1, Peru, New York 12972.
NY	Rome (Oneida County)	Rome Supermarket Business	Tops 587	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 217 Erie Boulevard West, Rome, New York 13440.

State	City	Business	Store Number	Description
NY	Saranac Lake (Franklin County)	Saranac Lake Supermarket Business	Tops 707	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 156 Church Street, Saranac Lake, New York 12983.
NY	Sherrill (Oneida County)	Oneida Supermarket Business	Tops 364	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 87 East State Street, Sherrill, New York 13461.
NY	Warrensburg (Warren County)	Warrensburg Supermarket Business	Tops 701	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 3836 Main Street, Warrensburg, New York 12885.
NY	Watertown (Jefferson County)	Watertown Supermarket Business	Tops 589	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 22050 Seaway Shopping Center, Watertown, New York 13601.
NY	Watertown (Jefferson County)	Watertown II Supermarket Business	Tops 597	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 1330 Washington Street, Watertown, New York 13601.
VT	Rutland (Rutland County)	Rutland Supermarket Business	Tops 740	All business activities conducted by Tops prior to the Merger Date at or relating to the Supermarket located at 14 N. Main Street, Rutland, Vermont 05701.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
LOCKHEED MARTIN CORPORATION,	)	
a corporation;	)	
	)	**Docket No. 9405**
and	)	**REDACTED PUBLIC VERSION**
	)	
AEROJET ROCKETDYNE HOLDINGS, INC.	)	
a corporation.	)	
	)	

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Lockheed Martin Corporation ("Lockheed"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Aerojet Rocketdyne Holdings, Inc. ("Aerojet"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

NATURE OF THE CASE

1. Lockheed, the world's largest defense contractor, proposes to acquire Aerojet, the last significant independent, and, in some instances sole, U.S. supplier of several critical missile propulsion products used as inputs in multiple weapon systems, for $4.4 billion (the "Proposed Acquisition"). If permitted, the Proposed Acquisition would allow the combined firm to use its control of Aerojet to harm Lockheed's rivals in ways that would substantially lessen competition in multiple markets for products critical to the national defense.

2. The United States Department of Defense ("DoD" or the "Department") depends on prime contractors such as Lockheed to design, develop, and produce the weapon systems it requires to defend the United States. Under DoD's acquisition system, a prime contractor is

responsible for sourcing all necessary systems, subsystems, and components either internally or through sub-contracts with qualified outside suppliers.

3. Lockheed currently competes against other firms, including Raytheon Technologies, Inc. ("Raytheon"), Northrop Grumman Corporation ("Northrop" or "NG"), and The Boeing Company ("Boeing"), for prime contracts to design, develop, and produce, all-up missile rounds and/or missile systems ("missiles"), missile defense kill vehicles ("KVs"), and/or hypersonic cruise missiles ("HCMs") (collectively, the "Relevant Products" and the "Relevant Markets") for DoD. The competition among prime contractors for these important weapon systems has provided benefits to DoD, including lower costs, enhanced quality, and greater innovation.

4. After conducting an independent review of the Proposed Acquisition, DoD, the sole customer for the Relevant Products, has "concluded [redacted]

5. Aerojet is a premier provider of multiple critical inputs to the Relevant Products, including solid propellant rocket motors ("SRMs") for missile propulsion, divert-and-attitude control systems ("DACS") that provide the fast and precise maneuvering capabilities for the KVs used to intercept hostile ballistic missile threats, and air-breathing hypersonic propulsion systems, including, but not limited to, the supersonic combustion ramjets ("scramjets") that power HCMs (collectively, "Critical Propulsion Technologies").

6. As a Lockheed executive summarized in Executive Talking Points about the Proposed Acquisition, "propulsion is an absolutely critical element for all future advanced missiles." This executive further explained, [redacted]

7. Aerojet is the only independent, and, in some instances sole, significant U.S. supplier of the Critical Propulsion Technologies. [redacted]

8. Lockheed believed that the Proposed Acquisition [redacted] whereas, if Lockheed did not pursue the acquisition, [redacted]

9. The Proposed Acquisition would reduce competition because it will provide Lockheed with the ability and incentive to foreclose access to, or raise its rivals' cost for, the Critical Propulsion Technologies. Without access to these essential inputs, Lockheed's competitors (and future potential competitors) would be seriously disadvantaged—if not completely foreclosed—from competing for upcoming DoD prime contracts in the Relevant

Markets. Short of refusing to sell or increasing the price of its in-house propulsion products, a combined Lockheed-Aerojet could use multiple other mechanisms to disadvantage its competitors that rely on these critical inputs to design, develop, and produce the Relevant Products, such as making adverse personnel assignments and/or scheduling, investment, or design decisions.

10. Today, as a neutral merchant supplier, Aerojet has the incentive to (and in fact does) compete to supply the Critical Propulsion Technologies to all potential customers. When a prime contract is up for bid, Aerojet currently possesses an incentive to support as many potential prime contractors as possible to maximize the probability that Aerojet will be the supplier of choice for the winning prime contractor.

11. Before agreeing to purchase Aerojet, Lockheed sought unsuccessfully to prevent Aerojet from supplying Critical Propulsion Technologies to other prime contractors on a number of occasions. [redacted] This is not the first time Lockheed made such an attempt. [redacted]

12. If Lockheed acquires Aerojet, the combined firm will no longer have the same incentive to support its rival prime contractors. For example, post-acquisition, Lockheed would earn substantially more by winning a DoD prime contract for a Relevant Product than it would from the sale of Critical Propulsion Technologies to a rival that won the prime contract. Because Lockheed will earn more if it wins the prime contract, it will have an increased incentive to refuse to sell to, or otherwise disadvantage (e.g., by failing to provide pre-acquisition levels of pricing, support, access, or research investment) its rival defense prime contractors in order to shift future prime missile contracts to Lockheed.

13. The Proposed Acquisition will likely result in a decrease in certain research and development ("R&D") investment and innovation in the design, development, and production of missile propulsion systems. Today, Aerojet collaborates closely and shares innovative ideas with all its major customers, including, but not limited to, Lockheed, Raytheon, Boeing, and Northrop. Similarly, Aerojet invests its own resources in R&D to support competing propulsion concepts advanced by multiple prime contractors for a given missile program. Given Aerojet currently is generally agnostic as to which prime wins a given contract (provided Aerojet is the supplier for the winner), Aerojet invests in technologies that it expects will yield the most benefit to its propulsion business without regard to the identity of the prime contractor. Post-acquisition, however, a combined Lockheed-Aerojet will no longer possess the same incentives with respect to R&D. Post-acquisition, the combined firm will earn more if Lockheed wins the prime

contract, and therefore, would have a diminished incentive to devote its resources toward otherwise beneficial, innovative R&D that would advantage Lockheed's rivals or diminish sales of competing Lockheed Relevant Products, ultimately inhibiting DoD's capability to defend the nation.

14. A further anticompetitive effect of the Proposed Acquisition is that it presents new opportunities, and heightens the incentives, for Lockheed to misuse the competitively sensitive, non-public information of rival primes and propulsion suppliers in at least two ways. First, by acquiring Aerojet, Lockheed will gain access to competitively sensitive, non-public information about its rivals' competing missile, KV, or HCM systems to which Aerojet was privy in its role as a supplier of the Critical Propulsion Technologies to those rival primes. If such information is shared, whether intentionally or unintentionally, with Lockheed personnel working on a competing prime proposal, the information exchange could reduce competition for the relevant program. Going forward, rival primes may also be inhibited from sharing necessary information with the former Aerojet propulsion business because they risk the loss of their proprietary information to Lockheed. Second, Lockheed, in its current role as purchaser of Critical Propulsion Technologies, is likely to be privy to competitively sensitive, non-public information relating to Aerojet's only SRM rival, Northrop. Post-acquisition, Lockheed would have an incentive that it did not previously have to exploit that proprietary Northrop information to gain an advantage for its newly acquired in-house propulsion business and to disadvantage Northrop in future SRM competitions. Preventing such potential anticompetitive exchanges of information is necessary to maintain effective competition in the Relevant Markets to ensure that innovation, price, and/or performance for these important U.S. military systems is not negatively impacted.

15. The Proposed Acquisition will substantially lessen competition in all Relevant Markets, likely impacting multiple consequential current and future missile procurement programs. If the Proposed Acquisition is consummated, it will likely result in less innovation by Lockheed and other prime competitors, possible exit by Lockheed's prime competitors, increased barriers to entry in the downstream Relevant Markets, and higher cost and/or lower quality product for DoD.

16. There are no countervailing factors sufficient to offset the likelihood of competitive harm from the Proposed Acquisition. Neither new entry nor expansion by existing market participants will be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition.

17. Nor can Respondents demonstrate substantiated, verifiable, cognizable, and merger-specific efficiencies that would offset the Proposed Acquisition's likely significant anticompetitive effects in the Relevant Markets.

RESPONDENTS AND THE PROPOSED ACQUISITION

18. Respondent Lockheed is a Maryland corporation headquartered at 6801 Rockledge Drive, Bethesda, Maryland 20817. The largest defense contractor in the world, Lockheed reported net sales of over $65 billion in 2020, approximately 74 percent of which were from sales to the U.S. Government. Lockheed employs approximately 110,000 people, with the vast majority located in the United States. Lockheed's business is organized into four segments: Aeronautics, Missiles and Fire Control, Rotary and Mission Systems, and Space. At least three of its business segments (Aeronautics, Missile and Fire Control, and Space) research, design, develop, integrate, produce, and/or sustain various classified and unclassified advanced missiles and missile defense systems, including missiles, KVs, and HCMs.

19. Respondent Aerojet is a Delaware corporation headquartered at 222 N. Pacific Coast Highway, Suite 500, El Segundo, California 90245. Aerojet is an aerospace and defense company that specializes in researching, developing, and manufacturing advanced power, propulsion, and armament systems. A major portion of Aerojet's business is devoted to developing and producing liquid and solid rocket propulsion systems for defense and civil space applications. Aerojet is also a leader in developing cutting-edge hypersonic propulsion technologies, including air-breathing hypersonic propulsion systems and solid propellant boost motors for hypersonic weapon systems. Aerojet reported net sales of over $2 billion in 2020, approximately 96 percent of which were sales made, directly or indirectly, to the U.S. Government, including to the military services, the Missile Defense Agency ("MDA"), and the National Aeronautics and Space Administration. As a tier-one subcontractor, Aerojet usually is a direct supplier to a prime contractor customer such as Lockheed. Aerojet considers its remaining performance obligations, or "backlog," to be a key metric of its financial performance. In October 2021, Aerojet's backlog totaled approximately $7 billion and its funded backlog (amounts for which funding has been authorized by a customer and purchase order received), totaled approximately $3.2 billion.

20. Pursuant to an Agreement and Plan of Merger dated December 20, 2020, Lockheed agreed to acquire 100 percent of the issued and outstanding voting securities of Aerojet for approximately $4.4 billion.

JURISDICTION

21. Respondents, and each of their relevant operating entities and subsidiaries are, and at all relevant times have been, engaged in commerce and in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12

22. The Proposed Acquisition is subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

INDUSTRY BACKGROUND

23. The Relevant Products are defense-specific products for which DoD is generally the sole customer. DoD's process for buying a new weapon system is lengthy, highly complex, governed by multiple sets of regulations, and involves numerous decision makers. Each new

weapon system must go through a formal three-step process, which includes (1) identifying the specific military requirements for the new weapon system; (2) planning, programming, budgeting, and execution; and (3) determining how the weapon system will be developed and acquired. This weapon system procurement program—from initial concept to full production of the weapon system—occurs over a number of years.

24. Under the DoD acquisition system, the weapon system integrator or "prime contractor" is typically responsible for designing the new weapon system, assessing the trade-offs inherent in potential designs, maturing the enabling technologies, and planning development, production, and sustainment programs to achieve an operational weapon that meets DoD's performance, cost, and schedule requirements. Because of the enormous complexity of modern weapon systems, only a small number of firms possess the necessary mix of technical, managerial, and industrial capabilities to act as a prime contractor for most DoD acquisition programs for any of the Relevant Products. In the acquisition phase, some common factors that DoD considers before awarding a competitive prime contract include technical capability, cost/price, schedule risk, and the bidders' past performance on similar programs.

25. The prime contractor is, in turn, responsible for selecting subcontractors to manufacture components of the integrated weapon system. These sub-components can vary greatly in complexity and importance. For the Relevant Products, the propulsion provider is a major subcontractor of particular importance because the propulsion sub-system is one of the critical discriminator technologies that determines the weapon system's performance. Propulsion subcontractor evaluations can be based on a multitude of factors including, but not limited to, capabilities, price, performance, past performance/reputation, risk, and delivery schedule. As a result, the design and development of a propulsion sub-system entails a close and lengthy collaboration, including the sharing of significant amounts of proprietary, competitively sensitive information, between the input supplier and the prime throughout the entire length of the acquisition program.

26. The U.S. missile industry is highly concentrated up and down the supply chain. In most cases, there are at most four firms that possess sufficient experience and expertise in designing, developing, and producing missile systems to serve as prime contractors for the Relevant Products: Lockheed, Raytheon, Boeing, and, in some instances, Northrop. There are at most two firms that can competitively supply the Critical Propulsion Technologies to the prime contractors: Aerojet and Northrop.

THE RELEVANT ANTITRUST MARKETS

27. The Proposed Acquisition is likely to lessen competition substantially in multiple relevant product markets, including the design, development, and production of missiles, KVs, and HCMs in the United States.

I. The Relevant Product Markets are the Design, Development, and Production of Missiles, KVs, and HCMs

a. The Design, Development, and Production of Missiles is a Relevant Product Market

28. The first relevant product market in which to analyze the Proposed Acquisition is no broader than the design, development, and production of missiles. A missile is a self-propelled, guided munition that flies through or above the atmosphere to strike a target. Missiles are advanced weapon systems that provide essential national defense capabilities that no other weapon system is as capable of providing.

29. The U.S. military depends on many different missiles to accomplish various specific missions. There are three broad categories of missiles: strategic, tactical, and missile defense interceptors ("MDIs"). U.S. military strategic missiles include nuclear-armed ballistic and cruise missiles intended to achieve strategic nuclear deterrence. These missiles are designed to strike strategic targets at very long ranges. U.S. military tactical missiles are conventional, typically shorter-range weapons used to engage individual military targets to gain tactical advantage on the battlefield. MDIs are specialized missiles designed to intercept and destroy incoming ballistic missile threats.

30. Missiles contain several components that can vary depending on the mission-specific purpose for which the missile is designed. All missiles, however, contain four principle sub-systems: airframe, guidance and control, armament, and propulsion.

31. Most missiles employed by the U.S. military use SRMs for propulsion. The U.S. military also employs a small number of missiles, called "cruise missiles," that use air-breathing jet engines instead of SRMs for primary propulsion. Cruise missiles, which travel at sub-sonic speeds, are not substitutes in most cases for SRM-powered missiles that can travel at high supersonic and even hypersonic (above Mach 5) speeds.

32. Missiles have different characteristics and operational capabilities than other weapon systems employed by the U.S. military. Other munitions—such as gravity bombs, ammunition, mortar rounds, and naval gun rounds—are not close substitutes for most missile applications because they differ substantially from missiles in terms of cost, performance characteristics, and operational capabilities. For example, missiles are uniquely suited to certain missions such as intercepting fast-moving targets, including hostile aircraft and missiles. Missiles also may permit engagement of targets at greater range than other weapon systems, which allows the U.S. military to strike targets while remaining outside of the effective range of enemy counter-fire weapons.

33. The U.S. military has not, and likely would not, switch to any substitute product in response to a small but significant and non-transitory increase in the price of any given missile.

34. The design, development, and production of missiles for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

b. The Design, Development, and Production of KVs is a Relevant Product Market

35. The second relevant product market in which to analyze the Proposed Acquisition is no broader than design, development, and production of KVs. KVs are essential subsystems of the MDIs used in U.S. ballistic missile defense programs. The U.S. Ballistic Missile Defense System consists of technology deployed to counter ballistic missile threats using either the force of a direct collision or an explosive warhead to destroy the enemy missile before it reaches its intended target. Since ballistic missiles have different ranges, speeds, size, and performance characteristics, the Ballistic Missile Defense System utilizes a layered approach that provides multiple opportunities to destroy missiles and their warheads at different altitudes along their flight trajectories. DoD relies on multiple MDI systems to execute this layered approach for missile defense.

36. In most U.S. missile defense systems, the MDI consists of one or more SRM-powered boost stage(s) that propel the interceptor through the earth's atmosphere and a KV that is designed to destroy or neutralize the incoming threat. Launched on the front end of the interceptor, the KV detaches from the interceptor's final booster stage once the interceptor is in range of its intended target, seeks its target, and maneuvers to intercept it. KVs are typically "hit-to-kill" weapons, meaning that they aim to eliminate the threat by using only the kinetic energy produced by physically colliding with the target.

37. There are no substitutes for KVs. All of the ballistic missile defense systems deployed or under advanced development by DoD's MDA and U.S. military services depend on KVs. As a result, DoD has not, and likely would not, switch to any substitute product in response to a small but significant and non-transitory increase in the price of any given KV.

38. The design, development, and production of KVs for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

c. The Design, Development, and Production of HCMs is a Relevant Product Market

39. The third relevant product market in which to analyze the Proposed Acquisition is no broader than design, development, and production of HCMs. A HCM is a hypersonic strike missile powered by an air-breathing hypersonic propulsion system, namely a scramjet engine. The unclassified HCMs currently under development are air-launched cruise missiles that use SRM-powered boost stages to accelerate the HCMs to a sufficiently high speed (approximately Mach 3) at which point scramjet sustainer engines take over to propel the HCMs to their intended targets at hypersonic speeds of Mach 5 or greater.

40. The development and near-term deployment of hypersonic weapon systems is one of the highest national security priorities for DoD, due, in part, to the need to match or deter the threats posed by recent advances in these technologies by potential adversaries of the United States. HCMs are one type of hypersonic weapon that DoD is interested in developing because they would provide the U.S. military with important capabilities that would enhance its ability to strike rapidly targets in highly contested environments. Specifically, HCMs would provide significant advantages over current cruise missiles in terms of speed to target and survivability to attack well-defended targets. Consequently, Lockheed and other major U.S. defense contractors are prioritizing the acquisition and development of hypersonic technologies to capture anticipated future business in high growth markets for hypersonic weapon systems, including HCMs.

41. Lockheed, Raytheon, and Boeing have each won contracts to develop HCMs for the U.S. military and are competing, or likely to compete, for future U.S. military HCM programs. DoD's Defense Advanced Research Projects Agency awarded Lockheed and Raytheon dual prime contracts to develop competing prototype HCM flight vehicles for the Hypersonic Air-breathing Weapon Concept program. A U.S. Air Force program, Southern Cross Integrated Flight Research Experiment ("SCIFiRE"), also seeks to develop a HCM that can be launched from ground-attack fighter aircraft. The SCIFiRE program is in study phase now, and Lockheed, Boeing, and Raytheon were each awarded SCIFiRE preliminary development contracts in 2021. [redacted] In addition to these two unclassified programs, there are other future HCM programs under consideration by various branches of the U.S. military. Aerojet is one of only two competitive suppliers of the scramjets necessary to develop successfully HCMs for the U.S. military.

42. The U.S. military likely would not switch to any substitute product in response to a small but significant and non-transitory increase in the price of any HCM.

43. The design, development, and production of HCMs for the U.S. military is a line of commerce and a relevant product market within the meaning of the Clayton Act.

II. The Relevant Geographic Market is the United States

44. The relevant geographic area in which to analyze the effects of the Proposed Acquisition on competition in each of the Relevant Product markets is the United States.

45. The Relevant Products are purchased almost solely by DoD, which decides which companies are acceptable suppliers and then funds the development and procurement of these weapons through appropriations made by Congress. As a result of federal law, national security, and other considerations, DoD is unlikely to turn to any foreign producers in the face of a small but significant and non-transitory price increase by domestic suppliers of missiles, KVs, or HCMs.

46. For legal, political, economic, practical, and national security reasons, U.S. military prime contractors are unlikely to turn to any foreign producers in the face of a small but

significant and non-transitory price increase by domestic suppliers of SRMs, DACS, or scramjets.

47. The United States is a relevant geographic market within the meaning of the Clayton Act.

ANTICOMPETITIVE EFFECTS

48. The Proposed Acquisition of Aerojet—the last independent domestic missile propulsion supplier (and one of only two significant domestic suppliers)—by a leading supplier of missiles, KVs, and HCMs to the U.S. military is likely to substantially lessen competition for procurements of these products, which are critical to the national security interests of the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

49. As a result of the Proposed Acquisition, Lockheed would gain the ability and incentive to deny or degrade competitors' access to Critical Propulsion Technologies, which would increase rivals' costs for these inputs or otherwise disadvantage Lockheed's competitors. The U.S. Government, in turn, would be harmed because the cost of the Relevant Products would likely increase, innovation would be lessened, and quality would be reduced.

50. The U.S. missile industry is highly concentrated up and down the supply chain, and it has unique characteristics that make it difficult—if not impossible—for prime contractors to switch to alternative suppliers for Critical Propulsion Technologies. The presence of only two (at most) upstream suppliers and four significant participants (Lockheed, Raytheon, Northrop, and Boeing) in the downstream markets demonstrates the extent to which the Relevant Markets and the related upstream propulsion markets are highly concentrated. The effect of foreclosure by the combined firm following the acquisition would thus only increase or entrench market concentration.

51. Per DoD policy, DoD independently assessed the impact of the Proposed Acquisition [redacted] and concluded that the transaction [redacted]

52. Lockheed feared such foreclosure risk to itself were one of its competing primes to acquire Aerojet. For example, one Lockheed businessperson concluded, [redacted] Another Lockheed executive similarly observed, [redacted] That defensive rationale for the Proposed Acquisition itself substantiates the criticality of the propulsion products Aerojet supplies and validates the concerns that control

of these essential inputs could be wielded effectively to lessen competition by other suppliers of the Relevant Products.

53. Through its acquisition of Aerojet, Lockheed would gain the ability to foreclose, raise costs for, or otherwise disadvantage, its prime contract rivals that rely on Aerojet's Critical Propulsion Technologies to compete effectively in the Relevant Markets. Switching propulsion suppliers is prohibitively expensive, and Aerojet's current customers therefore cannot easily switch to Northrop, the only remaining U.S propulsion supplier of SRMs and scramjets, for existing programs. Moreover, there is no other proven alternative U.S. supplier of DACS to which KV producers could turn. Nor can primes practicably turn to foreign suppliers for propulsion products for DoD programs.

54. The Proposed Acquisition will necessarily alter the combined firm's incentives to supply Critical Propulsion Technologies to Lockheed's prime contractor rivals. Currently, Aerojet has the incentive to supply all potential primes seeking to win DoD contracts in the Relevant Markets to maximize Aerojet's probability of being the Critical Propulsion Technology sub-contractor for the winning prime. Post-acquisition, however, Lockheed's incentive will change because the total profits earned as a prime for a major weapon system almost always outweigh any foregone profits from supplying propulsion inputs to a rival prime. As a result, Lockheed would have a strong post-acquisition incentive to monitor, identify, and disadvantage potential threats to its current missile, KV, and HCM programs, as well as future competitive bids.

55. In many instances, Lockheed will have the ability to lessen competition by withholding Critical Propulsion Technologies from Lockheed's rivals post-acquisition. DoD's ongoing NGI program embodies the extreme vulnerability of Lockheed's rivals post-acquisition. The NGI program is a significant capability upgrade to the United States' primary homeland defense against attack from hostile intercontinental ballistic missiles. For the NGI program, every prime involved relies on Aerojet, which is the sole supplier of the critical DACS component for this important missile defense system. The NGI program alone represents total potential future revenues for the prime contractor of up to $18 billion over the expected life of the program.

56. Because a weapon system procurement program—from initial concept to full production of the weapon system—occurs over a number of years, there are numerous opportunities for a prime contractor that controls a necessary input to partially foreclose its rivals' access to the input. Before awarding a prime contract, DoD assesses a number of factors of each potential prime's bid, including technical merits of the design, the technical capability of the prime and its partners, cost/price, schedule risk, and the bidders' past performance on similar programs. There are numerous mechanisms by which Lockheed could handicap a competitor's performance with respect to each of these factors through a variety of foreclosure strategies for each of the Critical Propulsion Technologies, including:

a. affecting the price of the technology;

b. affecting the quality of the technology;

c. affecting the quality of the engineering team for the technology;

d. affecting the schedule associated with the technology; or

e. affecting the contract terms for the technology.

57. These partial foreclosure mechanisms are less detectable and harder to deter than total foreclosure, especially given the often unique design and complex development pathway for each of the Critical Propulsion Technologies. A given acquisition program for a Relevant Product may have dozens of development milestones, each of which is vulnerable to myriad foreclosure strategies that Lockheed could employ to degrade or delay the performance of a competing prime contractor. Partial foreclosure by the merged firm appears highly likely, given that Lockheed's competitors in the downstream Relevant Markets cannot compete effectively without access to Aerojet's best experts, technology, and timely delivery commitments.

58. Apart from complete or partial foreclosure, a combined Lockheed-Aerojet could also raise its rivals' costs for Critical Propulsion Technologies. Propulsion often comprises a significant portion of the Relevant Product's total bill of materials, which leaves competing primes vulnerable should Lockheed increase the price for the Critical Propulsion Technologies. If Lockheed were to increase the price of Aerojet input products for its prime rivals post-transaction, competition could be lessened in a number of ways: the competing prime could be forced to raise the prices of the downstream Relevant Product to account for increased input costs; it could decide not to compete at all in light of its higher cost position; or foreclosed rivals could have fewer discretionary dollars to invest to win future programs, which, in turn, would decrease competitive pressure on Lockheed. In addition, by gaining insight into a key cost component of a rival's anticipated bid, Lockheed may be able to be incrementally less aggressive with respect to its own bid.

59. The Proposed Acquisition may also impact R&D and innovation. Lockheed, Aerojet, and other defense contractors currently compete on the basis of innovation, often making decisions to allocate company-sponsored or internal research and development ("IRAD") funds from one project or program to another based on the expected return the company can earn on its IRAD investment. Currently, an independent Aerojet has the incentive to direct IRAD investment based on the potential return the funds would generate regardless of which prime it is supporting. Indeed, Aerojet currently maximizes its probability of becoming the winning bidder's supplier by supporting as many competing bidders as possible. The Proposed Acquisition would alter this dynamic, however, as the combined firm would be incentivized to allocate Aerojet investment dollars for the combined firm's benefit alone, to the detriment of Lockheed's downstream rivals who have long relied on an independent Aerojet's IRAD investments to increase the competitiveness of their prime contract proposals.

60. The Proposed Acquisition also increases the likelihood of the acquisition, transfer, misuse, and/or mishandling of competitively sensitive, non-public information. Such an exchange of competitively sensitive information could, in turn, negatively impact current and/or future competitions for the Relevant Products. Primes and their propulsion sub-contractors, through their collaboration for the competitive pursuit of a given program, often exchange sensitive information about technological advancements, cost, schedule, and business strategies,

among other things. The Proposed Acquisition will give Lockheed access to competitively sensitive business information of rival primes that Aerojet acquired as a supplier of Critical Propulsion Technologies to rival primes. In contrast to an independent Aerojet, Lockheed would have an incentive to exploit its access to its rivals' proprietary information to gain an advantage in competitions against those rival primes. The Proposed Acquisition also creates the risk that proprietary, competitively sensitive information relating to Northrop's SRM business—Aerojet's only SRM rival—could be unwittingly, or purposefully, transferred to the formerly independent Aerojet, which could disadvantage Northrop in future competitions against Lockheed's newly acquired SRM business.

61. The Proposed Acquisition would increase entry barriers into the design, development, and production of each of the Relevant Products, making future entry even less likely, timely, and sufficient. If Lockheed were to foreclose supply of the Critical Propulsion Technologies to a potential new downstream entrant post-acquisition, the putative new entrant would likely face substantial development delays as it would need to seek out an alternative propulsion input supplier—if one existed. In the alternative, the new entrant would face the difficult prospect of having to first enter into the design, development, and production of the relevant input product(s)—i.e., Critical Propulsion Technologies—before it could subsequently enter into the downstream market for one of more of the Relevant Products.

I. The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of Missiles for the U.S. Military

62. Lockheed is the largest supplier of missiles to the U.S. military, serving as a prime contractor for various strategic, tactical, and MDI missile programs. The Proposed Acquisition would provide a combined Lockheed-Aerojet with the ability and incentive to foreclose or otherwise disadvantage Lockheed's prime contractor missile rivals, resulting in competitive harm to the market for the design, development, and production of missiles for the U.S. military, which could inhibit DoD's capability to defend the nation.

63. Lockheed accounts for approximately [redacted] of all dollar sales of tactical missiles, at least [redacted] percent of all dollar sales of strategic missiles, and at least [redacted] percent of all dollar sales of MDIs to the U.S. military. Lockheed is the prime contractor for multiple current U.S. military missile programs, including the U.S. Navy's Fleet Ballistic Missile strategic missile system, as well as several tactical missiles, including, among others, Javelin, Hellfire, Guided Multiple Launch Rocket System, Long-Range Anti-Ship Missile, Joint Air to Ground Missile, and Joint Air-to-Surface Standoff Missile. Lockheed also is the prime contractor for the Terminal High Altitude Area Defense ("THAAD") and Patriot Advanced Capability ("PAC-3") MDIs. Lockheed has been awarded development contracts for the NGI MDI program, as well as for several hypersonic missile and hypersonic missile technology demonstrator programs, including Conventional Prompt Strike, Long Range Hypersonic Weapon, Air-Launched Rapid Response Weapon, Operational Fires, and Tactical Boost Glide.

64. The relevant market is highly concentrated, with Lockheed competing primarily against three other firms: Raytheon, Boeing, and Northrop to design, develop, and produce missiles for the U.S. military. Raytheon is the second largest missile supplier to the U.S. military, and its key missile programs include several tactical missiles, such as the Advanced

Medium-Range Air-to-Air Missile, AIM-9X, Rolling Airframe Missile/SeaRAM, Griffin, and Standard Missile ("SM")-2 and SM-6. Raytheon also supplies the SM-3 and SM-6 families of MDIs, as well as a next-generation strategic cruise missile—the Long-Range Stand-Off Weapon. Northrop manufactures one tactical missile: the medium-range air-to-ground Advanced Anti-Radiation Guided Missile. Northrop has also been awarded a sole-source prime contract for the development of the Ground-Based Strategic Defense strategic missile program, and, along with partner Raytheon, a development contract for the NGI missile defense interceptor program (Lockheed was awarded a competing contract). Boeing is the prime contractor for MDA's Ground-based Midcourse Defense ("GMD") program and the Harpoon tactical anti-ship missile.

65. The design of a missile's propulsion system is driven by the specific performance requirements and technical constraints imposed by the missile's intended mission(s). Selecting the optimal propulsion design is a complex task that requires extensive collaboration between the engineering teams of the missile prime contractor and the propulsion subcontractor. Modern missiles are designed around one of three types of propulsion systems: rockets, turbojets, and ramjets/scramjets. Each of these engines has different advantages and disadvantages that must be weighed to select the optimal propulsion technology for a given missile design. Most missiles employ SRMs because they produce high specific thrust.

66. SRMs are used to provide the primary propulsion for the vast majority of U.S. military missiles. The U.S. military currently fields approximately forty missile designs that use SRMs. At a basic level, a SRM is a cylindrical casing filled with solid propellant that, when ignited, expels hot gases through a nozzle to produce thrust. A typical composite solid propellant used for SRMs is a mixture of ammonium perchlorate (oxidizer) and aluminum (fuel) mixed in a binder with other ingredients. This mixture is cast in the motor case, and, when cured, produces a rubbery solid propellant that can be stored relatively safely until the motor is employed. SRMs are differentiated products that are specially designed for a particular missile and can vary greatly in size and power, depending on the platform. Tactical missiles usually require the smallest motors—ranging in size from about 3 inches up to about 24 inches in diameter. Strategic missiles employ larger SRMs of over 40 inches in diameter. MDIs use SRMs that generally fall somewhere in between—ranging in size from 10-inch diameter to over 40-inch diameter (in the case of the Ground-Based Interceptor).

67. SRMs are an essential input to almost all current and upcoming U.S. military missile programs. And all current missile prime contractors, as well as any potential future competitors for future U.S. military missile programs, depend on SRMs for current or future missiles. There is no substitute product that can be used in place of SRMs for missile propulsion. SRMs have important advantages over other technologies for missile applications, including, but not limited to, the ability to store the missile safely in a launch-ready state for extended periods of time until needed. For safety and convenience in handling, among other reasons, SRMs have replaced liquid propellant rocket engines for primary propulsion in modern U.S. missiles. Because of differences in technological capability and cost, missile prime contractors would not substitute to any other technology in place of SRMs, in the event of a small but significant increase in prices for SRMs.

68. The Proposed Acquisition will give Lockheed control over a critical input for most missiles—Aerojet's SRM design, development, and production capabilities. The design,

development, and production of high performance SRMs for U.S. military missiles is highly complex and requires specialized skills, as engineers must carefully balance performance against various constraints, such as cost, weight, volume, pressure, and temperature.

69. Over the past two decades, the number of U.S. companies manufacturing SRMs has consolidated from six to only two: Aerojet and Northrop. This duopoly accounts for over 90 percent of SRM sales in the United States. The only other firm selling a significant number of SRMs in the United States is Nammo Raufoss ("Nammo"), a Norwegian company that sells small tactical SRMs to Raytheon for its AMRAAM, Evolved Sea Sparrow, and Naval Strike missiles. Unique circumstances prompted Raytheon's selection of Nammo as a propulsion provider for these missile systems. Nammo is not a competitive supplier of SRMs for most U.S. missile programs, and the company's U.S. presence and capabilities are extremely limited. Further, as a foreign supplier, Nammo is not preferred by the U.S. Government, especially for critical next-generation and all classified programs. Nammo also lacks the breadth of experience and capabilities Aerojet and Northrop possess across all sizes of SRMs.

70. The Proposed Acquisition follows other acquisitions of SRM suppliers by missile prime contractors. Northrop acquired Orbital ATK, the only other significant U.S. manufacturer of SRMs in 2018. Indeed, Lockheed's rationale, in part, for the Proposed Acquisition was that it presented a [redacted]

71. Aerojet and Northrop compete by constantly looking for innovative ways to increase SRM performance or lower the cost of their production. For example, Aerojet is researching new technologies to [redacted]

72. For some missiles, there may be no close substitutes for Aerojet's SRMs. Even if there were, switching, in and of itself, would impose a large cost on Aerojet's SRM customers. Where Northrop offers a competitive alternative, partial or complete foreclosure by Lockheed would likely still result in competitive harm, because in those situations, Northrop could use its increased leverage as the customer's only option available to extract higher prices for its SRMs.

73. The Proposed Acquisition would give the combined firm the ability to foreclose missile system prime contractor competitors by denying them access to Aerojet's SRMs or by making pricing, personnel, scheduling, investment, design, and other decisions that disadvantage those competitors.

74. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm Lockheed's missile prime contractor competitors. Lockheed views missiles as a core product area and an engine of future profit growth. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an advantage in competing for a new missile prime contract because the expected profits from winning such a bid typically far exceed the foregone profits from supplying Aerojet SRMs to rival prime contractor bidders.

75. If Lockheed were to withhold effective access to its in-house Aerojet SRMs post-acquisition, or increase the price of those SRMs, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their missile systems, decide not to compete, or invest less aggressively to win missile programs, which, in turn, would decrease or eliminate competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

II. The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of KVs

76. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Lockheed's rivals in the market for the design, development, and production of KVs for the MDA and U.S. military. By acquiring Aerojet, Lockheed would gain control over the only established and proven supplier of DACS, a critical input for KVs.

77. Historically, three firms have competed to design, develop, and produce KVs for U.S. missile defense systems: Lockheed, Raytheon, and Boeing. Lockheed supplies the KVs for the THAAD system and has won development contracts for other KVs, including the multiple kill vehicle ("MKV") and Multi Object Kill Vehicle ("MOKV") programs. Raytheon produces the current KVs used on the GMD and SM-3 missile defense systems and has won contracts relating to other KVs, including MKV and MOKV. Boeing is the prime contractor for the current GMD system and has experience developing other KVs, including designs for the Redesigned Kill Vehicle, MKV, and MOKV programs. Each of these competitors, or potential competitors, in turn, depend on Aerojet for DACS, which are a critical input to a KV.

78. DACS are advanced, high performance propulsion systems used to provide fast and precise maneuvering capabilities for KVs. DACS use divert thrusters, which create forceful pulses to quickly and accurately change the KV's trajectory with respect to the target, and smaller attitude control thrusters, which provide very low thrust to make finer pitch, roll, and yaw adjustments to maintain or adjust the KV's orientation.

79. DACS can be designed to utilize either solid or liquid propellant depending on the requirements of the specific missile defense system. Solid DACS ("SDACS") are favored for certain applications, such as deployment on U.S. Navy ships, because the propulsion system is safer to store and maintain. Liquid DACS ("LDACS"), however, can provide higher performance that may be required for a specific KV mission profile. In heritage SDACS, the solid propellant would continuously burn in a single pulse once ignited. Aerojet developed innovative technologies, however, such as throttling solid propellant DACS ("TDACS") or extinguishing solid propellant DACS ("EDACS" or "extinguishing TDACS") that are able to narrow the performance gap between SDACS and LDACS.

80. There is no substitute for DACS, which are an essential component of most KV designs.

81. Aerojet is the only current supplier of DACS for U.S. missile defense programs. Aerojet also possesses the most advanced DACS technology and development know-how of any

potential U.S. supplier, gained through its performance on multiple past and present DACS programs. Aerojet provides the LDACS used for Raytheon's exo-atmospheric kill vehicle as well as for Lockheed's THAAD KV. Aerojet also supplies the TDACS for Raytheon's SM-3 Block IB KV and high divert TDACS for Raytheon's SM-3 Block IIA KV. Orbital ATK (which Northrop acquired in 2018) is the only other company that has supplied DACS for U.S. missile defense programs. Orbital ATK supplied a simple design SDACS for Raytheon's SM-3 Block IA until 2014. Aerojet displaced Orbital ATK as a DACS supplier for the SM-3 Block IB and Block IIA programs, and Northrop is [redacted] As a result, Northrop is relying on Aerojet—rather than in-house Orbital ATK DACS technology—to supply DACS for Northrop's entry in the competition to develop the NGI.

82. Aerojet is currently supporting all of the prime contractors currently competing or preparing to compete for forthcoming missile defense programs. Aerojet supported all three prime contractor teams (Lockheed, Boeing, and Northrop/Raytheon) that competed for initial development contracts for MDA's NGI program. All three teams submitted design proposals based on Aerojet DACS for the KVs. In March 2021, MDA awarded dual contracts to Lockheed and the Northrop/Raytheon team with an estimated combined maximum value of $1.6 billion through fiscal year 2022. The timing on a final down-select to one prime contractor has not been announced but is anticipated to occur [redacted]

83. In addition, Lockheed's rivals will require Aerojet DACS technology and support for future DoD programs intended to defend against attacks by hypersonic missiles, including, but not limited to, MDA's Glide Phase Interceptor program. In November 2021, MDA awarded Lockheed, Northrop, and Raytheon contracts for the accelerated concept design phase of the program, which is aimed at developing MDIs designed for deployment on U.S. Navy Aegis Ballistic Missile Defense destroyers to counter hypersonic weapons during their glide phase of flight. All of these firms will likely require Aerojet's DACS technology for their designs.

84. The Proposed Acquisition would give the combined firm the ability to foreclose rival KV competitors by denying them access to Aerojet's essential DACS technology or by making pricing, personnel, scheduling, investment, design, or other decisions that disadvantage those competitors.

85. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm competing KV suppliers. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an advantage in competing for a prime contract for a new missile defense system utilizing KVs because the expected profits from winning such a bid typically far exceed the foregone profits from supplying DACS to the winning bidder.

86. If Lockheed were to withhold effective access to its in-house Aerojet DACS technology post-acquisition, or increase the price of those DACS, to its prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their KV or missile defense systems, decide not to compete, or invest less aggressively to win missile defense system programs, which, in turn, would decrease

competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

III. The Proposed Acquisition is Likely to Harm Competition in the Design, Development, and Production of HCMs

87. The Proposed Acquisition would result in a combined firm with the ability and incentive to engage in foreclosure strategies targeting Lockheed's rivals in the market for the design, development, and production of HCMs for the U.S. military.

88. Scramjets, also referred to as "dual mode ramjets," are an essential enabling technology for development of HCMs. There is no substitute product that could be used in place of a scramjet in current or future U.S. military HCM development programs.

89. A scramjet is a type of air-breathing jet engine. Unlike rocket motors, air-breathing jet engines draw upon oxygen in the atmosphere for combustion, eliminating the need to carry oxidizer in addition to fuel. As a result, air-breathing engines are more efficient than rocket motors, enabling a missile powered by an air-breathing engine potentially to travel longer distances. Scramjets are a critical enabling technology for HCMs and other potential future reusable hypersonic vehicles because the air-breathing turbojet engines that power current sub-sonic cruise missiles are incapable of propelling a vehicle to hypersonic speeds.

90. A scramjet is a technologically advanced type of high-performance ramjet engine. A ramjet uses the high pressure generated by the vehicle's forward motion to compress incoming air, eliminating the turbines used in a conventional turbojet engine. A ramjet engine slows the incoming air to subsonic speed before it enters the combustor where liquid fuel is injected into the airflow and ignited to produce additional thrust. In a scramjet engine, however, the airflow travels at supersonic speed through the combustion chamber—a design that poses several significant technical challenges. Scramjets are the only air-breathing engines capable of propelling a missile to hypersonic speeds in excess of Mach 5.

91. Not only is scramjet technology necessary to produce an HCM, but the designs of the scramjet engine and the missile or other flight vehicle are tightly integrated and interdependent. Simply put, as one Lockheed executive indicated, the [redacted] The necessity for close collaboration between the propulsion provider and missile prime contractor heightens the potential for competitive harm to result from the Proposed Acquisition, as it would increase the volume of competitively sensitive, non-public information that must be shared and amplify Lockheed's ability to undermine its rivals' efforts through foreclosure strategies.

92. Aerojet and Northrop are the only two viable suppliers of scramjets for U.S. military HCM applications. Aerojet and Northrop have both gained extensive technical knowledge and expertise through their participation on several current and past DoD programs. The development of hypersonic propulsion technologies requires specialized expertise and technology, including the development of advanced materials technology and special analytical tools. Both companies have achieved successful flight tests of scramjet-powered hypersonic

flight vehicles. No other U.S. company has scramjet development experience and capabilities commensurate with Aerojet and Northrop.

93. Three prime contractors (Lockheed, Raytheon, and Boeing) are currently developing HCMs, and they all rely on Aerojet or Northrop scramjet engines to support their efforts. These primes are in a race to develop HCMs and to position favorably their companies to secure lucrative potential future production contracts for the missiles.

94. [redacted]

95. The Proposed Acquisition would give the combined firm the ability to foreclose Boeing and other future rival HCM competitors by denying them access to Aerojet's scramjet technology or by making pricing, personnel, scheduling, investment, design, and other decisions that disadvantage Boeing or other competitors.

96. The Proposed Acquisition would also give the combined firm the incentive to use foreclosure strategies to harm competing HCM suppliers. Post-acquisition, Lockheed would have a substantial incentive to engage in foreclosure strategies that give Lockheed an advantage in competing for an HCM prime contract because the expected profits from winning such a bid would exceed the foregone profits from supplying scramjets to the winning bidder.

97. If Lockheed were to withhold effective access to Aerojet's scramjet technology, or increase the price of those scramjets, to Lockheed's prime contractor competitors, competition would be lessened because the foreclosed prime contractors would be forced to raise the prices of their HCMs, decide not to compete, or invest less aggressively to win future HCM programs, which, in turn, would decrease or eliminate competitive pressure on Lockheed, leading to an increase in price and/or decrease in quality or innovation.

LACK OF COUNTERVAILING FACTORS

98. Respondents cannot demonstrate that entry or expansion of products in the Relevant Markets that would not rely upon Critical Propulsion Technologies would be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Respondents also cannot demonstrate the entry of substitutes for Aerojet's Critical Propulsion Technologies would be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. Successful entry into the design, development, and production of each of the Relevant Products, as well as to each of the Critical Propulsion Technologies, would be difficult, time consuming, and costly. Entry requires specialized know-how, advanced technology, skilled engineers, and specialized equipment and facilities.

99. Respondents cannot demonstrate substantiated, verifiable, cognizable, and merger-specific efficiencies that would offset the Proposed Acquisition's likely significant anticompetitive effects in the Relevant Markets. Nor can Respondents demonstrate that any elimination of double marginalization would offset the harm of this anticompetitive acquisition.

VIOLATIONS CHARGED

COUNT I – ILLEGAL AGREEMENT

100. The allegations of Paragraphs 1 through 99 above are incorporated by reference as though fully set forth.

101. The Acquisition Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

102. The allegations of Paragraphs 1 through 99 above are incorporated by reference as though fully set forth.

103. The Proposed Acquisition, if consummated, may substantially lessen competition in the Relevant Markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the sixteenth day of June, 2022, at 10 a.m. EST, is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that this administrative proceeding shall be conducted as though the Commission, in an ancillary proceeding, has also filed a complaint in a United States District Court, seeking relief pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), as provided by Commission Rule 3.11(b)(4), 16 CFR 3.11(b)(4). You are also notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a

waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the Relevant Markets, with the ability to offer such products and services as Lockheed and Aerojet were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Respondents that combines their businesses in the Relevant Markets, except as may be approved by the Commission.

3. A requirement that, for a period of time, Respondents provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the Relevant Markets with any other company operating in the Relevant Markets

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Aerojet as a viable, independent competitor in the Relevant Markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-fifth day of January, 2022.

By the Commission.

April J. Tabor
Secretary

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